

William L. Gavras, Esq.
 Law Offices of William L. Gavras
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 101 Salisbury Street
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RECEIVED
 OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEALS

MAY 06 2009

TIME: 1:45 PM
 BY: AC
 FILE No. OPA-PA 09-002

PROCUREMENT APPEAL

)	APPEAL NO.: OPA-PA-09-002
)	
In the Appeal of)	
)	
TEAL PACIFIC, LLC,)	OPPOSITION TO MOTION TO DISMISS
)	
)	
Appellant.)	
<hr/>		

Title 5 GCA § 5425(e) requires that appeals to the Office of the Public Auditor be made “within fifteen (15) days after receipt by the protestant of the notice of decision.” § 5425(c)(2) requires that the decision “inform the protestant of its right to administrative and judicial review.” The decision violated subsection (c)(2) – it did not inform protestant of its right to administrative and judicial review. See Exhibit A. Because the decision did not properly inform protestant of its right to administrative and judicial review, the fifteen day limitation found in § 5425(e) is not applicable and the imposition of the fifteen day limitation would be a violation of Due Process. See, Pacific Security Alarm, Inc. v. Dept of Public Works, Civil Case no. CV 0591-05 (Decision and Order, Steven Unpingco, August 14, 2006)(to impose the time limitation when protestant was not advised of its appeal rights would be a violation of Due Process); Sumitomo Constr. Co. Ltd. v. Gov. of Guam, SP0274-98 (Decision and Order, Michael Bordallo, November 16, 1998). See Exhibit B.

The Decision being appealed was made (or rather dated) March 25, 2009. This Decision was not received by Appellant’s legal counsel until April 7, 2009. See Exhibit

COPY


In the Appeal of Teal Pacific, LLC; Appeal No. OPA-PA-09-002
Opposition to Motion to Dismiss
May 2009

A. Had the Decision properly informed protestant of its appeal rights, the April 7th date would be the date from which the fifteen day time limitation for appeals would have been computed. Respondent incorrect states the date from which the fifteen days would have been computed should be March 25, 2009. However, this question as to which date is correct is moot as, as stated *supra*, the fifteen day time limitation is not applicable as the Notice did not apprise the protestant of its appeal rights.

Respectfully Submitted,

LAW OFFICES OF WILLIAM L. GAVRAS

Date: May 6, 2009.

By: 
WILLIAM L. GAVRAS, ESQ.

CERTIFICATE OF SERVICE

I certify that I will cause to be served upon Fred Nishihara, Esq., a true and correct copy of this document on or before May 6, 2009.

LAW OFFICES OF WILLIAM L. GAVRAS

Date: May 6, 2009.

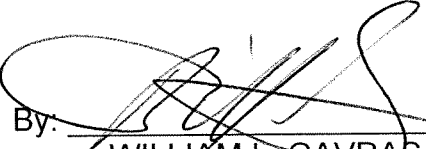
By: 
WILLIAM L. GAVRAS, ESQ.

Exhibit A



GUAM PUBLIC SCHOOL SYSTEM

OFFICE OF SUPPLY MANAGEMENT

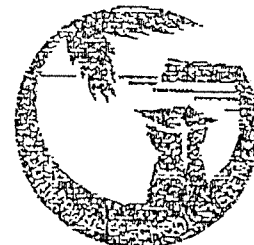
Manuel F.L. Guerrero / Administration Building

2nd Floor, Suite B-220

Hagåtña, Guam 96932

Telephone: (671) 475-0436/0440

Fax: (671) 472-5001



FACSIMILE COVER



Date: April 7, 2009

To: William L. Garvas

From: Edith A. Pinaula
email: eapinaula@gdoe.net

Attn:

Fax#: 632-4368 / 472-2342

Fax#: 472-5001

Subject: GPSS IFB-004-2009

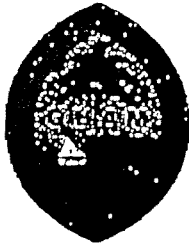
Comments:

Hafa Adai,

Accompanying this cover sheet is our respond to your protest.

Kindly acknowledge and return by fax.

Number of pages plus cover: 3



Nerissa Brzjanian-Shafer, Ph.D.
Superintendent of Education

OFFICE OF SUPPLY MANAGEMENT
GUAM PUBLIC SCHOOL SYSTEM

Manuel F.L. Guerrero / Administration Building

2nd. Floor, Suite B-202

Hagåtña, Guam 96932

Telephone: (671) 475-0438

Fax: (671) 472-5001



Roque A. Alcantara
Administrator, Supply Management

March 25, 2009

William L. Gavras
Attorney at Law
101 Salisbury Street
Dededo, Guam 96929

Subject: Protest letter dated March 16, 2009 and received on the same

Reference: Indefinite Quantity Bid for Administrative Supplies
GPSS IFB 004-2009

Dear Mr. Gavras,

Buenas Yan Saludas! The Department is in receipt of your protest letter dated March 16, 2009 and received on the same.

This letter is in response to your protest letter regarding the bid award of item number 114. The responses are made in light of your contentions.

Please be advised that your submittal was rejected because it was not in total compliance with the award evaluation procedures.

On page 2, titled: "SPECIAL REMINDER TO PROSPECTIVE BIDDERS", item #6, which states, "Local Procurement Preference application qualifying on section number 2 & 3 only. Failure to indicate qualification on sections 2 & 3 and to complete and sign application will result in disqualification of this preference."

Pursuant to the Guam Public School System Procurement Regulation (GPSS Procurement Regulation Section 1.7) (GSA Section 1-104/GCA Section 5008) which states in part, "All procurement of supplies and services shall be made from among business licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

2. A business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the items of supplies to be procured;
3. A business that has a bona fide retail or wholesale business location that regularly carries an inventory on Guam of a value of at least one half of the value of the bid or one hundred fifty thousand dollars (\$150,000), which ever is less, of supplies and items of a similar nature to those being sought; or

Letter of Protest
March 25, 2009
Page 2

Teal Pacific, LLC chose not to mark or identify what section identifying whether they elect to have local procurement preference or not instead marked their document N/A.

Furthermore, GPSSPR Section 3.9.15.1 (GSA Section 3-202.15.1) titled, "DEFINITION" states that, "Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids".

In addition, GPSSPR Section 3.9.15.2 (GSA Section 3-202.15.2) titled, "AWARD" states, "Award shall not be made by drawing lots, except as set forth below, or by dividing business among identical bidders. In the discretion of the Superintendent of Education, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids and a written determination is made so stating, award may be made by drawing lots."

In regards to the Local Procurement Preference which is a requirement to the bid awarding process, the Buy American Act is applicable and a fifteen percent (15%) is added to the non-qualifying bidder. National Office qualified for the Local Procurement Preference and thus the lowest bidder.

Based on the aforementioned response, the Department hereby rejects your protest

Please be advised, that pursuant to the Guam Public School System's Procurement Regulation Section 9.2.8, you may request a reconsideration of this decision within ten (10) working days of receipt of this letter.

For your information, a copy of the Department Procurement Regulations are on file in the Territorial Law Library.


ROQUE A. ALCANTARA

ACKNOWLEDGEMENT RECEIPT

TAMI C. SAUAC

Received By: (Please Print Name)

4/7/09

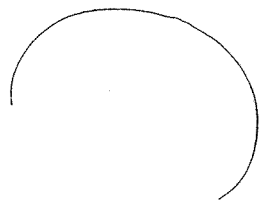
Date:

9:40

Time:

AM/PM

cc: Admin., Supply Management
File



*** FAX TX REPORT ***

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Apr-07-2009 09:52am

From-GDOE, Office of Supply Management

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P.001/003

F-086



GUAM PUBLIC SCHOOL SYSTEM

OFFICE OF SUPPLY MANAGEMENT

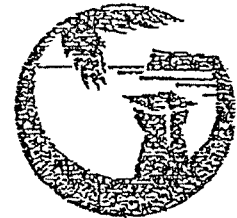
Manuel F.L. Guerrero / Administration Building

2nd Floor, Suite B-220

Hagåtña, Guam 96932

Telephone: (671) 475-0436/0440

Fax: (671) 472-5001



FACSIMILE COVER

Date: April 7, 2009

To: William L. Garvas

From: Edith A. Pinaula
email: eapinaula@gdoe.net

Attn:

Fax#: 632-4368 / 472-2342

Fax#: 472-5001

Subject: GPSS IFB-004-2009

Comments:

Hafa Adai,

Accompanying this cover sheet is our respond to your protest.

Kindly acknowledge and return by fax.

Exhibit B

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IN THE SUPERIOR COURT
OF GUAM

FILED
SUPERIOR COURT
OF GUAM
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FREDO V. GUTRAS
CLERK OF COURT

SUMITOMO CONSTRUCTION CO.,
LTD.,

Petitioner,

vs.

GOVERNMENT OF GUAM,
DEPARTMENT OF PUBLIC WORKS
PUBLIC WORKS

Respondents.

CORE TECH INTERNATIONAL,

Real Party In Interest.

SPECIAL PROCEEDINGS NO. SP0274-98

DECISION AND ORDER

INTRODUCTION

This matter came before the HONORABLE MICHAEL J. BORDALLO on October 23, 1998, on the Petitioners' Petition for a Writ of Mandate. Gregory R. Shaughnessy and Martin Deinhart represented the Petitioner, Sumitomo Construction Co.. Kenneth D. Orcutt represented the Respondent, the Government of Guam and the Department of Public Works. Joyce Tang represented the real party in interest, Core Tech International. The Court now issues the following Decision and Order.

BACKGROUND

This Petition arises from the Respondent, Government of Guam, Department of Public's Works ("DPW"), awarding of a public contract to Core Tech International, ("Core Tech"), for the project known as "Route 4 reconstruction and Widening (Yona to Yig Bridge) - Design/Build, Project No. GU-NH-0004(101) ("Project)". The DPW solicited bids for the project in a two phase competitive sealed bidding process pursuant to General Services regulations 30202.18. The first

3 phase consisted of an evaluation of the bidders' unpriced technical offers. In the second phase, those
4 bidders whose technical offers were determined to be acceptable during the first phase had their
5 priced bids considered.

6 Petitioner and the real party in interest, Core Tech, were among five parties submitting bids.
7 Core Tech is a relatively new enterprise having incorporated on or about March 9, 1998. On August
8 5, 1998, the director of Public Works, by letter, informed Sumitomo as well as the other bidding
9 parties, that Core Tech was among the companies whose unpriced technical proposals was
10 acceptable. Subsequently, pursuant to the second phase of the bidding process, Core Tech and the
11 other four bidders which had submitted acceptable technical proposals had their respective priced
12 bids considered.

13 On or about August 19, 1998, Petitioner sent a letter of protest to DPW objecting to Core
14 Tech's technical proposal since "Core Tech International does not possess required experience and
15 designer Mr. Johnny Aquino has little or no experience with the design/build of major highway
16 project." The director of Public works denied the protest by letter dated August 27, 1998. The DPW
17 justified its decision to the Petitioner stating that the design plans had already been determined by
18 Duenas and Associates, thereby requiring only minor revisions, and that Core Tech was an
19 "offshoot" of Korando Corporation (a subcontractor that performed major civil work on previous
20 highway projects and subdivisions). Therefore, the Respondent determined that Core Tech's
21 technical proposal was capable of performing the job. On or about September 18, 1998, the DPW
22 informed the Petitioner by letter, that it intended to award the Project to Core Tech. Since Core Tech
23 was awarded the contract, Core Tech has submitted payment and performance bonds to the DPW.

24 Taking issue with the awarding of the project to Core Tech, the Petitioner requests this Court
25 to issue a writ of mandate, directing the DPW to follow its bid solicitation and regulations and
26 award the contract to the lowest responsive and responsible bidder.

27 ///

28 ///

3 DISCUSSION

4 In government contracts, 5 GCA § 5425 controls the solicitation and procedures for the
5 awards of government contracts. It states:

6 **Authority to Resolve Protested Solicitations and Awards.**

7 (a) **Right to Protest.** Any actual or prospective bidder, offeror,
8 or contractor who may be aggrieved in connection with the method
9 of source selection, solicitation or award of a contract, may protest
10 to the Chief Procurement Officer, the Director of the 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.

11 Thereafter, the Chief Procurement Officer, the Director of Public Works, the head of a
12 purchasing agency, or a designee of one of these offices shall have the authority to settle and resolve
13 the protest. 5 GCA § 5425 (b). If the protest is not resolved, then the settling party must issue a
14 decision in writing stating the “reasons for the action” and “inform the protestant of its rights to
15 administrative review.” 5 GCA § 5425 (c). If the protestant is not satisfied with the decision, it may
16 then appeal to the Procurement Appeals Board. 5 GCA § 5425 (e).

17 **Whether A Writ of Mandate is the Proper Procedure**

18 In this case, the protestant, Sumitomo was unsatisfied with DPW’s decision and argues that
19 the DPW failed to follow its own regulations in making its decision to award the bid to Core Tech.
20 Since there is no Appeals Procurement Board, its only recourse is to seek judicial intervention.
21 Therefore, the Petitioner seeks a writ of mandate. A writ of mandate is a proper remedy whenever
22 a party demonstrates a clear right to have an action perform by a governmental official who refuses
23 to act (Grant v. Hogan, 505 F.2d 1220, 1225 (3rd Cir. 1974) and there are no other or adequate means
24 of enforcing that action. Dowell v. Superior Court, 47 Cal. 2d 483, 487 (1956).

25 Although classified as an extraordinary legal remedy, mandamus is essentially an equitable
26 proceeding (Smith v. Krintz, 201 Cal. App. 2d 696 (1962), in which equitable principles apply
27 (Bruce v. Gregory, 65 Cal. 2d 666 (1967); therefore, its issuance is controlled by equitable
28 considerations. Hutchinson v. Reclamation Dist., 81 Cal. App. 427 (1927). The exercise of

3 jurisdiction in mandamus rests to a considerable extent in the discretion of the trial court. McDonald
4 v. Stockton Met. Transit District, 36 Cal. App. 3d 436, 440 (1973).

5 The Guam Code provides for a writ of mandate under 7 GCA §31201 *et seq.*:

6 §31201. **Writ of Mandate.** The writ of mandamus may be
7 denominated a writ of review.
8 SOURCE: CCP §1084.

9 §31202. **When and by What Court Issued.** It may be issued by any
10 court, except a commissioner's court or police court, to any inferior
11 tribunal, corporation, board, or person to compel the performance of
12 an act which the law specially enjoins, as a duty resulting from an
13 office, trust, or station; or to compel the admission of a party to the
14 use and enjoyment of a right or office to which he is entitled, and
15 from which he is unlawfully precluded by such inferior tribunal,
16 corporation, board, or person.
17 SOURCE: CCP §1085.

18 § 31203. **When and Upon What Writ to Issue.** The writ must be
19 issued in all cases where there is not a plain, speedy, and adequate
20 remedy in the ordinary course of law. It must be issued on the
21 verified petition of the party beneficially interested.
22 SOURCE: CCP §1086.

23 Respondent urges this Court to find that the request for a writ is improper because the
24 Petitioner has the available remedy of judicial review and injunctive relief. In fact, Respondent
25 states that judicial review of a decision denying a procurement protest was established in the earlier
26 cases of Multi-Line Corporation, Inc. v. Lorenzo C. Aflague, CV 0667-88 (Super. Ct. Guam Sept.
27 7, 1988); and in Island Medical Supplies v. Aflague et, CV0913-88 (Super. Ct. Guam Dec. 6, 1988).
28 Therefore, rather than for this Court to issue a Writ of Mandate, the Petitioners should be granted
leave to amend its pleadings to seek judicial review and injunctive relief of DPW's actions.

Had the Appeals Procurement Board been in existence, Petitioner would have appealed the
Respondent's decision to the Board and thereafter, if unsatisfied, it would have proceeded upon an
appeal to the Superior Court. 5 GCA §§ 5425 (e), 5425 (f). The Petitioner urges this Court to find
that they are not precluded from seeking a writ of mandate merely because it could have sought
judicial review and injunctive relief. The burden of showing the inadequacy of other remedies is on
the petitioner. Citizens Utility Company v. Superior Court, 59 Cal. 2d 805 (1963). The petitioner

3 must plead and prove that he has no other remedy or, if another remedy is available, why it is not
4 adequate in this particular situation. Id.

5 Relying upon the principles of equity, the Petitioner states that the alternative remedy of an
6 action for declaratory relief or money damages together with an injunction could delay the
7 procurement for months if not years. Moreover, the use the writ process eliminates the need for a
8 bond because there will be no preliminary injunctions issued.

9 This Court does not find the reasons proffered by Petitioner, namely, that it could obtain a
10 quicker resolution, and avoid the posting a bond if it sought a writ of mandate justifies the request
11 for writ of mandate. If an appeal is available, it is generally an adequate remedy and does not fail
12 to be adequate and speedy simply because it is not as expeditious. Corona Unified Hospital district
13 v. Superior Court, 61 Cal. 2d 846 (1964). While the writ of mandate ostensibly provides for a
14 quicker resolution, the process for a preliminary injunction and judicial review can be accelerated
15 such that in fact, the process may be just as fast.

16 The Court notes that Core Tech has already submitted payment and performance bonds to
17 DPW, therefore, it would be unfair to Core Tech to issue the mandate. If a petitioner were allowed
18 to seek a writ of mandate against public officers instead of seeking judicial relief, it could circumvent
19 the requirement under civil rule GRCP 65(c), requiring the posting of a bond for payment of such
20 costs and damages as may be incurred by any party who is found to have been wrongfully enjoined
21 or restrained. The posting of a bond is weighed against the likelihood that the moving party will
22 prevail on the merits.

23 Upon the facts of this case, the Court is being asked to consider the qualifications of the
24 bidder, Core Tech. The Court is not being asked to merely enforce a ministerial act that the DPW
25 failed to perform, for example failing to accept a bid that is timely proffered, but rather is asked to
26 review an area that concerns the discretion of the Director of the DPW. Mandamus ordinarily issues
27 to compel performance of any ministerial act that a court, agency, corporation or board, or officer
28 is duty bound to perform. See State Board of Equalization v. Watson, 68 Cal. 2d 307 (1968).

3 Accordingly, this Court is inclined to grant writs of mandate where it finds that certain
4 regulations were not followed or that a ministerial act was ignored. This Court does not agree that
5 that is what is being asked in this instance. Here, pursuant to the bid solicitation, the unpriced
6 technical bids were to be evaluated, and accepted based on certain requested criteria, to the extent
7 the Procurement Officer deemed it necessary, it could conduct oral or written discussions of the
8 unpriced technical offers. The Court simply does not know whether any such discussions took place
9 and if so, the extent of those discussions. Clearly, such knowledge would go to the issue of whether
10 there was an abuse of discretion by the DPW in the awarding of the contract. Mandamus cannot
11 be used to control or correct errors in the exercise of discretion, except when such exercise is abused.
12 Faulkner v. California Toll Bridge Authority, 40 Cal. 2d 317 (1953). When discretion can be
13 exercised in one of several ways, mandamus cannot compel that discretion to be exercised in a
14 particular way, here is such a situation.

15 There is the general principle that there is a public interest in the maintenance of an
16 uninterrupted and efficient system of procurement (M. Steinthal & Co. v. Seamens, 455 F.2d 1289,
17 1301 (D.C. Cir. 1971). This Court is not prepared to allow for that which will most assuredly
18 promote unnecessary intrusions upon the procurement process. Accordingly, the Petitioner's
19 petition for a writ of mandate is improper and the proper course of action for the Petitioner is judicial
20 review and request for injunctive relief.

21 Sumitomo's Petition was Timely Filed

22 Both the Respondent and Core Tech argue that regardless of whether the proper procedure
23 is a writ of mandate, Sumitomo's petition should be denied because it was untimely. Sumitomo
24 filed its protest on August 18, 1998. Thereafter, in its August 27, 1998 letter, the director of the
25 DPW denied Sumitomo's protest. According to 5 GCA §5481, "[a]ny action under §5480(a) . . .
26 shall be initiated within fourteen (14) days after receipt of a final administrative decision." Thus,
27 Respondent and Core Tech argue that the director issued his "final administrative decision" in its
28 August 27th letter and that Sumitomo had fourteen days from that date to file an action seeking

3 judicial review. Thus, the last day to file this action expired on September 10, 1998. Sumitomo
4 filed this action on September 28, 1998.

5 In countering Core Tech and the Respondent's position, Sumitomo argues that the
6 Respondent was remiss in its August 27th letter of not informing Sumitomo of it's right to an
7 administrative and judicial review. Sumitomo asserts that such an omission was material since the
8 Guam Procurement Law provides for an appeal of such a decision to the "Procurement Appeals
9 Board," albeit a non existing board. 5 GCA §5425(f).

10 Therefore, since Sumitomo was not properly informed of its rights to further proceedings.
11 Sumitomo argues that it considered the DPW's September 18, 1998, letter informing Sumitomo that
12 it intended to award the project to Core Tech as the DPW's final decision. On September 28, 1998,
13 Sumitomo filed this Petition for Writ of Mandate. The Petition was filed ten (10) days after DPW's
14 unambiguous notice of intent to award to Core Tech and well within the time provided for by 5 GCA
15 §5425 (e).

16 This Court finds that the DPW's August 27th letter denying Sumitomo's protest failed to
17 comport with the statute mandating the DPW to inform a protestant that it has a "right to
18 administrative and judicial review." 5 GCA § 5425(c)(2). The Court finds that in such cases, where
19 the Respondent is remiss in its obligations, a Petitioner should be allowed a reasonable amount of
20 time to file a protest. The 9th Circuit has upheld that the time for an appeal does not begin to run
21 until the judgment is actually docketed, even where the appeal is filed several years after judgment
22 was rendered but not docketed. Likewise, time in the instant case does not begin to run until the
23 DPW complies with the statutory requirements. Therefore, under the facts of this case, the Court
24 finds that the Petitioner's filing of its protest on September 28 was reasonable and that Sumitomo
25 filed its Petition in a prompt and timely manner.

26 **CONCLUSION**

27 For the foregoing reasons, Petitioners' motion for a Writ of Mandate is DENIED. While the
28

3 Court finds that the Petitioner's issuance of a Writ of Mandate is procedurally improper under the
4 circumstances, it does GRANT the Petitioner leave to amend its pleadings to conform with this
5 Court's decision regarding the appropriateness of a request for judicial review and injunctive relief.

6 SO ORDERED this 17th Day of Nov 1998.

7
8 
9 Michael J. Bordallo
10 Judge, Superior Court of Guam

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16 I do hereby certify that the foregoing
17 is a full true and correct copy of the
18 original on file in the office of the
19 clerk of the Superior Court, Guam

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SUPERIOR COURT
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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]hensoever 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 case¹.

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 (10th 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 (9th 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
18 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
26

27 ¹Since 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 tolling². 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 minimum³.

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).

23
24 ²The 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.

³The 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.”914 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 Board⁴. 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 ⁴Although 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
20 Judge, Superior Court of Guam

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25 I do hereby certify that the above is a true and correct copy of the original as filed in the office of the Secretary of the Superior Court of Guam.
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JUL 12 2006

