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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

DATA MANAGEMENT RESOURCES, LLC,
Petitioner-Appellee,

v.

OFFICE OF PUBLIC ACCOUNTABILITY,
Respondent-Appellant.

and

GUAM DEPARTMENT OF EDUCATION,
Real Party in Interest-Appellee.

DATA MANAGEMENT RESOURCES, LLC,
Petitioner-Appellant,

v.

OFFICE OF PUBLIC ACCOUNTABILITY,
Respondent-Appellee,

and

GUAM DEPARTMENT OF EDUCATION,
Real Party in Interest-Appellee.

OPINION

Cite as: 2013 Guam 27

Supreme Court Case Nos.: CVA12-018, CVA12-030 (consolidated)
Superior Court Case No.: SP0107-11

Appeal from the Superior Court of Guam
Argued and submitted on May 22, 2013
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Respondent-Appellant Office of Public Accountability (“OPA”) appeals from the trial court’s March 29, 2012 Findings of Fact and Conclusions of Law, Decision and Order (hereinafter “March Decision and Order”), which was issued in Superior Court Case Number SP0107-11 in favor of Petitioner-Appellee Data Management Resources, LLC (“DMR”). In this March Decision and Order, the trial court found that the Public Auditor exceeded her authority, and it therefore reversed and rescinded the Public Auditor’s administrative decision to deny DMR’s protest in OPA-PA-11-004; the court then ordered Real Party in Interest-Appellee Guam Department of Education (“GDOE”) to proceed with its award to qualified responsive bidders.

[2] On appeal, OPA argues that the trial court lacked jurisdiction to hear SP0107-11 because DMR filed its petition as a special proceeding instead of as a civil action. Moreover, OPA argues that the trial court erred in its findings because OPA did not exceed its authority when affirming GDOE’s determination that bidder Micros-Fidelio Micronesia, Inc. (“MFM”) was a manufacturer authorized reseller, an affirmation that was “neither arbitrary, capricious, fraudulent, clearly erroneous, [or] contrary to law.” Resp’t-Appellant’s Br. at 12 (July 19, 2012). OPA further argues that the trial court failed to give OPA’s administrative decision “great weight and the benefit of reasonable doubt[.]” *Id.*

[3] In opposition, DMR argues that OPA’s appeal was premature, that OPA lacks the “right, power or authority” to appeal the trial court’s March Decision and Order, and that otherwise the trial court validly retained jurisdiction and correctly held that OPA abused its discretion. Pet’r-Appellee’s Br. at 5-16 (Sept. 5, 2012).

[4] In turn, DMR appeals the trial court’s July 27, 2012 decision and order (hereinafter “July Decision and Order”), which was issued in SP0107-11 in favor of OPA. In this July Decision and Order, the trial court denied DMR an award of reasonable costs and attorney’s fees after conducting a plain reading of the applicable statute. DMR challenges the trial court’s plain reading as erroneous and asserts that DMR is entitled to recover its costs, including attorney’s fees, pursuant to a grammatical rule of statutory interpretation known as the “rule of the last antecedent.” Pet’r-Appellee’s Br. at 8-9 (Dec. 26, 2012) (internal quotation marks omitted).

[5] In response, both OPA and GDOE submit that the trial court acted correctly in denying DMR costs and attorney’s fees because DMR failed to meet the requirements for reimbursement under a plain reading of the applicable statute, because DMR does not offer a compelling reason for the court to deviate from its previously espoused American Rule, and because following DMR’s interpretation would lead to absurd results. We consolidated the separate appeals of the trial court’s decisions and orders which were filed by OPA and DMR.

[6] We hold that the trial court erroneously determined that OPA exceeded its jurisdiction, and we therefore reverse the trial court’s March Decision and Order on the merits. We further hold that the trial court correctly denied DMR both costs and attorney’s fees under the applicable statute, and therefore affirm the trial court’s July Decision and Order.

I. FACTUAL AND PROCEDURAL BACKGROUND

[7] GDOE issued IFB-025-2010 (“Bid”) soliciting the outright purchase of computer systems. Specifically, the Bid solicited two types of computer systems and two types of switches. Of key importance, the Bid’s technical specifications required vendors to be manufacturer authorized resellers of the computer equipment. The Bid closed, with three companies submitting their bids: MFM, ComPacific, and DMR. The following week, GDOE

identified MFM as the lowest responsive bidder for the two computer systems, and ComPacific as the lowest responsive bidder for the two types of switches.

[8] After learning its bid status from GDOE, DMR filed a protest with GDOE, alleging that MFM's bid proposal was nonresponsive to the specifications because MFM was not a manufacturer authorized reseller. GDOE denied DMR's protest, stating that MFM was in fact a manufacturer authorized reseller.

[9] Thereafter, DMR appealed to OPA, protesting GDOE's award to MFM on the basis that GDOE violated the law when qualifying MFM as a manufacturer authorized reseller. GDOE responded by filing its Agency Report with OPA in which GDOE admitted that the technical specification at issue was not a minor formality and could therefore not be waived, and that MFM was not a manufacturer authorized reseller. Accordingly, GDOE declared its intent not to award MFM the Bid for the two computer systems.

[10] After the parties waived a hearing, DMR sought judgment on the pleadings, and the Public Auditor issued its decision ("OPA Decision"). While the OPA Decision comported with GDOE's finding that waiver of the Bid's technical specification was erroneous, OPA nevertheless denied DMR's appeal and qualified MFM as a responsive bidder under its interpretation of the term "Manufacturer Authorized Reseller." Record on Appeal ("RA"), tab 24 at 3 (Finds. Fact & Concl. L., Dec. & Order, Mar. 29, 2012).

[11] Consequently, DMR initiated a special proceeding in the trial court, SP0107-11, by filing a Verified Petition for Judicial Review. In its petition, DMR argued that the Public Auditor, by deeming MFM a manufacturer authorized reseller over GDOE's admission to the contrary, had "arbitrarily, capriciously and erroneously disregarded the admissions of GDOE" RA, tab 8

at 4 (Am. Verified Pet. for Judicial Review; Alternatively, Writ of Review, June 3, 2011). DMR sought relief in the form of, *inter alia*, costs and attorney's fees.

[12] The trial court issued its first decision and order on March 29, 2012, finding that the Public Auditor exceeded her authority under 5 GCA § 5703 when rejecting GDOE's admissions as to its error in waiving a technical specification of the Bid and redefining the term "Manufacturer Authorized Reseller." *See* RA, tab 24 at 4-5 (Finds. Fact & Concl. L., Dec. & Order). The trial court based its finding on the fact that GDOE agreed with DMR's protest and that GDOE stipulated that it could not waive the "Manufacturer Authorized Reseller" requirement as a minor informality and that MFM was not a manufacturer authorized reseller. *Id.* at 3-4. Therefore, the trial court reversed and rescinded the Public Auditor's administrative decision to deny DMR's protest in OPA-PA-11-004 and ordered GDOE to immediately proceed with its award to qualified responsive bidders. Additionally, the trial court found that no attorney's fees incurred prior to DMR's protest appeal to OPA may be granted, pursuant to 5 GCA § 5425, but the court reserved for a later date the issue of whether attorney's fees may be awarded for services rendered at the OPA and judicial review levels, and the court sought further briefing from the parties, including GDOE, on that issue.

[13] As per the court's request, the parties briefed the issue of attorney's fees. Approximately three weeks later, OPA filed a timely notice of appeal from the trial court's March Decision and Order.

[14] The trial court heard the outstanding issue of attorney's fees. The trial court issued its second decision and order on July 27, 2012, denying DMR's request for attorney's fees on the grounds that a plain reading of the applicable statute, 5 GCA § 5425(h), "clear[ly]" forbids the court, as well as GDOE and the Public Auditor, from awarding attorney's fees as part of DMR's

reasonable costs. RA, tab 38 at 3-4 (Dec. & Order, July 27, 2012). DMR then filed a timely notice of appeal, wherein it stated that is was appealing both decisions and orders. *See* RA, tab 41 (Notice of Appeal, Aug. 24, 2012) (“Notice is hereby given that [DMR] hereby appeals to the Supreme Court of Guam from the Findings of Fact and Conclusions of Law entered in this action on March 30, 2012, and the Decision and Order entered in this action on the 27[th] day of July, 2012.”). We consolidated the appeals.

II. JURISDICTION

[15] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub. L. 113-47 (2013)) and 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[16] We review *de novo* whether an administrative body holds certain powers under its enabling statute, such as the right to appeal an adverse finding after a Petition for Judicial Review. *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 16. We also review *de novo* whether the trial court has jurisdiction over a Petition for Judicial Review when it asserts jurisdiction via statutory interpretation of Guam’s procurement laws. *See Blas v. Guam Customs & Quarantine Agency*, 2000 Guam 12 ¶ 12; *Sule v. Guam Bd. of Dental Exam’rs*, 2008 Guam 20 ¶ 8 (“Generally, the standard of review on appeal of the trial court’s determination is the substantial evidence test. However, pure questions of law that were determined by the trial court based on undisputed facts are reviewed *de novo*.”).

[17] “The interpretation of a statute is a legal question subject to *de novo* review.” *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 8 (emphasis added). Statutory interpretation always begins with the language of the statute. *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6. The plain meaning will prevail where there is no clearly stated legislative intent to the contrary. *Sumitomo Constr. Co. v.*

Gov't of Guam, 2001 Guam 23 ¶ 17. “[I]n determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections.” *Id.*; see also *Amerault v. Intelcom Support Servs., Inc.*, 2004 Guam 23 ¶ 14 (“In determining the plain meaning of a statutory provision, we look to the meaning of the entire statutory scheme containing the provision for guidance.”).

IV. ANALYSIS

[18] The two key issues on appeal are whether OPA exceeded its jurisdictional authority when it determined that MFM was a manufacturer authorized reseller, and whether DMR is entitled to reasonable costs and attorney’s fees incurred as a result of its procurement protest. However, we must address as a threshold matter whether the trial court lacked jurisdiction to hear SP0107-11 because DMR filed its petition as a special proceeding instead of as a civil action. We must also consider the propriety of OPA’s appeal to our court, specifically addressing whether OPA had authority to appeal and if so, whether OPA filed a premature appeal, before reaching the merits.

A. Whether the Trial Court Lacked Jurisdiction to Hear SP0107-11 Because DMR Filed its Petition as a Special Proceeding Instead of as a Civil Action.

[19] The first issue is whether the form of DMR’s petition warranted dismissal. OPA argues that the trial court lacked jurisdiction because DMR filed its petition as a special proceeding as opposed to a civil action as required by 5 GCA § 5480. Resp’t-Appellant’s Br. at 13-14 (citing 5 GCA § 5480 (2005)). Section 5480 provides, in relevant part:

(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.

5 GCA § 5480(a).

[20] In support of its position, OPA cites to the trial court's decision in SP0050-11, which appeal was still pending at the time of briefing. *See* Resp't-Appellant's Br. at 13. OPA also cites to a number of cases in its reply brief that stand for the proposition that DMR's failure to comply with 5 GCA § 5480 raises salient sovereign immunity concerns. *See* Resp't-Appellant's Reply Br. at 8 (Sept. 19, 2012) ("Further, sovereign immunity implicates a court's subject matter jurisdiction and when it applies, the action is barred because of the court's lack of subject matter jurisdiction. Here, 5 G.C.A. §5480 is the statute waiving the Government of Guam's sovereign immunity that would otherwise bar DMR's claims in SP0107-12 [sic]." (citations omitted)).

[21] DMR responds by arguing that the trial court properly exercised jurisdiction because, as a matter of substance over form, its petition sought the trial court's review of the OPA Decision. Pet'r-Appellee's Br. at 1, 11. DMR highlights that OPA failed to raise this issue at the trial court level, and submits that therefore, absent exceptional circumstances, the court is free to find that OPA waived the issue and to ignore it. *Id.* at 10 (citing *Sinlao v. Sinlao*, 2005 Guam 24 ¶ 30); *see also id.* ("While the Court may exercise its discretion to review issues of jurisdiction raised for the first time on appeal, review of these issues is 'reserved for extraordinary circumstances where review is necessary to address a miscarriage of justice or clarify significant issues of law.'" (quoting *Taitano v. Lujan*, 2005 Guam 26 ¶ 15)).

[22] According to DMR, OPA's reliance on a decision rendered after the trial court's March Decision and Order would, ironically, "result in a miscarriage of justice for DMR," while at the same time, OPA cannot demonstrate how it was prejudiced by the technical caption noncompliance. *Id.* at 11-12. DMR also points out that we have previously permitted less-than-technical compliance with certification rules when no party suffers prejudice. *See id.* at 12 (citing *Abalos v. Cyfred, Ltd.*, 2006 Guam 7 ¶ 65).

[23] DMR acknowledges in its brief that we may exercise our discretion to hear issues raised for the first time on appeal “when a change in law raises a new issue while an appeal is pending; and when the issue is purely one of law.” *Id.* at 10 (quoting *Sinlao*, 2005 Guam 24 ¶ 30) (internal quotation marks omitted). While this appeal was still pending, we recently decided in a similar case that, as a jurisdictional prerequisite, parties seeking judicial review of decisions concerning the propriety or legality of a contract solicitation must file a civil action as opposed to a writ or other special proceeding. *See Town House Dep’t Stores, Inc. v. Dep’t of Educ.*, 2012 Guam 25 ¶¶ 24-29. Specifically, we stated in *Town House*:

We hold that the term “action” in 5 GCA § 5480(a) means a “civil action.” 5 GCA § 5480(a). The law in Guam distinguishes between civil actions and special proceedings, providing different procedures and rules for each. *Compare* 7 GCA Div. 2, *with* 7 GCA Div. 3. Because the type of appeal gives rise to different rules and procedures, and because the Legislature specifically called for “an action” under these circumstances, we determine that it means a “civil action.” 5 GCA § 5480(a).

A writ initiating a special proceeding is not appropriate in this case. IBSS had a plain, speedy, and adequate remedy by bringing a civil action under the terms of 5 GCA § 5480(a), and where such a remedy exists, a writ is not an appropriate substitute. *See Duque*, 2007 Guam 15 ¶ 12. Further, while we may in certain circumstances reclassify one type of writ as another, there is no authority for reclassifying a writ initiating a special proceeding as a civil complaint. *Carlson*, 2007 Guam 6 ¶ 67 n.24; *DCK Pacific*, 2010 Guam 16 ¶ 15. Here, despite being titled a “Verified Complaint,” IBSS did not list any defendants and instead started a special proceeding. It therefore does not fall within the demands [of] 5 GCA § 5480(a) that the party bring “an action,” and this error deprived the Superior Court of jurisdiction. 5 GCA § 5480(a).

Id. ¶¶ 28-29.

[24] Notwithstanding, DMR argues that the petition in *Town House* is distinguishable from its petition in this case for a few reasons. First, DMR argues that it invoked the trial court’s subject matter jurisdiction under 5 GCA § 5480 when it filed a Petition for Judicial Review and sought a writ in the alternative. Pet’r-Appellee’s Reply Br. at 6 (Feb. 12, 2013); *see also* RA, tab 3 at 1

(Verified Pet. for Judicial Review; Alternatively, Writ of Review, June 3, 2011). Second, unlike in *Town House*, DMR named both OPA and GDOE, thereby implicating the necessary abrogation of sovereign immunity. DMR also cites to our decision in *Castino v. G.C. Corporation*, wherein we held that a “formalistic defect” did not strip the trial court of subject matter jurisdiction. Pet’r-Appellee’s Reply Br. at 7 (citing *Castino*, 2010 Guam 3 ¶ 57).

[25] We agree with DMR. It is true that waiver of sovereign immunity is an explicit jurisdictional prerequisite. See *Pac. Rock Corp. v. Dep’t of Educ. (Pacific Rock II)*, 2001 Guam 21 ¶¶ 18-20. As we stated in *Town House*, invoking the waiver of sovereign immunity requires a lawsuit naming “either the Territory of Guam or the relevant agency or government entity from which [the aggrieved party] seeks relief.” 2012 Guam 25 ¶ 33.

[26] Still, in *Town House*, we explained that the trial court correctly dismissed the underlying case because IBSS failed to bring a civil action and because it did not name any defendants, let alone the Territory of Guam or the relevant agency or entity that could waive sovereign immunity. *Id.* ¶ 36. Our decision in *Town House* rested on the fact that Guam’s statutory laws governing procurement protests require the aggrieved party to file a civil action as opposed to a writ initiating a special proceeding. See *id.* ¶¶ 24-29, 36. Our focus was on providing formal notice to the adverse parties of the lawsuit.

[27] The case at bar is distinguishable from *Town House* on several grounds. First, DMR did not file a writ or special proceeding by itself; rather, DMR filed a “Verified Petition for Judicial Review; Alternatively, Writ of Review.” Second, unlike IBSS’s defendant-less Petition in *Town House*, DMR named two parties in its Petition, namely, OPA and GDOE, when seeking declaratory and equitable relief. By doing so, DMR furnished formal notice to these agencies sufficient to allow them to respond to the Petition and defend the lawsuit. Third, DMR named

the appropriate agency, OPA, given that DMR sought the trial court's review of OPA's administrative decision, and that OPA is a qualifying agency of the Territory of Guam that can waive sovereign immunity. *See* 1 GCA § 1900 (as amended by Guam Pub. L. 30-027:2 (June 16, 2009)) (“There is an instrumentality of the government of Guam, independent of the executive, legislative, and judicial branches, known as the [OPA].”).

[28] Though complex and irregular, DMR's Petition for Judicial Review, coupled with a petition for an alternative writ of review, should not be equivocated with a writ or special proceeding standing alone. Our allowance of a Petition for Judicial Review as a procedural vehicle dates back to a case at the Guam Appellate Division, *Guam Power Authority v. Civil Service Commission*, in which the court held that the trial court possessed the authority under the former Guam Code of Civil Procedure section 187 (now codified as 7 GCA § 7117) to craft a Petition for Judicial Review as a procedural remedy even though it was not provided for by statute. *See Guam Power Auth. v. Civil Serv. Comm'n*, No. CV-87-00072A, 1988 WL 242617, at *3-4 (D. Guam App. Div. Nov. 17, 1988). In *Carlson v. Perez*, we explained that a Petition for Judicial Review was developed in an *ad hoc* fashion. 2007 Guam 6 ¶¶ 61, 64. Accordingly, in *Perez*, we held that if the Petition had named the reviewing agency (in that case, the Civil Service Commission) and specifically requested a review of the reviewing agency's decisions, then “we would have treated it as an appropriate Petition for Judicial Review notwithstanding its label as a Petition for Writ of Mandate.” *Id.* ¶ 67 n.24.

[29] In *Castino*, we echoed our preference for substance over form in evaluating compliance with our procedural requirements, and we held that a formalistic defect does not strip the trial court of subject matter jurisdiction. 2010 Guam 3 ¶ 57. Likewise, in *DCK Pacific Guam, LLC v.*

Morrison, we expounded that “[t]he formal title of the writ . . . is not determinative of its propriety as much as its contents and the prayer for relief.” 2010 Guam 16 ¶ 14.

[30] Therefore, even though *Town House* directs bid protestants to file a civil action against the appropriate agency, we can continue our focus on substance over form and qualify the Petition for Judicial Review in this particular case as a civil action because it satisfied all of the concerns underlying the procedural framework we built in *Town House*.

[31] Finally, while OPA is correct in submitting that our discretion to review issues raised for the first time on appeal is ordinarily reserved for extraordinary circumstances, we have the discretion to entertain issues of subject matter jurisdiction at any time and at any stage in the proceedings. *See Lujan*, 2005 Guam 26 ¶ 15.

B. Whether OPA Lacked Authority to Appeal SP0107-11.

[32] The second issue is whether OPA lacked authority to appeal the trial court’s decisions and orders issued in SP0107-11. DMR argues that we cannot entertain this appeal because OPA is a “creature of statute” whose enabling statute lacks the “right, power or authority” to appeal the trial court’s adverse review of a procurement decision such as this one. Pet’r-Appellee’s Br. at 8. DMR cites to our decision in *Carlson v. Guam Telephone Authority*, wherein we held that any acts by an agency falling outside of the scope of the express authority conferred to that agency by its enabling statute are to be deemed unauthorized. *Id.* at 8-9 (citing *Carlson*, 2002 Guam 15 ¶ 9). According to DMR, OPA’s enabling statute only grants the agency appeal rights in one instance, and that is the removal from office. *Id.* at 10 (citing 1 GCA § 1910(b) (2005)).¹

¹ Section 1910 provides, in pertinent part: “The Public Auditor may appeal such removal to the Superior Court of Guam, but shall not perform Auditor duties pending the outcome of such appeal.” 1 GCA § 1910(b).

Otherwise, DMR submits, only the party adversely affected by the OPA Decision holds appeal rights. *Id.* at 9 (citing 5 GCA § 5425(f)).²

[33] OPA challenges DMR's position on several fronts. First, OPA avers that any aggrieved party may appeal the trial court's decision in a special proceeding where, as here, that party is named as a respondent. Resp't-Appellant's Reply Br. at 6-7 (citing 7 GCA § 25104 (2005)).³ Second, OPA finds faulty DMR's reliance on *Carlson v. Guam Telephone Authority*, and distinguishes the present case on the grounds that OPA, unlike GTA, has "more than ample statutory authority" under its enabling statute to file this appeal; OPA is expressly authorized to hear and decide appeals of procurement protest decisions "arising under 9 GCA § 5425[c],"⁴ the Public Auditor can use her jurisdiction to "promote the integrity of the [] procurement process

² The relevant portions of section 5425 provide:

(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.

5 GCA § 5425(e), (f) (2005) (emphases added).

To note, a "person" is defined in Chapter 5 as "any business, individual, union, committee, club, other organization or group of individuals." 5 GCA § 5030(n) (2005). This definition does not explicitly include an agency.

³ Title 7 GCA § 25104 states: "[A]ny party aggrieved may appeal in the cases prescribed in this Chapter." 7 GCA § 25104 (2005) (emphasis added). This statute was derived from California Code of Civil Procedure section 938 (1952), which, though subsequently repealed, has been held to confer jurisdiction on agencies as inclusive in the definition "any party aggrieved":

The policy of the law is to recognize a right to review the judgment of a lower court if not prohibited by law. The right of appeal is remedial, and in doubtful cases the doubt should be resolved in favor of the right whenever the substantial interests of a party are affected by a judgment. . . . Under section 938 of the Code of Civil Procedure any party aggrieved may appeal in a proper case. Where the jurisdiction of a tribunal is involved, and the granting of a writ directed to the tribunal would have the effect of controlling or limiting that jurisdiction, the tribunal is an aggrieved party and entitled to appeal.

Koehn v. State Bd. of Equalization, 326 P.2d 502, 504 (Cal. 1958) (citations and internal quotation marks omitted).

⁴ OPA likely meant to cite to 5 GCA § 5425.

and the purposes of Guam’s Procurement Law[,]” and OPA is empowered to carry out other duties and powers delegated to it by law. Resp’t-Appellant’s Reply Br. at 7.

[34] We agree with OPA. It is true that in *Carlson v. Guam Telephone Authority*, we suggested that agencies derive some of their powers expressly and others by implication. See *Carlson*, 2002 Guam 15 ¶ 9 (“As creatures of legislation, the powers of administrative agencies and their executive officers are dependent upon statutes They have no general or common law powers but only such as have been conferred upon them by law expressly *or by implication.*” (emphasis added) (internal quotation marks omitted)). It is also true that no appeal right is expressly conferred onto the Public Auditor by its enabling statute. See 1 GCA § 1909 (2005). However, we need not conduct an arduous search for implied authority where OPA can be properly characterized as an aggrieved party falling within the ambit of 7 GCA § 25104. Therefore, OPA properly exercised its implied authority to appeal SP0107-11, albeit an authority conferred under 7 GCA § 25104 rather than under its enabling statute.

C. Whether OPA Filed a Premature Appeal.

[35] The third issue is whether OPA filed its appeal prematurely. DMR argues that OPA’s appeal was prematurely filed because there was no final judgment or interlocutory order of appeal entered on the docket before OPA filed its Notice of Appeal on April 27, 2012. See Pet’r-Appellee’s Br. at 1. In particular, DMR argues that the court’s express reservation on the issue of attorney’s fees prevented the March Decision and Order from being final and appealable. See *id.* at 7 (citing RA, tab 24 at 5 (Finds. Fact & Concl. L., Dec. & Order)) (“On DMR’S request for attorney’s fees . . . the Court reserves on the issue of whether attorney’s fees may be awarded at the OPA and judicial review level pending further briefing of the parties.”). In support of its position, DMR cites to our decision in *Department of Revenue & Taxation v. Civil Service*

Commission, wherein we held that the existence of any outstanding factual or legal questions creates a lack of finality, thereby depriving our court of jurisdiction. See Pet'r-Appellee's Br. at 6; see also *Dep't of Revenue & Taxation*, 2007 Guam 17 ¶ 19 ("The finality doctrine is based on the twin policies of controlling piecemeal adjudication and eliminating the delays caused by the appeal of interlocutory decisions." (quoting *Dental Capital Leasing Corp. v. Martinez (In re Martinez)*, 721 F.2d 262, 265 (9th Cir. 1983))).

[36] In response, OPA argues that the March Decision and Order was an appealable order under Rule 4(a) of the Guam Rules of Appellate Procedure ("GRAP"). See Resp't-Appellant's Reply Br. at 4.⁵ Furthermore, OPA challenges DMR's reference to our decision in *Department of Revenue & Taxation*, because the interlocutory ruling in that case "did not constitute a final determination of the rights of the parties in an action or proceedings because it did not address the merits of the case, and did not determine the rights of the parties." *Id.* at 5 (citing *Dep't of Revenue & Taxation*, 2007 Guam 17 ¶ 22). OPA explains that our ruling in *Department of Revenue & Taxation* was based on California precedent providing that no finality results from a trial court's decision to set aside an administrative matter and remand the case back to the administrative body, and in that case we directed the parties to a second evidentiary hearing back at the administrative level. *Id.* (citing *Dep't of Revenue & Taxation*, 2007 Guam 17 ¶¶ 9, 16). In the trial court's March Decision and Order, GDOE was ordered to immediately proceed with its award without ordering a follow-up hearing; therefore, the order "terminated the litigation of the parties, addressed the merits of SP0107-11, and determined the rights of the parties." *Id.*

⁵ GRAP Rule 4(a)(1), provides: "Time for Filing a Notice of Appeal. In a civil case, except as provided in Rules 4(a)(4) and 4(c), the notice of appeal required by Rule 3 must be filed with the Superior Court within 30 days after the *judgment or order* appealed from is entered." Guam R. App. P. 4(a)(1) (emphasis added).

[37] In dealing with our GRAP Rules, which “are substantially similar to the Federal Rules of Appellate Procedure, we look to federal case law for guidance.” *McGhee v. McGhee*, 2008 Guam 17 ¶ 12. Federal case law provides a rational basis for us to adopt the collateral order doctrine with respect to attorney’s fees. For example, in *Obin v. District No. 9 of the International Ass’n of Machinists & Aerospace Workers*, the Eighth Circuit Court of Appeals held that:

1) A motion for an assessment of attorney’s fees raises a collateral and independent claim for determination by the district court. Thus, a judgment on the merits of an action, otherwise final, is final for purposes of appeal notwithstanding that a claim for attorney’s fees may remain to be decided.

....

4) The district court’s order on the claim for attorney’s fees is separably appealable as a final judgment and may be consolidated with any pending appeal on the merits of the action.

651 F.2d 574, 584 (8th Cir. 1981). The following year, the United States Supreme Court seemed to adopt this approach, holding “the collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as final and appealable.” *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445, 452 n.14 (1982) (internal quotation marks omitted).

[38] The United States Supreme Court extended its holding in *White* a few years later in the case of *Budinich v. Becton Dickinson & Co.*, one of the seminal cases applying the collateral order doctrine to claims for attorney’s fees. *See Budinich*, 486 U.S. 196, 199-203 (1988). In *Budinich*, the Court held that, in general, claims for attorney’s fees, whether based on statute or contract, should be considered collateral to and separate from the underlying merits of the action. *Id.* Moreover, the Court held that a judgment on the merits in any federal court is final and

appealable, regardless of whether the outstanding issue of attorney's fees remains unresolved as to either recoverability or amount. *Id.*

[39] Subsequent to the *Budinich* decision, the collateral order doctrine, as it governs attorney's fees, has been universally adopted by each and every federal circuit.⁶ To be clear, federal courts still require that a preceding decision on the merits is final and appealable before the subsequent decision on attorney's fees can be deemed appealable as a collateral matter. *See Prod. & Maint. of Emps.' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397, 1399 (7th Cir. 1992) (“[I]f the underlying decision on the merits . . . is not final and appealable, neither is the decision regarding attorneys’ fees. Decisions about fees are separate ‘final decisions’ only after there is a judgment on the merits that would be final but for the matter of fees.” (quoting *Sandwiches, Inc. v. Wendy’s Int’l, Inc.*, 822 F.2d 707, 711 (7th Cir. 1987))) (internal quotation marks omitted).

⁶ *See House of Flavors, Inc. v. TFG-Michigan, L.P.*, 700 F.3d 33, 37 (1st Cir. 2012) (affirming bright-line rule in *Budinich* and holding request for attorney's fees authorized by statute or decisional law does not suspend finality of judgment on underlying claim); *O & G Indus., Inc. v. Nat’l R.R. Passenger Corp.*, 537 F.3d 153, 168 n.11 (2d Cir. 2008) (holding the same and noting that this “sensible” bright-line rule “promotes the interests of judicial economy, especially in this case where resolution of the ‘question remaining to be decided . . . will not alter . . . or revise’ the court’s final rulings on the merits of the other issues on appeal.” (quoting *Budinich*, 486 U.S. at 199)); *Budget Blinds, Inc. v. White*, 536 F.3d 244, 251 (3rd Cir. 2008) (“The part of the District Court’s Order vacating the default judgment is ‘final’ . . . despite the fact that the amount of attorneys’ fees remains unresolved.”); *S. Alliance For Clean Energy v. Duke Energy Carolinas, LLC*, 650 F.3d 401, 405-06 (4th Cir. 2011) (holding fee determinations are generally distinct from merits determinations, and the latter of which cannot generally be revisited on appeal of the former); *Lindy Invs. v. Shakertown Corp.*, 209 F.3d 802, 805 (5th Cir. 2000) (“By separating the trial on the merits from the award of attorney’s fees and costs, the trial court has created a two-track system for appeals purposes.”); *Armisted v. State Farm Mut. Auto. Ins. Co.*, 675 F.3d 989, 993 (6th Cir. 2012) (holding presence of outstanding claim for attorney’s fees does not alter finality of judgment otherwise of all parties and issues); *Elusta v. City of Chicago*, 696 F.3d 690, 695 (7th Cir. 2012) (holding the same and distinguishing *Budinich* on other grounds); *Tweedle v. State Farm Fire & Cas. Co.*, 527 F.3d 664, 669 (8th Cir. 2008) (holding the same); *Or. Natural Desert Ass’n v. Locke*, 572 F.3d 610, 614 (9th Cir. 2009) (holding the same); *RMA Ventures Cal. v. SunAmerica Life Ins. Co.*, 576 F.3d 1070, 1073 (10th Cir. 2009) (“[A] decision on the merits and a decision on attorneys’ fees are considered separate, final decisions of the district court, subject to appeal”); *In re Porto*, 645 F.3d 1294, 1301 (11th Cir. 2011) (holding part of sanctions award issued “in addition to and separate from” merits of judgment “therefore falls on the *Budinich* side of the bright line of finality.”); *Cotton v. Heyman*, 63 F.3d 1115, 1118 (D.C. Cir. 1995) (reiterating holding in *Budinich* and distinguishing on other grounds); *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356, 1358 (Fed. Cir. 2012) (holding attorney’s fees “are not compensation for the injury giving rise to an action. Their award is uniquely separable from the cause of action to be proved at trial.” (quoting *White*, 455 U.S. at 452) (internal quotation marks omitted)).

[40] Here, the trial court's March Decision and Order explicitly left outstanding only the issue of attorney's fees, but otherwise disposed of every other claim presented in the cause of action. This complete disposition and clear demarcation separating the claim for attorney's fees from the underlying merits rendered the March Decision and Order, and by extension, the July Decision and Order, separately final and appealable.

[41] Therefore, in accepting guidance from federal law, we hereby adopt the collateral order doctrine with respect to attorney's fees, which allows us to treat each of the two decisions and orders issued in this case as separately final and appealable, and we assume jurisdiction over both orders without offending our GRAP Rules.

D. Whether OPA Exceeded its Jurisdictional Authority When it Determined that MFM was a Manufacturer Authorized Reseller.

[42] We now turn to whether OPA acted within its jurisdictional authority when it determined that MFM was a manufacturer authorized reseller.

[43] In its March Decision and Order, the trial court explained that while OPA has broad review powers over procurement protests under 5 GCA § 5703,⁷ once OPA resolved the legal issues and the parties represented to OPA that there was no further violation of law, OPA exceeded its authority by interpreting a technical specification of the Bid and making the factual

⁷ Section 5703 provides:

The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. Notwithstanding § 5245 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by any employee of the government of Guam, including any employee of any autonomous agency or public corporation. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5.

5 GCA § 5703 (2005).

determination that MFM was a manufacturer authorized reseller. *See* RA, tab 24 at 4-5 (Finds. Fact & Concl. L., Dec. & Order).

[44] OPA asserts that its *de novo* review of GDOE's decision to deny DMR's protest was not bound by GDOE's original stipulation that MFM was not a manufacturer authorized reseller. Resp't-Appellant's Br. at 15. OPA cites to the trial court's March Decision and Order, wherein the court concluded the same. *See id.* (citing RA, tab 24 at 4 (Finds. Fact & Concl. L., Dec. & Order)); RA, tab 24 at 4 (Finds. Fact & Concl. L., Dec. & Order) ("It is within the authority of the OPA to have taken review of the entire matter before her."). According to OPA, the trial court erroneously interpreted 5 GCA §§ 5703 and 5425, in concluding that while OPA retains the power to conduct a *de novo* review of all matters properly before OPA, this power is limited in scope to procurement protests involving violations of law. *Id.* OPA argues that it is the purchasing agency's protest decision, and not the protest itself, that is appealed to OPA. *Id.* at 16. Therefore, OPA submits, notwithstanding GDOE's stipulation with DMR that MFM is not a manufacturer authorized reseller, OPA has the power under 5 GCA § 5704⁸ to both determine issues and make findings of fact pertaining to the application or interpretation of procurement laws or regulations, including compliance with the technical specification of the Bid requiring a bidder to be a manufacturer authorized reseller in order to receive the award. *Id.* at 16-17 ("Thus, the OPA did not exceed her authority by reviewing DOE's decision *de novo* and

⁸ Section 5704 provides:

Any 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. Any 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 and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.

5 GCA § 5704 (2005).

affirming that decision's finding that MFM was a manufacturer authorized reseller in accordance with the terms and conditions of the IFB.").

[45] Finally, OPA argues that the court failed to give OPA's finding "great weight and the benefit of reasonable doubt" as required under 5 GCA § 5704, and that its decision should be "final and conclusive unless it is arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law . . ." *Id.* at 17.

[46] DMR agrees with the trial court's interpretation of OPA's limited powers and argues that OPA exceeded its authority when declining to affirm DMR's appeal. *See* Pet'r-Appellee's Br. at 15 ("Instead, the OPA proceeded to redefine the technical specifications of the bid, which is outside the authority to 'review and determine any matters properly submitted' to her [pursuant to] 5 GCA § 5703." (quoting 5 GCA § 5703)).

[47] Guam's Procurement Law provides that where procurement protests are not resolved by mutual agreement, one of the statutorily-designated officers, such as the head of a purchasing agency, is required to promptly issue a decision in writing that "state[s] the reasons for the action taken; and inform[s] the protestant of its right to administrative and judicial review." 5 GCA § 5425(c). A dissatisfied protestant may appeal that decision "to the Public Auditor within fifteen (15) days after receipt by the protestant of the notice of decision." 5 GCA § 5425(e). If the Public Auditor determines that a solicitation or proposed award is in violation of law, the Auditor must cancel the solicitation or proposed award, or otherwise revise it to comply with the law. 5 GCA § 5451 (2005).

[48] The trial court's interpretation of OPA's authority to remedy errors in procurement bids is overly constrictive. OPA was entitled to make a factual interpretation of the terms of the bid solicitation pursuant to its authority provided in Guam's Procurement Law. For example, as

provided in Guam's Administrative Rules and Regulations ("GAR"), when a dissatisfied bidder appeals to OPA after an unsuccessful protest, OPA "shall determine whether a decision on the protest of method of selection, solicitation or award of a contract . . . is in accordance with the statutes, regulations, and the terms and conditions of the solicitation." 2 Guam Admin. R. & Regs. Div. 4 § 12201 (2006).

[49] Nothing in Guam's Procurement Law restricted OPA's power, as provided by statute and in the GAR, to review the propriety of terms and conditions of the bid solicitation at issue here, to determine whether MFM qualified for the bid as a manufacturer authorized reseller, and to revise the proposed award to comply with the law. Furthermore, under the statutorily prescribed standard of review, the trial court was required to give OPA's interpretation of the solicitation terms "great weight and the benefit of reasonable doubt," 5 GCA § 5704, and the court erred in failing to do so.

[50] Finally, DMR sought review of GDOE's bid protest decision, giving OPA jurisdiction over the protest. As a result, OPA was then empowered to make its determination relative to the bid protest. In particular, OPA was entitled as a matter of law to determine whether GDOE's decision on the protest was "in accordance with . . . the terms and conditions of the solicitation." *See* 2 GAR Div. 4 § 12201. DMR cannot invoke OPA's jurisdiction selectively, inviting its jurisdiction when the decision is favorable, and challenging jurisdiction when the decision is unfavorable.

[51] Therefore, we hold that OPA did not exceed its jurisdiction in finding that MFM was a manufacturer authorized reseller under the terms and conditions of the solicitation because its authority to do so is provided by statute and in the GAR. OPA was empowered to exercise its authority once DMR sought OPA's review of its bid protest by appealing GDOE's decision.

E. Whether DMR is Entitled to Reasonable Costs and Attorney's Fees.

[52] The final issue the court addresses is whether the trial court erred when it denied DMR reasonable costs and attorney's fees associated with its procurement protest. DMR sought attorney's fees in the amount of \$7,500.00 and costs in the amount of \$634.42, pursuant to 5 GCA § 5425(h).⁹ See RA, tab 38 at 1-4 (Dec. & Order).

[53] DMR implores us to adopt a grammatical rule of statutory construction known as the "rule of the last antecedent" to interpret 5 GCA § 5425(h).¹⁰ Pet'r-Appellee's Br. at 9. DMR admits that we have never applied this rule to any case involving statutory construction. *Id.* at 9-10. In addition, DMR argues that a reading of the statute as a whole supports its interpretation, and submits that there is no express legislative prohibition of an award of attorney's fees as part of costs incurred. *Id.* at 11 (citing *Sule*, 2008 Guam 20 ¶ 53). Finally, after citing to jurisprudence from other jurisdictions to support its position, DMR argues that an award of attorney's fees is "consistent with the general policies encouraging the enforcement and compliance of [sic] procurement law." *Id.* (citations omitted). DMR asserts it would be

⁹ Section 5425(h) provides:

(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.

5 GCA § 5425(h) (2005) (emphasis added).

¹⁰ The "rule of the last antecedent," as announced by the U.S. Supreme Court in *Barnhart v. Thomas*, provides that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." 540 U.S. 20, 26 (2003) (citations omitted).

“absurd” that DMR would be required to “bear the financial burden of enforcing Guam Procurement Law, despite the non-conformance of the Government agency with the law.” *Id.* at 8.

[54] GDOE responds to DMR’s arguments by submitting that DMR failed to meet the statutory requirement for reimbursement of its costs, that DMR’s interpretation leads to an “absurd” interpretation, and that “there is no policy reason to deviate from the clear meaning of § 5425(h)” or to allow for attorney’s fees in this case. Real Party In Interest-Appellee’s Br. at 4-5.

[55] OPA argues that the trial court correctly followed the American Rule in denying DMR’s request for attorney’s fees and costs, that a plain reading of the statute dictates that the trial court is not authorized to award DMR attorney’s fees as part of its reasonable costs, and that the underlying policy advanced by the statute is to “limit the award of reasonable costs and reduce the financial burden of the government” *See* Resp’t-Appellee’s Br. at 12-14. OPA also argues that, even if we were to espouse the “rule of the last antecedent,” we would reach the same result and find that attorney’s fees are excluded from the recovery of reasonable costs for bid protests. *Id.* at 15-16.

[56] Title 5 Guam Code Annotated, Chapter 5 was adopted from the Model Procurement Code (“MPC”), and Guam’s Procurement Law explicitly adopted the MPC’s official comments as part of our own legislative history. *See* Comment to 5 GCA Chapter 5 (“The Official Comments to the [MPC] are a part of the Legislative History of this Chapter.”). One official comment to an analogous provision of the MPC makes it abundantly clear that the award of costs incurred as part of a procurement protest excludes attorney’s fees:

(5) The award of costs under Subsection (7) is intended to compensate a party for reasonable expenses incurred in connection with a solicitation for which that party was wrongfully denied a contract award. No party can recover profits which it anticipates would have been made if that party had been awarded the contract. Attorney’s fees associated with filing and prosecution of the protest are not recoverable.

Model Procurement Code § 9101(7) cmt. n.5 (1979).

[57] Therefore, it is clear from legislative history that attorney’s fees are categorically disallowed under this section of the MPC, and we are persuaded to hold the same under Guam’s nearly-identical statute. This approach is in keeping with the policies underlying the creation of a Model Procurement Code that OPA discussed in its opposition brief, such as promoting the “efficiency in procurement” and “conserv[ing] taxpayers’ money.” See Model Procurement Code, Drafting Concepts, at xiii (2000). Applying the rule of the last antecedent is unnecessary here.

[58] Even without the aid of this piece of legislative history, the plain language of the statute is sufficiently clear that no attorney’s fees are recoverable as part of the collection of costs a successful bid protestant might otherwise be able to recover. The official comment from the MPC simply serves to corroborate this legal determination, and absent clear legislative history to the contrary, this is the plain interpretation that must prevail. See *Sumitomo*, 2001 Guam 23 ¶ 17 (“Absent clear legislative intent to the contrary, the plain meaning prevails.”).

[59] As for costs, DMR argued that it was entitled to attorney’s fees because neither prong of the exceptions provided in 5 GCA § 5425(h) were satisfied in this case. On the basis of DMR’s inverse interpretation of the statutory language, despite its faulty or otherwise illogical nature, DMR incidentally admitted that it did not satisfy either section 5425(h)(1) or (h)(2) in order to recoup costs. Pet’r-Appellee’s Br. at 7-10. If we are to accept DMR’s admission, then we are directed to deny costs. However, because we do not sustain DMR’s bid protest, section 5425(h) does not support DMR’s request for costs, so it is ultimately unnecessary for us to adopt DMR’s admission as a basis for denying costs. See 5 GCA § 5425(h) (“[W]hen a protest is *sustained*, the protestant shall be entitled to the reasonable costs incurred in connection with the solicitation and

protest” (emphasis added)). Accordingly, we maintain denial of DMR’s request for costs because its protest was not sustained.

[60] Therefore, the trial court did not err when it denied DMR reasonable costs and attorney’s fees associated with its procurement protest.

V. CONCLUSION

[61] With respect to the procedural issues on appeal, this case was properly submitted to the trial court. The trial court retained jurisdiction over SP0107-11, despite the formalistic defect in the pleadings, because DMR named OPA in its lawsuit, served OPA, and sought declaratory and equitable relief against OPA. This case was also properly submitted for appellate review. As an aggrieved party covered by the applicable statute, OPA enjoys implied statutory authority to appeal an adverse finding of the trial court after Judicial Review. Additionally, both the March Decision and Order and the July Decision and Order were separately final and appealable under the collateral order doctrine, a doctrine we hereby adopt with respect to attorney’s fees. Since the trial court’s March Decision and Order explicitly left outstanding only the issue of attorney’s fees, but otherwise disposed of every other claim presented in the cause of action, the March Decision and Order, and by extension, the July Decision and Order, were separately final and appealable decisions.

[62] With respect to the merits of this appeal, the trial court erred in determining that OPA exceeded its jurisdictional authority when it determined that MFM qualified as a manufacturer authorized reseller, which authority derives from both Guam’s statutory code and regulations, and affords OPA the power to determine whether a bid award is in accordance with the terms and conditions of a bid solicitation. Finally, the trial court correctly denied DMR both costs and attorney’s fees under a plain reading of the applicable statute.

[63] For the foregoing reasons, we **REVERSE** the trial court’s March Decision and Order on the merits and **REMAND** the case to the trial court for further proceedings not inconsistent with this opinion, and we **AFFIRM** the trial court’s July Decision and Order denying costs and fees.

Original Signed : Robert J. Torres
By

Original Signed : Katherine A. Maraman
By

ROBERT J. TORRES
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

Original Signed : F. Philip Carbullido
By

F. PHILIP CARBULLIDO
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

NOV 22 2013

By: Charisne T. Santos
Deputy Clerk
Supreme Court of Guam