

CHAPTER 9
LEGAL AND CONTRACTUAL REMEDIES

- §9101. Protest Resolution by the Chief Procurement Officer. The Director of Public Works, or the Head of a Purchasing Agency.
- §9101.1 Finality
- §9102. Debarment or Suspension by the Chief Procurement officer, the Director of Public Works, or the Head of a Purchasing Agency
- §9103. Regulations Governing the Settlement and Resolution of Contract and Breach of Contract Controversies
- §9104. Determination that Solicitation or Award Violates law
- §9105. Violations of Law Found Prior to Award
- §9106. Ratification, Termination, or Cancellation of Contract to Comply with the Law
- §9107. Interest
- §9108. Waiver of Sovereign Immunity
- §9109. Limitations on Actions 5 GCA (§5481 of the Guam Procurement Act)

§9101. Protest Resolution by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency. (a) Authority to resolve Protested Solicitations and Awards.

(1) Definitions.

(a) *Interested Party* means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract and who files a protest.

(b) **Complaint to Procurement Officer.** Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing.

(c) Filing of Protest.

(1) **When Filed.** Protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Protests filed after the 14 day period shall not be considered.

(2) **Subject of Protest.** Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

(3) **Form.** To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:

- (a) the name and address of the protestor;
- (b) appropriate identification of the procurement, and, if a contract has been awarded, its number;
- (c) a statement of reasons for the protest; and
- (d) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

(4) **Notification of the Attorney General.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall submit a copy of the protest to the Attorney General within three days of the receipt of the written protest.

(d) **Requested Information Time for Filing.** Any additional information requested by any of the parties should be submitted within the time periods established by the requesting source in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may result in resolution of the protest without consideration of any information which is untimely filed pursuant to such request.

(e) **Stay of Procurement During Protest.** When a protest has been filed within 14 days and before an award has been made, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall make no award of the contract prior to final resolution of such protest, and any such further action is void, unless:

1. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the government of Guam; and
2. Absent a declaration of emergency by the Governor, the protestor has been given at least two-days notice (exclusive of government of Guam holidays); and

3. If the protest is pending before the Board or Court, the Board or Court has confirmed such determination, or if no such protest is pending, no protest to the Board of such determination if filed prior to the expiration of the two-day period specified in item 2 of this subsection.

SOURCE: Modified to comply with 5 GCA §6425(g). (1/1/1999)

(f) **Making Information on Protests Available.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

(g) Decision by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency.

(1) **Time for Decisions.** A decision on a protest shall be made by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in Subsection 9101(g)(2) of this Section, and §9104 (Determination that Solicitation or award Violates Law), §9105 (Violation of Law Found Prior to Award), and §9106 (Ratification, Termination, or Cancellation of Contract to Comply with the Law) of these Regulations. A copy of the decision as contained in this section shall be made or otherwise furnished immediately to the protestor and any other party intervening.

SOURCE: Modified to complete protest process. (1/1/1999).

(2) **Bid Preparation Costs.** In addition to any other relief, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall award the protestor the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorneys fees, when a protest is sustained and the protesting bidder or offeror should have been, but was not awarded the contract under the solicitation.

The Chief Procurement Officer, the Director of Public Works, or the head of the purchasing agency shall have the power to assess reasonable costs other than attorney fees incurred by the government of Guam against a protestor upon a find that the protest was made fraudulently, frivolously or solely to disrupt the procurement process.

SOURCE: Modified upon recommendation of Attorney General. (1/1/1999)

(h) Request for Reconsideration.

(1) **Request.** 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 fifteen (15) days after receipt by the protestor of the notice of decision. Reconsideration can also be requested by an appellant or any interested party who submitted comments during consideration of the protest or any agency involved in the protest. The same time frame applies herein. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

SOURCE: Modified to provide fuller procedure.

(2) **Time for Filing.** [Deleted - included elsewhere]

(3) **Time for Acting.** [Deleted - included elsewhere]

(i) **Effect of Judicial or Administrative Proceedings.** If an action concerning the protest has commenced in court, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall not act on the protest, but refer the protest to the Attorney General. This Section shall not apply where a court requests, expects, or otherwise expresses interest in the decision of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency.

§9101.1 Finality. A decision of the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with §9103 and §9108.

SOURCE: Added to comply with 5 GCA §5425(f).

§9102. Debarment or Suspension by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency. (a) Authority to Debar or Suspend.

(1) **Application.** This Subsection applies to all debarment or suspensions of persons from consideration for award of contracts imposed by the Chief

Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency.

(b) Suspension.

(1) **Initiation.** After consultation with the affected using agency, the Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency that probable cause exists for debarment as set forth in 5 GCA §5426 (Authority to Debar or Suspend) of the Guam Procurement Act, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor.

Such notice shall state that:

(a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of debarment decision, but not for a period in excess of three months;

(b) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and

(c) if a hearing has not been held, the suspended person may request a hearing in accordance with §9102(d) (Request for hearing) of these Regulations.

(2) **Effect of Decisions.** A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the officer who issued the notice of suspension or by a court, but otherwise shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

(c) **Initiation of Debarment Action.** Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

(1) state that debarment is being considered;

(2) set forth the reasons for the action;

(3) state that if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Chief Procurement Officer, the Director of Public Works, or the head of a

Purchasing Agency within ten days after the contractor or prospective contractor receives notice of the proposed action; and

(4) state that the contractor or prospective contractor may be represented by counsel.

Within ten working days from mail date, such notice shall be personally delivered to [the] vendor's place of business.

Such notice shall also be sent to the Attorney General and the affected using agency. The affected using agency is that agency that has used the supplies, services, or construction supplied by the contractor. If more than one affected using agency is involved the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may designate one or more representative to be consulted in respect to this action.

(d) **Request for Hearing.** A contractor or prospective contractor that has been notified of a proposed debarment action **must** request in writing that a hearing be held. Such request must be received by the official proposing the action within ten days of receipt of notice of the proposed action under §9102(c) (Initiation of Debarment Action). If no request is received within the 10-day period, a final determination may be made as set forth in §9102(h) (Determination of Hearing Officer; Final Decision) after consulting with the Attorney General and the affected using agency.

SOURCE: First "may" changed to "must" for clarification.

(e) **Notice of Hearing.** If a hearing is requested, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may appoint a hearing officer to conduct the hearing and recommend a final decision. Otherwise, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall act as a hearing officer. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the Attorney General and the using agency.

(f) **Authority of the Hearing Officer.** The hearing officer, in the conduct of the hearing, has the power, among others, to:

(1) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other

matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(2) require parties to state their positions with respect to the various issues in the proceeding;

(3) require parties to produce for examination those relevant witnesses and documents under their control;

(4) rule on motions, and other procedural items on matters pending before such officer;

(5) regulate the course of the hearing and conduct of participants therein;

(6) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(7) fix time limits for submission of written documents in matters before such officer;

(8) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

(i) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(ii) excluding all testimony of an unresponsive or evasive witness; and

(iii) expelling any party or person from further participation in the hearing;

(iv) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

(g) Hearings Procedures.

(1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements **and the Administrative Adjudication Law**. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

SOURCE: Modified to clarify applicable procedures.

(2) A hearing may be recorded, but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those

present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(3) Opening statements may be made unless a party waives this right.

(h) Decision. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:

- 1.. state the reasons for the actions taken; and
- 2 inform the debarred or suspended person involved of its rights to judicial review as provided in these regulations.

(i) Notice of Decision. A copy of the decision made pursuant to this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(j) Determination of Hearing Officer, Final Decision. The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Copies shall also be sent to the contractor or prospective contractor, the Attorney General, and the affected using agency. The contractor or prospective contractor shall have ten days to file comments upon the hearing officer's determination. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may request oral argument. After consultation with the affected using agency and the Attorney General, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed two years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of its rights to judicial or administrative review under 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Act.

(i) Effect of Debarment Decision. A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, or the head of the agency that issued the decision, orders

otherwise or until the debarment period specified in the decision expires.

(j) **Maintenance of List of Debarred and Suspended Persons.** The Chief Procurement Officer shall maintain and update a list of debarred and suspended persons **including notices from all purchasing agencies of the government of Guam.** All purchasing agencies and political subdivisions of the territory shall be supplied with this list **as needed.** The Chief Procurement Officer shall send updates of this list to all purchasing agencies and political subdivisions of the territory as **needed.** Such list shall be available to the public upon request. **Any and all debarments and suspensions determined by another government or autonomous agency will be honored.**

§9103. Regulations Governing the Settlement and Resolution of contract and Breach of Contract Controversies. (a) Authority to Resolve Contract and Breach of Contract Controversies.

(1) **General.** The Guam Procurement Act establishes procedures and remedies to resolve contract and breach of contract controversies between the territory and a contractor. It is the territory's policy, consistent with this Act, to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities also are encouraged at this stage.

(b) **Scope of Regulation.** 5 GCA §5427 (Authority to Resolve Contract and Breach of Contract Controversies) of the Guam Procurement Act is applicable to controversies between the territory and a contractor which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission. The word *controversy* is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

(c) **Delegation of Authority to Procurement Officer.**

(1) **Procurement Officer Authority.** Subject to Subsection 9103(c)(2) of this Section, unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, such authority is hereby delegated to the Procurement Officer. Within this Regulation, therefore, Procurement Officer denotes the person with such authority whether that is the Procurement Officer, the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or a designee of such officer.

(2) **Prior Approval of Settlements.** The settlement or resolution of controversies involving claims is subject to the Government Claims Act.

(d) **Procurement Officer's Decision.**

(1) **Procedures Prior to Issuing Decision.** When a controversy cannot be resolved by mutual agreement, the Procurement Officer shall, after written request by the contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Procurement Officer shall:

- (a) review the facts pertinent to the controversy;
- and
- (b) secure any necessary assistance from legal, fiscal, and other advisors.

(2) **Final Decision.** The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

- (a) a description of the controversy;
- (b) a reference to pertinent contract provisions;
- (c) a statement of the factual areas of agreement or disagreement;
- (d) a statement of the Procurement Officer's decision, with supporting rationale;
- (e) a paragraph substantially as follows:
"This is the final decision of the Procurement Officer. You may obtain judicial review of this decision by bringing an action in the Superior Court of Guam."

(3) **Failure to Timely Issue Final Decision.** If the Procurement Officer does not issue a written decision within 60 days after written request by the contractor 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.

(e) Controversies Involving Territorial Claims Against the Contractor. All controversies involving claims asserted by the territory against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, as applicable.

(f) Interest.

(1) **Payable on Claims.** Pursuant to 5 GCA §5475 (Interest) of the Guam Procurement Act, interest on amounts ultimately determined to be due to a contractor or the territory shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

(2) **Contract Clause.** Each contract between the territory and a contractor shall contain a paragraph substantially similar to Subsection 9103(f)(1) of this Section.

(g) **Disputes Clause.** Language substantially similar to the following clause shall be inserted in all territorial contracts:

"DISPUTES

(1) All controversies between the territory and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Procurement Officer in writing, within 60 days after written request by the contractor for a final decision concerning the controversy; provided, however, that if the Procurement Officer does not issue a written decision, within 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.

(2) The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or:

(i) the contractor brings an action seeking judicial review of the decision in the Superior Court of Guam.

(4) The contractor shall comply with any decision of the Procurement Officer and proceed diligently with

performance of this contract pending final resolution by the Superior Court of Guam of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of the contract by the territory; provided, however, that in any event the contractor shall proceed diligently with the performance of the contract where the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency has made a written determination that continuation of work under the contract is essential to the public health and safety.”

§9104. Determination that Solicitation or Award Violates Law. (a) **Applicability of this Part.** The provisions of this Part 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 (5 GCA §5450 of the Guam Procurement Act).

(1) **Determination that Solicitation or Award Violates Law.**

(2) **Determination.** A solicitation or award may be in violation of the law due to actions of territorial employees, bidders, offerors, contractors, or other persons. After consultation with the Attorney General, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may determine that a solicitation or contract award is in violation of the provisions of the Guam Procurement Act. After consultation with the Attorney General, the Policy Office may determine that a solicitation or award violates 5 GCA Chapter 5, Article 11 (Ethics in Public Contracting) of the Guam Procurement Act or regulations promulgated thereunder. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. The courts designated in 5 GCA §5480 (Waiver of Sovereign Immunity in Connection with Contracts) of the Guam Procurement Act, may find that a solicitation or award is in violation of the law.

(3) **Finding of Bad Faith or Fraud.** Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

§9105. Violations of Law Found Prior to Award. (a) Remedies Prior to an Award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award shall be: (Quoted from 5 GCA §5451 of the Guam Procurement Act.)

- (1) cancelled; or
- (2) revised to comply with the law.

(b) Cancelling or Revising Solicitation or Proposed Award to Comply with the Law. A finding by the Procurement Officer, after consultation with the Attorney General, that the solicitation or proposed award is in violation of law will constitute a cogent and compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with §3115 (Cancellation of Solicitations) of these Regulations.

§9106. Ratification, Termination, or Cancellation of Contract to Comply with the Law. (1) 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:

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

(ii) 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:

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

(ii) the contract may be ratified and affirmed if such action is in the best interests of the territory, without prejudice to the territory's rights to such damages as may be appropriate.

This Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA, §4137 (Prohibition on Activities of Government Employees). This §9106 is quoted from 5 GCA §5452 of the Guam Procurement Act.

(a) No Fraud or Bad Faith by Contractor.

(b) **General.** Upon finding after award that a territorial employee has made an unauthorized award of a contract or that a solicitation or contract award is

otherwise in violation of law where there is no finding of fraud or bad faith, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may ratify or affirm the contract or terminate it in accordance with this Section after consultation with the Attorney General.

(c) Ratification, and Affirmation.

(1) If the violation can be waived without prejudice to the territory or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(2) If the violation cannot be waived without prejudice to the territory or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is not time for resoliciting bids or offers either formally, or informally under the emergency authority, the contract may be amended appropriately, ratified, and affirmed.

(3) If the violation cannot be waived without prejudice to the territory or other bidders or offerors and if performance has begun, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall determine in writing whether it is in the best interest of the territory to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the territory's best interest:

- (i) the costs to the territory's best interest;
- (ii) the possibility of returning supplies delivered under the contract and thus decreasing the costs of termination;
- (iii) the progress made toward performing the whole contract; and
- (iv) the possibility of obtaining a more advantageous contract by resoliciting.

(d) **Termination.** Contracts based on awards or solicitation that were in violation of law shall be terminated at no cost to the territory, if possible, unless the determination required under Subsection 9106 of this Section is made. If the contract is terminated, the territory shall, where possible and by agreement with the supplier, return the supplies delivered for a refund at no cost to the territory or at a minimal restocking charge. If a termination claim is made, settlement shall

be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

(2) **Fraud or Bad Faith by the Contractor.**

(a) **General.** Upon finding after award that a solicitation or award is in violation of law and that the recipient of the contract acted fraudulently or in bad faith, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may, after consulting with the Attorney General, declare the contract null and void or ratify and affirm it in accordance with this Section.

(b) **Declaration of Contract Null and Void.** The contract shall be declared null and void unless ratification and affirmation is found to be in the territory's best interest under Subsection 9106 of this Section.

(c) **Ratification and Affirmation.** The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the supplies, services, or construction under the contract and:

(1) there is no time to reward the contract under emergency procedures or otherwise; or

(2) the contract is being performed for less than it could be otherwise performed.

(d) **Effect of Declaring a Contract Null and Void.** In all cases where a contract is voided, the territory shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the territory is entitled to recover the greater of:

(1) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or

(2) the difference between payments under the contract and the value to the territory of the supplies, services, or construction it obtained under the contract.

The territory may in addition claim damages under any applicable legal theory.

(e) **Effect of Ratification.** The territory shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.

§9107. Interest. Interest on amounts ultimately determined to be due to a contractor or the territory shall be payable at the statutory rate applicable to judgements from the date the claim arose through the date of decision or judgment, whichever is later (5 GCA §5475 of the Guam Procurement Act).

§9108. Waiver of Sovereign Immunity. (a) Waiver of Sovereign Immunity in Connection with Contracts (5 GCA §5480 of the Guam Procurement Act).

(1) **Solicitation and Award of Contracts.** The Superior Court of Guam shall have jurisdiction over an action between the territory and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. The Superior Court shall have such jurisdiction in actions at law or in equity, and whether the action are for monetary damages or for declaratory or other equitable relief.

(2) **Debarment or Suspension.** The Superior Court shall have jurisdiction over an action between the territory and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the statutes and regulations. The Superior Court shall have such jurisdiction, in action at law or in equity, and whether the actions are for declaratory or other equitable relief.

(3) **Actions Under Contracts or for Breach of Contract.** The Superior Court shall have jurisdiction over an action between the territory and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contractor or for a breach of the contract, and whether the action is for monetary damages or declaratory or equitable relief, but shall be subject to §526 of the Code of Civil Procedure, and as it may be amended or recodified from time to time.

(4) **Limited Finality for Administrative Determinations.** In any judicial action under this Section, factual or legal determinations by the

employees, agents, or other persons appointed by the territory shall have no finality and shall not be conclusive, notwithstanding any contract provision or regulation, except to the extent provided in 5 GCA §5480 of this Act. See also §3125 of these Regulations.

(5) For the purpose of this Section a *prospective bidder*, contractor or offeror is one who will actually submit a bid, contract or otherwise offer his services if, in the actions permitted by this Section, such person would prevail.

(6) All actions permitted by this Section shall be conducted as provided in the Government Claims Act.

§9109. Time Limitations on Actions (5 GCA §5481 of the Guam Procurement Act.)

(1) **Protested Solicitations and Awards.** Any action under §9108(a) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts) of these Regulations shall be initiated as follows:

(a) within 30 days after the aggrieved person knows or should have known of the facts giving rise to the action; or

(b) within 14 days after receipt of a final administrative decision pursuant to either 5 GCA §5425(c) (Authority to Resolve Protested Solicitations and Awards, Decision) of the Guam Procurement Act.

(2) **Debarment or Suspensions for Cause.** Any action under 5 GCA §5480(b) shall be commenced within six (6) months after receipt of the decision of the Chief Procurement Officer, the Director of Public Works, or head of a Purchasing Agency under 5 GCA §5426(c) or the Decision of the Policy Office under 5 GCA §5651 of this Act whichever is applicable.

(3) **Actions Under Contracts or for Breach of Contract.** Any action commenced under 5 GCA §5481(c) shall be commenced within six (6) months of the date the claim arose or within six months of the date the claimant knew or should have known, that a claim existed against the parties.