

CHAPTER 5  
GUAM PROCUREMENT LAW

ARTICLE 9  
LEGAL AND CONTRACTUAL REMEDIES

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PART A  
PRE-LITIGATION RESOLUTION OF CONTROVERSIES

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- § 5426. Authority to Debar or Suspend.
- § 5427. Authority to Resolve Contract and Breach of Contract Controversies.

**§ 5425. Authority to Resolve Protested Solicitations and Awards.**

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

(b) **Authority to Resolve Protests.** The Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers shall have the authority, prior to the commencement of an action in court concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the solicitation or award of a contract. This authority shall be exercised in accordance with regulations promulgated by the Policy Office.

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

- (1) state the reasons for the action taken; and
- (2) inform the protestant of its right to administrative and judicial review.

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

(e) **Appeal.** A decision under Subsection (c) of this Section including a decision there under regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision.

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

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

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

(2) Absent a declaration of emergency by the Governor, the protestant has been given at least two (2) days notice (exclusive of territorial holidays); and

(3) If the protest is pending before the Public Auditor or the Court, the Public Auditor or Court has confirmed such determination, or if no such protest is pending, no protest to the Public Auditor of

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such determination is filed prior to expiration of the two (2) day period specified in Item (2) of Subsection (g) of this Section.

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

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

(2) there is a reasonable likelihood that the protestant may have been awarded the contract but for the breach of any ethical obligation imposed by Part B of Article 11 of this Chapter or the willful or reckless violation of any applicable procurement law or regulation. The Public Auditor shall have the power to assess reasonable costs including reasonable attorney fees incurred by the government, including its autonomous agencies and public corporations, against a protestant upon its finding that the protest was made fraudulently, frivolously or solely to disrupt the procurement process.

**SOURCE:** GC '6975. MPC '9-101. Repealed/ Reenacted by P.L. 18-44:2. Subsections (e), (f),(g)(3),(h)(2) amended by P.L. 28-068:IV:67 (Sept. 30, 2005).

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

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

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

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

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

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

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

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

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

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

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

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

(c) **Decision.** The Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency shall issue a written decision to debar or suspend. The decision shall:

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(1) state the reasons for the action taken; and

(2) inform the debarred or suspended person involved of its rights to judicial or administrative review as provided in this Chapter.

(d) **Notice of Decision.** A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

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

(f) Any member of the public may petition the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency to take action to debar or suspend pursuant to Subsection (a) of this Section. An investigation of each petition shall be conducted promptly and a written report should be made of findings of fact and action taken.

**SOURCE:** GC '6975.1. MPC '9-102. Subsection (b) amended by P.L. 18-44:31; (c) by P.L. 18-44:3; (e) amended and (f) added by P.L. 18-44:4 and 5 respectively. Subsection (e) amended by P.L. 28-068:IV:68 (Sept. 30, 2005).

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

(a) **Applicability.** This Section applies to controversies between the Territory and a contractor and 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 or rescission.

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

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

(1) state the reasons for the action taken; and

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

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

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

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

**SOURCE:** GC § 6975.2. MPC § 9-103. Subsection (c) amended by P.L. 18-44:6 and (e) amended by P.L. 18-44:7. Subsection (e) amended by P.L. 28-068:IV:69 (Sept. 30, 2005).

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**PART B  
SOLICITATIONS OR AWARDS IN VIOLATION OF LAW**

- § 5450. Applicability of this Article.
- § 5451. Remedies Prior to an Award.
- § 5452. Remedies After an Award.

**§ 5450. 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.

**SOURCE:** GC ' 6976. MPC ' 9-201. Amended by P.L. 18-44:14.

**COMMENT:** This Part applies only **after** a solicitation or award has been actually made or, in the case of an award, in such a stage as to be beyond the general scope of negotiation or review. It does not apply to, say, a review by

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the Attorney General, who determines, in the course of his normal review, that the proposed action would be in violation of law if it were to be made.

**§ 5451. 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 law, then the solicitation or proposed award shall be:

- (a) cancelled; or
- (b) revised to comply with the law.

**SOURCE:** GC '6976.1. MPC '9-202.

**COMMENT:** This Section restates, in statutory form, current law and practice.

**§ 5452. Remedies After an Award.**

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

(1) 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.

(2) 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.

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

**SOURCE:** GC '6976.2. MPC '9-203 modified.

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**COMMENT:** See 4 GCA '4134(f)(2) regarding situations where a government employee has a conflict of interest. Since this Section deals with similar remedies as does 4 GCA '4137, the two sections should be read as complementing each other, not one repealing the other. Both have their place within the government. In cases of employee conflicts, 4 GCA should prevail and those contracts rendered null and void as a result of the application of 4 GCA '4137 would not be subject to this Section.

**NOTE: (2004)** After a diligent search, it appears that 4 GCA '4134 no longer exists. While, specifically, there is no record of its repeal, the Compiler believes that this section was removed as a part of the overall re-enactment of Title 4 GCA Chapter 4 in the 16<sup>th</sup> Guam Legislature. Nowhere were individual sections repealed in that Legislature, rather the entire first Article was repealed and re-enacted. Since it adds nothing to this Section, its loss will not be missed.

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**PART C  
INTEREST**

§ 5475. Interest.

**§ 5475. Interest.**

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.

**SOURCE:** GC '6977. MPC '9-301.

**COMMENT:** The actual statutory rate of interest is now 6% p.a. To avoid confusion and possible unintentional discrimination in applicable rates, any discussion of actual rates should be left to the Civil Procedure Code (soon to be 7 GCA), and not to this Section.

The question of interest after judgment but before payment is contained in the above-mentioned Civil Procedure Code (soon to be 7 GCA) and Government Claims Act (Chapter 6 of this Title).

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**PART D  
WAIVER OF SOVEREIGN IMMUNITY; LIMITATIONS ON ACTIONS**

§ 5480. Waiver of Sovereign Immunity in Connection with Contracts.

§ 5481. Time Limitations on Actions.



**§ 5480. Waiver of Sovereign Immunity in Connection with Contracts.**

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

(b) **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 actions at law or in equity, and whether the actions are for declaratory, or other equitable relief.

(c) In addition to other relief and remedies, the Superior Court shall have jurisdiction to grant injunctive relief in any action brought under Subsections (a), (b) or (c) of this Section.

(d) **Limited Finality for Administrative Determinations.** In any judicial action under this Section, factual or legal determinations by employees, agents or other persons appointed by the Territory shall have no finality and shall not be conclusive, notwithstanding any contract provision, or regulation, except to the extent provided in ' § 5245, 5705 and 5706 of this Chapter.

(e) For purposes 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.

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

**SOURCE:** GC '6978. MPC '9-401 heavily modified. Subsection (c) as amended by P.L. 18-44:9 and (d) by P.L. 18-44:8.

**COMMENT:** The MPC envisions a waiver of sovereign immunity far in excess of what has been granted heretofore on Guam. Under existing law (before enactment of this Title) the Appellate Division of the District Court has

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held, in *Alexander et al v. Bordallo* (not yet reported) (January 8, 1979, Civil Appeal No. 78-038A) that:

". . . sovereign immunity applies to specific performance actions against the Government; otherwise the government cannot operate effectively if its every act is subject to injunctive actions. See *Larson v. Domestic and Foreign Corporation*, 337 U.S. 682, 69 S.Ct. 457, 93 L.Ed. 1629 (1948). Wright and Miller, Volume 14, 3655."

Further, the Government Claims Act, while not ideal (and substantially amended by P.L. 17-29, after the enactment of this Chapter), has provided very adequate remedies in **contract** actions against the government. Therefore, this Section has been amended to permit the additional action of declaratory judgment against the government and suits as specifically permitted in this Section, but not injunctions. If the government or its employees are to be stopped in undertaking actions alleged (by them) to be lawful, the plaintiff must meet the more difficult standard of a writ of mandate or of prohibition.

Another change is to define "prospective" to limit it to a person who actually will submit a bid, contract or offer if he succeeds in his suit rather than to permit wider suits by persons who may allege some vague interest in the solicitation or contract, but who plan no immediate action.

The MPC is changed again to follow the Government Claims Act with respect to the procedure required in actions against the government. Since this Section allows suits in certain specified cases, obviously claims need not first be filed with the Attorney General, but at least the same court procedure must be followed.

A final change from the MPC is to delete references to "notwithstanding" provisions of other laws relative to finality of decisions. While this Section does not permit executive action (contracts or rules of the Policy Office) to make certain decisions of administrative officials unchallengeable, the change does continue former general provisions of law with respect to administrative decisions and limited finality. There is no good reason to, in practice, change the law so drastically. It does not serve either this title or other provisions of law on Guam.

The whole aim of this Chapter is to centralize procurement. The enacted amendments (P.L. 17-29) to the Government Claims Act do the same with claims. If this Section were to follow the MPC exactly, the net effect would be to "decentralize" and confuse the legal aspects of both claims and this Chapter.

Changed by Committee on GGO.

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

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

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(b) **Debarments and Suspensions for Cause.** Any action under § 5480(b) of this Chapter shall be commenced within six (6) months after receipt of the decision of the Policy Office under § 5651 of this Chapter, or the decision of the Procurement Appeals Board under § 5707 of this Chapter, whichever is applicable.

(c) **Actions Under Contracts or for Breach of Contract.** Any action commenced under 5480(c) of this Chapter shall be commenced within twelve (12) months after the date of the Procurement Appeals Board decision.

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

**SOURCE:** GC '6978.1. MPC '9-402 modified. Subsections (a), (b) and (c) amended, and (d) added by P.L. 18-44:10-13 respectively.

**COMMENT:** Subsection (c) retains the limitations contained in the Government Claims Act (as in effect at the time of enactment of this Chapter).

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**PART E  
PROCUREMENT DATA**

§ 5485. Complaints that Procurement Data was Withheld.

**§ 5485. Complaints that Procurement Data was Withheld.**

(a) On complaint by any member of the public, the Superior Court has jurisdiction to enjoin a governmental body from withholding procurement data and to order the production of any government data improperly withheld from the complainant. In such a case, the court shall determine the matter de novo, and may examine the contents of such procurement data in camera to determine whether such records or any part thereof shall be withheld under any of the exceptions set forth in 6 GCA '4202 and the burden is on the agency to sustain its action.

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

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(c) Except as to cases the court considers of greater importance, proceedings as authorized by this Section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(d) The court may assess against the government or governmental body reasonable attorney fees and other litigation costs reasonably incurred in any case under this Section in which the complainant has substantially prevailed.

(e) Whenever the court orders the production of any procurement data improperly withheld from the complainant and assesses against the government or governmental body reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether government personnel acted arbitrarily or capriciously with respect to the withholding, apart from such other actions as the Court may take, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends. No right or power granted to the Civil Service Commission shall bar or preclude the Court from issuing such orders, imposing such sanctions or providing such remedy or relief as it deems proper.

(f) In the event of noncompliance with the order of the Court, the Superior Court may punish for contempt, the responsible employees or officer.

**SOURCE:** GC '6978.2 added by P.L. '18-44:27.

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