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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEAL**

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|---------------------------------|---|-------------------------------------|
| IN THE APPEAL OF: |) | DOCKET NO. OPA-PA-18-004 |
| |) | |
| TELEGUAM HOLDINGS, LLC, |) | |
| |) | |
| Appellant, |) | HEARING BRIEF AND |
| |) | MEMORANDUM OF POINTS AND |
| AND |) | AUTHORITIES IN SUPPORT OF |
| |) | GENERAL SERVICES AGENCY'S |
| GENERAL SERVICES AGENCY, |) | REQUEST TO AFFIRM THE PUBLIC |
| |) | AUDITOR'S DECEMBER 15, 2014 |
| Purchasing Agency. |) | DECISION ON REMAND |
| |) | |

Comes now the General Services Agency (“GSA”) by and through its counsel, files its Hearing Brief and Memorandum of Points of Authorities in support of its request to affirm the Public Auditor’s December 15, 2014 Decision on Remand in response to the appeal by Teleguam Holdings, LLC. (“GTA”).

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ORIGINAL

RELIEF REQUESTED

Based on *res judicata*, the Public Auditor should affirm its December 15, 2014 Decision on Remand for IFB GSA-064-11.

FACTUAL AND PROCEDURAL BACKGROUND

GTA's current appeal is a product of many years of legal proceedings involving multiple determinations and decisions by the Public Auditor, Superior Court Judges, and Supreme Court Justices. Spanning seven years through legal wrangling, the Public Auditor is again presented with the same issues, the same facts, and now bound by Superior Court Decisions and Supreme Court Opinions.

Due to the amount of time that has passed, it is important to refresh the Public Auditor as to why we are here again. In June 2011, GSA issued a ten-part Invitation for Bids, IFB GSA-064-11, for a comprehensive telecommunications system for the executive branch of the Government of Guam.

GTA appealed to the Public Auditor on October 8, 2012. This appeal was based on GSA's decision denying GTA's protest of the Bid Status Intent to Award Bid Forms 2 and 3, a part of IFB No. GSA-064-11, to Pacific Data Systems, Inc. ("PDS"). GTA again appealed to the Public Auditor on November 5, 2012. This appeal was based on GSA's denying GTA's protest of the Bid Status Intent to Award Request Bid Form 11, a part of IFB No. GSA-064-11, to PDS. Both appeals were consolidated on November 21, 2012. On March 6, 2013, the Public Auditor issued Consolidated Decisions, in which she affirmed several awards to PDS and repeatedly affirmed that such decisions were "Final Administrative Decision[s]." OPA Consol. Decs. at p. 16 (Mar. 6, 2013).

GTA filed two complaints in the Superior Court challenging the Public Auditor's Decisions.

GTA's first civil complaint, CV0333-13, was filed on March 20, 2013. Following a bench trial, the trial court issued its Findings of Fact and Conclusions of Law dismissing GTA's complaint. The Court found that, "Plaintiff failed to sustain its burden of proof to prove that the OPA's Decision was arbitrary, capricious, fraudulent, clearly erroneous or contrary to law. The Public Auditor's Decision is therefore conclusive." Finds. Fact & Concl., Oct. 31, 2013 at p. 8. Additionally, the Court found, "All parties have had full opportunity to present their entire case, and pursuant to the court's discretion under Guam Rules of Civil Procedure 65(a)(2), this Decision and Order is a final determination of the case on the merits. The court hereby dismisses Plaintiff's Complaint with prejudice and sustains the decision of the OPA in this matter." *Id.* at p. 9.

GTA's second complaint, CV0334-13, was filed the same day as the first complaint on March 20, 2013. In this case, evidence was presented that records were not properly retained and the Court determined that it could not affirm any award under the IFB. The Court vacated the Public Auditor's Decision, remanded the case to the Public Auditor, and ordered a new decision in light of the new findings that the record was incomplete. The Public Auditor issued a Decision on Remand which contained the following analysis: "No new evidence was presented that alters the Public Auditor's previously issued Consolidated Decisions." OPA Dec. on Remand at p. 6 (Dec. 15, 2014).

The case returned to the Superior Court, in which both GTA and PDS filed motions for summary judgment. Based on the Public Auditor's Decision on Remand, the Court found that the Public Auditor's Decisions upholding the procurement award were based on an incomplete procurement record. Dec. & Order at p. 8 (Aug. 18, 2016). The Court concluded that the procurement record was incurably incomplete, and canceled the entire ten-part IFB. *Id.*

PDS appealed the Court's final judgment in CV0334-13 and sought appellate review from

the Supreme Court. The Supreme Court found that the Superior Court’s jurisdiction was not properly invoked over Parts A-D and Part F-K of IFB GSA-064-11 and reversed the Superior Court’s Judgment canceling those parts. *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5 ¶ 44. Additionally, the Supreme Court found that GTA demonstrated that the required procurement record was materially incomplete, and the Superior Court’s canceling of Part E of IFB GSA-064-11 was affirmed. *Id.*

After the Supreme Court’s Decision, GSA subsequently issued awards of contracts under IFB GSA-064-11 through its Bid Status issued on June 28, 2018.¹ On July 9, 2018, GTA protested IFB GSA-064-11 to GSA, seeking to cancel all the awards by GSA under the argument that an incomplete record prohibits a procurement award. GSA responded to GTA on July 11, 2018, denying GTA’s protest on the basis that it was neither timely nor with merit. On July 26, 2018, GTA filed its Notice of Procurement appeal.

POINTS AND AUTHORITIES

I. *Res Judicata*

Res judicata applies where there is “a ‘final judgment’ or determination of an issue so no further judicial act remains to end the litigation.” *Presto v. Lizama*, 2012 Guam 24 ¶ 23 (citing *People v. Cooper*, 57 Cal. Rptr. 3d 389, 405 (Ct. App. 2007)). “[A] final judgment extinguishes all claims with respect to all or any part of the transaction, or series of connected transactions out of which the previous action arose.” *Trans Pac. Export Co. v. Oka Towers Corp.*, 2000 Guam 3 ¶ 20. Generally, “a judgment does not become final until it has been finally determined on appeal.” *Presto*, 2012 Guam 24 ¶ 23 (citing *In re Morrow*, 189 B.R. 793, 807 (Bankr. C.D. Cal. 1995)).

¹ IFB GSA-064-11 is the same bid issued back in 2011 minus Part E as directed by the Supreme Court in *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5.

In making a *res judicata* determination, “the central criterion ... is ‘whether the two suits arise out of the same transactional nucleus of facts.’” *Reyes v. First Net Ins. Co.*, 2009 Guam 17 ¶ 26 (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 233 F.3d 708, 714 (9th Cir. 2001)). Not only does this appeal share the same nucleus of facts, but it also contests the same legal claims as those previously presented to the Superior Court and to the Supreme Court.

A. The same legal issues were previously presented to the Superior Court and to the Supreme Court

Petitioner appealed the Public Auditor’s Decision **twice** in Superior Court in CV0333-13 and in CV0334-13. Additionally, the incomplete record issue was decided **twice** by the Superior Court in CV0334-13 and on appeal to the Supreme Court in CVA16-017.

B. Superior Court’s Jurisdiction was not properly invoked over the entire IFB

Guam law requires that a protestant seeking to challenge a GSA procurement award before the Public Auditor must file an appeal with the Public Auditor “within fifteen (15) days after receipt by the protestant of the notice of [protest] decision.” 5 GCA § 5425(e). Further, “any person receiving an adverse decision . . . may appeal from a decision by the Public Auditor to the Superior Court . . .” 5 GCA § 5707(a). Actions in the Superior Court “shall be initiated within fourteen (14) days after receipt of a final administrative decision.” 5 GCA § 5481(a).

In GTA’s first protest, GTA timely filed an appeal with the Public Auditor on November 5, 2012. *See In the Appeal of Teleguam Holdings, LLC*, No. OPA-PA-12-018 (Procurement Appeal, Nov. 5, 2012). GTA also timely filed an appeal in the Superior Court. However, in both appeals, GTA sought review of only Part E. GTA did not request the Superior Court cancel the entire IFB until it filed its Amended Verified Complaint on November 23, 2015. *See Am. Verified Compl.*, (Nov. 23, 2015). The Supreme Court found that the amendment came much too late. *Teleguam*, 2018 Guam

5 ¶ 21. More importantly, the Supreme Court found no basis for the Superior Court's exercise of jurisdiction over Parts A-D and Parts F-J of IFB GSA-064-11, and reversed the portions of the Superior Court's Order and Judgment canceling those parts. *Teleguam*, 2018 Guam 5 ¶ 22.

Here, GTA is essentially protesting GSA's IFB using the same legal arguments presented to the Courts and therefore asking the Public Auditor to take a second bite of the apple.

II. An incomplete record is only fatal to Part E, as Petitioner missed the statute of limitations to Parts A-D and F-J

GSA does not contest that an incomplete record is fatal to a procurement award. 5 G.C.A. § 5250. In fact, the Supreme Court affirmed the Superior Court's Decision to cancel the award for Part E due to an incomplete record. *Teleguam*, 2018 Guam 5 ¶ 42. What's important is that the Supreme Court refused to cancel the rest of the bid based on the incomplete record. Even though the Supreme Court knew that the whole record was incomplete for the entire bid, the Supreme Court did not apply an incomplete record analysis for the other parts because it did not have jurisdiction. In doing so, the Supreme Court affirmed the Public Auditor's December 15, 2014 Decision on Remand.² *See Teleguam*, 2018 Guam 5 ¶ 21 ("The Public Auditor's decision became final over the other Parts when GTA did not timely commence an action in the Superior Court. 5 GCA § 5425(f).").

III. The Public Auditor's December 2014 Decision is controlling as to all the other Parts of the Bid

First, "[a]ny determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law." *Id.* § 5704(a). Second, "[a]ny decision of the Public Auditor, including any determination regarding the application or interpretation of the procurement law or regulations, shall be entitled to great weight

² The Public Auditor's December 15, 2014 Decision on Remand reaffirms the Public Auditor's March 6, 2013 OPA Consolidated Decisions.

and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.” *Id.* § 5704(b). This means that factual findings made by the Public Auditor are ordinarily not to be relitigated. The Supreme Court emphasized, “Unless the appealing party successfully challenges the competency or jurisdiction of the original fact-finder—here, the Public Auditor—issues of judicial economy, fairness to the parties, and compliance with the purposes of Guam procurement law, 5 GCA § 5001(b)(1)-(8), counsel against endless re-litigation.” *Teleguam*, 2018 Guam 5 ¶ 32.

Here, the Public Auditor issued a March 6, 2013 Consolidated Decisions finding for the awards by GSA. OPA Consol. Decs. (Mar. 6, 2013). Additionally, the Superior Court in CV0334-13 found it proper for the Public Auditor to come to a decision based on the new evidence presented during litigation. In light of the new evidence that the record was incomplete, the OPA found that “the March 6, 2013 Consolidated Decision regarding OPA-PA-12-018 stands and is hereby reissued. The decision of GSA regarding OPA-PA-12-018 is affirmed . . . This is a Final Administrative Decision.” OPA Dec. on Remand at p. 6 (Dec. 15, 2014). Although the Superior Court decided to cancel the whole bid, the Supreme Court reversed the Superior Court’s Decision for all the Parts other than Part E. The last Public Auditor Decision regarding IFB GSA-064-11 is its December 15, 2014 Decision on Remand and is therefore the controlling decision as to the remaining awards.³ *See Teleguam*, 2018 Guam 5 ¶ 21 (“The Public Auditor’s decision became final over the other Parts when GTA did not timely commence an action in the Superior Court. 5 GCA § 5425(f).”).

IV. Finality of Determinations

Public Auditor decisions are final and conclusive if they do not meet the required statute of limitations. *See* 5 GCA § 5425(f) (“A decision of the Public Auditor is final unless a person adversely

³ The Public Auditor’s December 15, 2014 Decision on Remand reaffirms the Public Auditor’s March 6, 2013 OPA Consolidated Decisions.

affected by the decision commences an action in the Superior Court in accordance with Subsection (a) of § 5480 of this Chapter.”). Since GTA failed to meet the statute of limitations to commence an action in Superior Court for the remaining awards in IFB GSA-064-11, the Public Auditor Decisions on IFB GSA-064-11 are final and conclusive.

Additionally, Public Auditor decisions shall be final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. *See* 5 GCA § 5704(a). The Supreme Court has not found the remaining parts of IFB GSA-064-11 to be arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law, and the Public Auditor should again reaffirm its December 15, 2014 Decision on Remand minus the IFB award to Part E.

CONCLUSION

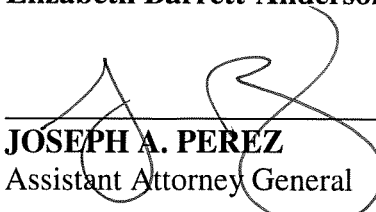
In conclusion, the current matter before the Public Auditor is barred by *res judicata*. Since this protest arises out of the same transactional nucleus of facts presented in *Teleguam Holdings LLC v. Territory of Guam*, 2018 Guam 5, no judicial act remains. Therefore, based on *res judicata*, the Public Auditor should affirm its previous December 15, 2014 Decision on Remand for IFB GSA-064-11. To quote the Supreme Court, “[F]actual findings made by the Public Auditor are ordinarily not to be relitigated.” *Teleguam*, 2018 Guam 5 ¶ 32.

GSA requests attorneys fees and costs associated with this appeal.

Submitted this 14 day of December, 2018.

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By:



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