IN THE SUPREME COURT OF GUAM

TELEGUAM HOLDINGS LLC AND ITS WHOLLY OWNED SUBSIDIARIES,
Plaintiff-Appellee,

v.

TERRITORY OF GUAM; DEPARTMENT OF ADMINISTRATION, GENERAL SERVICES AGENCY; THE OFFICE OF PUBLIC ACCOUNTABILITY,
Defendant-Appellees,

and

PACIFIC DATA SYSTEMS, INC.,
Defendant-Appellant.

Supreme Court Case No. CVA16-017
Superior Court Case No. CV0334-13

OPINION

Cite as: 2018 Guam 5

Appeal from the Superior Court of Guam
Argued and submitted on May 31, 2017
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] This appeal arises out of a lengthy government procurement dispute regarding the Government of Guam's attempt to procure comprehensive telecommunication services. Defendant-Appellant Pacific Data Systems, Inc. ("PDS") appeals a final judgment of the Superior Court granting summary judgment to Plaintiff-Appellee Teleguam Holdings LLC ("GTA") and canceling the entirety of a ten-part Invitation for Bids ("IFB"). PDS seeks appellate review of the Superior Court's procedure for reviewing decisions of the Public Auditor and whether the trial court erred in canceling the IFB. In response, GTA argues that PDS lacks appellate standing and that the cancellation and proceedings below were proper.

[2] We conclude that PDS has appellate standing. Further, we reverse the portion of the Superior Court's Judgment canceling Parts A-D and F-J of IFB GSA-064-11 and affirm the portion of the Superior Court's Judgment canceling Part E of IFB GSA-064-11.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] In 2011, the Government of Guam General Services Agency ("GSA") issued a ten-part Invitation for Bids, IFB GSA-064-11, for a comprehensive telecommunications system for the executive branch. The IFB stated: "Each Part of the IFB shall be treated separately for bid submission and shall not affect the other Parts of the bid." Record on Appeal ("RA"), tab 1, Ex. 1 at 25 (Invitation for Bid, June 22, 2011). Part E of the IFB sought bids for dedicated GovGuam Wide Area Network ("GGWAN") Data Communication Services. The GGWAN was divided into 1 Gbps and 10 Gbps services. In response to public questions from IT&E, the GSA

stated: "There will only be one contract awarded for each Part." RA, tab 45 at 1847 (Gov't Ex. List, Mar. 25, 2014). When asked if this would restrict competition and increase overall pricing, the GSA responded: "Smaller awards would require far more administrative time, technical resources, and cause confusion over who is responsible for what service at a location within a Part. The administrative overhead would be very high. As such, these Parts are the traditional components that are bid for larger organizations." *Id.*

[4] Part E garnered two bidders—GTA and PDS. For the 1 Gbps service, GTA bid $750 per month per node and PDS bid $870 per month per node. Both bidders waived installation charges. For the 10 Gbps service, GTA bid $9,400 per month per node, and PDS bid $1,500 per month per node. GTA bid an additional installation charge of $48,832 per node. In April 2012, the GSA issued a Bid Status recommending the award of both GGWAN services to PDS based on GTA's high price. In May 2012, the GSA issued a Revised Bid Status with the same recommendation. GTA filed a timely protest with the GSA, which was denied.

[5] GTA appealed to the Public Auditor. GTA argued that the GSA's single award of Part E to PDS was improper because its 1 Gbps bid was lower than PDS's. After instructing the parties to develop the record, the Public Auditor held a two-day hearing in the Office of Public Accountability.[1] Afterwards, the Public Auditor issued Consolidated Decisions, in which she affirmed the single award of Part E to PDS. In her decision, the Public Auditor found that "[t]he intent of the IFB was to issue a consolidated, centralized telecommunications bid for services to

[1] We note a discrepancy here that PDS raised in the trial court. Guam procurement law gives jurisdiction over appeals from the GSA to the Public Auditor, not the Office of Public Accountability. *See* 5 GCA § 5703. As the parties actually appeared before the Public Auditor and the Decision was signed by the Public Auditor, the discrepancy seems merely technical and does not impact the substantial rights of any party in this litigation. However, in future procurement appeals, the Public Auditor should be mindful of the capacity in which she is acting as to eliminate any confusion over issues of jurisdiction. In this opinion, we refer only to the "Public Auditor."

GovGuam, with consideration given to economies of scale and standardizing telecommunications services and equipment for GovGuam." RA, tab 1, Ex. 2 at 14 (OPA Consol. Decs., Mar. 6, 2013). She also found that "GSA hired a consultant concerning the IFB. As to [Part E], GovGuam wanted only one provider, envisioning one carrier to increase efficiency and to avoid incompatibilities, duplicate costs, and other potential problems which might arise with more than one provider." *Id.*

[6] GTA disagreed and filed a Verified Complaint in the Superior Court challenging the Public Auditor's decision. GTA named the Territory of Guam;[2] the Department of Administration, General Services Agency; the Office of Public Accountability;[3] and Pacific Data Systems, Inc. as defendants. As an initial matter, the parties disagreed with how the case should proceed in the Superior Court. PDS argued that the Superior Court sits in an appellate capacity over challenges to OPA actions by merely receiving briefs and hearing oral arguments. It further asserted that no discovery should be permitted. GTA argued that an appeal of a Public Auditor decision under 5 GCA § 5480 is a "civil action," which is governed by the Guam Rules of Civil Procedure. RA, tab 25, Ex. A at 1 (Statement Re: Disagreement of Scheduling Order, Aug. 1, 2013). According to GTA, the trial court has the discretion to permit discovery and supplement the agency-submitted record. In the action below, the trial judge permitted further discovery, but limited it to issues not already on the record.

[2] Title 1 GCA § 420 prohibits the use of the term "Territory of Guam" in official government documents, instead requiring the term "Guam." The first caption and reference to the Territory of Guam as a party remains to ensure consistency with the case documents and proceedings below. The remaining references are to Guam.

[3] The Attorney General entered an appearance in this appeal, but failed to file any briefs (or even a notice of waiver of briefs). The Government's failure to participate does not hinder review of the issue in this case.

[7] During discovery in the trial court, GTA deposed Dr. Norman Okamura—the consultant hired by GSA to help prepare the IFB. Through the deposition, the parties discovered that the GSA failed to keep proper records of minutes of meetings with Dr. Okamura and the Government, records of communications between Dr. Okamura and the Government, drafts of the IFB worked on by Dr. Okamura, and other paper and materials used by Dr. Okamura in the development of specifications. Since the procurement record was incomplete, 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." The case returned to the Superior Court.

[8] Back in the Superior Court, both GTA and PDS filed motions for summary judgment stating that no genuine issue of material fact remained in dispute. PDS argued that the Public Auditor's decision was proper and should be affirmed. GTA argued that the Public Auditor's decision should be overturned as arbitrary, capricious, clearly erroneous, and contrary to law. The court denied PDS's motion for summary judgment and granted GTA's cross-motion. The court found that the Public Auditor's decision on remand was "so devoid of analysis . . . that the Court now rules that the deficiencies in the procurement record . . . have not been cured." RA, tab 138 at 7 (Dec. & Order, Aug. 18, 2016). Based on this, the court found that the Public Auditor's decision upholding the procurement award violated Guam law.

[9] The Superior Court looked to the procurement statutes for the proper remedy. It found that, under Guam procurement law, the proper remedy depends on whether the procurement is in the pre-award or post-award stage. The court found that the procurement was still in the pre-award stage and determined that the only appropriate statutorily prescribed remedies were revision or cancellation. Because the procurement was incurably incomplete, the trial court found revision impossible. The trial court canceled the entire ten-part IFB. PDS now appeals.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 7 GCA §§ 3107, 3108(a) (2005); 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 115-140 (2018)).

III. STANDARD OF REVIEW

[11] The Superior Court's grant of a motion for summary judgment is reviewed *de novo*. *Newby v. Gov't of Guam*, 2010 Guam 4 ¶ 10.

IV. ANALYSIS

[12] Government procurement law is a unique statutory scheme, which enables the government to acquire necessary goods and services to ensure the proper functioning of government. *See* 5 GCA § 5030(o) (defining procurement). Guam's procurement law is governed largely by statute. *See* 5 GCA §§ 5001-5908. Under this statutory scheme, we review the specific issues raised by the parties. First, we review whether PDS has appellate standing in this matter. Second, we analyze whether the Superior Court's jurisdiction was properly invoked over the entire IFB or only Part E. Third, we discuss the appropriate procedure for the Superior Court to follow when handling an "appeal" from a decision of the Public Auditor. Finally, we

determine whether the Superior Court employed the appropriate remedy when faced with a materially incomplete procurement record.

A. PDS Has Standing to Appeal the Superior Court's Order Canceling the Entire IFB

[13] GTA argues that PDS does not have standing to appeal because bidders have no pecuniary interest in pre-award procurements. *See* Appellee's Br. at 12-13 (Feb. 13, 2017) (citing *C&E Servs., Inc. of Wash. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 199 (D.C. Cir. 2002)). Further, GTA argues that the automatic stay of procurement actions, *see* 5 GCA § 5425(g) (2005), deprives PDS of any interest in this litigation. *See* Appellee's Br. at 12-13 (citing *C&E Servs.*, 310 F.3d at 200-01).

[14] Standing is a threshold matter, *see Benavente v. Taitano*, 2006 Guam 15 ¶ 14, which questions "the power of the court to entertain the suit." *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). In Guam, standing may be conferred either constitutionally or statutorily. *Benavente*, 2006 Guam 15 ¶ 20. Constitutional standing requires a party to show injury-in-fact, a causal connection between the injury and conduct complained of, and redressability by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). For statutory standing, the court analyzes "the relevant statute to determine upon whom the Legislature conferred standing and whether the Petitioners . . . fall in that category." *Benavente*, 2006 Guam 15 ¶ 19 (citation omitted). A party must be "legally aggrieved" to have standing. *See Gov't of Guam v. 162.40 Square Meters of Land More or Less, Situated in Municipality of Agana*, 2011 Guam 17 ¶ 11 (citation omitted). While standing in general focuses on the harm caused by the underlying facts, for appellate standing, a party must show "an adverse effect of the judgment." *Id.* ¶ 10 (citation omitted).

[15] Regarding statutory standing, we note the absence of any independent statute creating standing. *See Benavente*, 2006 Guam 15 ¶ 23. Additionally, the parties have focused their arguments on constitutional or common-law standing. *See* Appellee's Br. at 9-18; Appellant's Reply Br. at 1-5 (Mar. 1, 2017). Contrary to GTA's assertions, we find PDS has constitutional or common-law standing.

[16] GTA's argument that PDS lacks constitutional standing is fatally doomed by its own actions. GTA sued PDS in this action, which is at least an implicit acknowledgment of PDS's pecuniary interest in the outcome of this litigation. *See* RA, tab 1 at 1 (Verified Compl., Mar. 20, 2013). Indeed, GTA and PDS both engaged each other through years of litigation prior to arriving in this court. *Compare* RA, tab 1 at Ex. 2 (OPA Consol. Decs., Mar. 6, 2013), *with* Notice of Appeal (Oct. 12, 2016). Our cases dictate a finding of standing.

[17] In *162.40 Square Meters*, this court found standing where the appealing party had purchased land from the government following condemnation. 2011 Guam 17 ¶ 12. The plaintiffs alleged that the landowners lacked standing on appeal because only the government has eminent domain power. *Id.* ¶ 8. PDS, like the landowners in *162.40 Square Meters*, entered into an agreement with the government. GTA sought, albeit through lawful means, to interfere with this agreement. The law recognizes pecuniary interests in prospective contractual and business relations as sufficient to provide the minimal, yet necessary, showing required for appellate standing. *See, e.g.*, *Pedersen v. United States*, 191 F. Supp. 95, 102 (D. Guam 1961) ("The right to pursue a lawful business is a property right . . . ." (quoting *Kamm v. Flink*, 175 A. 62, 66 (N.J. 1934))); *Ullmannglass v. Oneida, Ltd.*, 927 N.Y.S.2d 702, 705-06 (App. Div. 2011) (finding plaintiffs stated a claim for interference with prospective contractual relations). Indeed, contrary

to GTA's restrictive interpretation of pecuniary interest for standing purposes, Guam procurement law contemplates suits, *see* 5 GCA § 5480(a) (2005), and protests, *see* 5 GCA § 5425(a)-(b) (2005), by both "actual" and "prospective" bidders, offerors, and contractors, 5 GCA §§ 5425, 5480. By losing even a "prospective" contract, PDS suffers an "adverse effect of the judgment" sufficient to confer appellate standing in a case where it was already a party.

[18] GTA's reliance on *C&E Services* is equally misplaced. In *C&E Services*, the appealing party was complaining about the District of Columbia's procuring agency's cancellation of the bid process. 310 F.3d at 200-01. *C&E Services* was not a case about standing, but instead addressed whether there was a sufficient property interest created to maintain a due process suit against the government. *Id.* PDS is not complaining about GSA's actions. PDS is appealing a Superior Court action *instituted by GTA* which impacts its business and contractual relations with Guam's executive branch. While we need not determine whether PDS would have a claim if GSA issued a Cancellation of Invitations for Bids under 5 GCA § 5225, PDS certainly has standing to appeal both pre-award and post-award challenges to procurements brought by other actual and prospective bidders, offerors, and contractors when it would otherwise have been awarded the contract and is made a party to the suit. The Government of Guam has still not canceled or withdrawn the proposed award, which indicates its intent to contract with PDS. This shows an "adverse effect of the judgment" sufficient to confer appellate standing.

B. The Superior Court's Subject-Matter Jurisdiction Was Properly Invoked Only Over Part E of the IFB

[19] "A court's lack of subject matter jurisdiction over an action may . . . be raised at any time, including after trial has concluded and for the first time on appeal, and may not be waived or excused by the parties." *Taitano v. Lujan*, 2005 Guam 26 ¶ 21. Guam courts have a duty to

police their jurisdiction and power. *See People v. Gomia*, 2017 Guam 13 ¶ 8; *People v. San Nicolas*, 2016 Guam 21 ¶ 15; *see also Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) ("When a requirement goes to subject matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties . . . have not presented.").

[20] The jurisdiction of the Superior Court is invoked when a petition or complaint is filed. *See* Guam R. Civ. P. 3 ("A civil action is commenced by filing a complaint with the court."). While subject-matter jurisdiction relates to a court's competency and exists both before and after an action, a party seeking relief on a particular subject must properly invoke the jurisdiction. *Compare Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir. 1934) ("Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action in the plaintiff therein." (quoting *Malone v. Meres*, 109 So. 677, 727 (Fla. 1926))), *with Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts [in the complaint] is improbable, and 'that a recovery is very remote and unlikely.'" (citation omitted)). 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) (2005). Actions in the Superior Court "shall be initiated within fourteen (14) days after receipt of a final administrative decision." 5 GCA § 5481(a) (2005).

[21] GTA timely filed an appeal with the Public Auditor. *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. RA, tab 1 (Verified Compl.). However, in both appeals, GTA sought review of only Part E. RA, tab 1 at 8-9 (Verified Compl.). GTA did not request the Superior Court cancel the entire IFB until it filed its Amended Verified Complaint on November 23, 2015. *See* RA, tab 111 at 13 (Am. Verified Compl., Nov. 23, 2015). This amendment came much too late. In amending its petition, GTA did not change just factual allegations, but sought to invoke the Superior Court's jurisdiction over the entire IFB, not just Part E. Since the Superior Court's jurisdiction over Parts A-D and Parts F-J was not invoked within fourteen days of the Public Auditor's decision, the Superior Court lacked the authority to cancel those portions. Where the Superior Court's jurisdiction is not timely invoked, the Superior Court lacks the authority to exercise that jurisdiction. 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). While the subject matter of an IFB may be appropriate for review in the Superior Court, that jurisdiction must be timely invoked to allow the Superior Court to exercise its power to review the claim.

[22] Finding no basis for the Superior Court's exercise of jurisdiction over Parts A-D and Parts F-J of IFB GSA-064-11, we reverse the portions of the Superior Court's Order and Judgment canceling those parts. Yet, the Superior Court's jurisdiction was properly invoked over Part E, and we now analyze the Superior Court's review of that Part.

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C. The Superior Court Properly Reviews the "Whole Record" in a Timely Filed "Civil Action" as an Exercise of Its Original Jurisdiction

[23] A significant portion of the dispute in the Superior Court centered around the proper procedure for handling an "appeal" from a decision of the Public Auditor to the Superior Court. *See* 5 GCA § 5707(a). PDS argued that the action should be handled like an appellate proceeding, where the court's decision is made on only the administrative record submitted by the Public Auditor. Essentially, the proposed process was: (1) briefing, (2) oral arguments, and (3) a decision. No discovery would be permitted. RA, tab 25 at 1-2 (Statement Re: Disagreement of Scheduling Order, Aug. 1, 2013). GTA argued that this court's ruling in *Town House Department Stores, Inc. v. Department of Education*, 2012 Guam 25, dictates that appeals from the Public Auditor's decision are "civil actions" and are governed by the Guam Rules of Civil Procedure, which permit discovery. Appellee's Br. at 18-19; *see also* RA, tab 25 at 1-2 (Statement Re: Disagreement of Scheduling Order). We agree with GTA that procurement appeals from Public Auditor decisions proceed as "civil actions" and that the trial court's procedures, in this case, did not exceed the scope of its discretion. However, we take this opportunity to outline how the Superior Court should review decisions of the Public Auditor.[4]

1. A party seeking to challenge the Public Auditor's procurement decision must timely file a civil action in Superior Court naming the proper defendants.

[24] In *Town House*, this court held that the term "action" in 5 GCA § 5480(a) means civil action. 2012 Guam 25 ¶ 28. Our rules similarly contemplate that there is only "one form of

[4] In the Superior Court, the Attorney General's Office posited that two alternate tracks for review of procurements may exist: (1) appellate review through the Public Auditor or (2) filing a petition in the Superior Court after the GSA denies a protest. *See* RA, tab 32 at 2-3 (Guam Resp. Br. Re: Standards of Review, Oct. 21, 2013). Bypassing the Public Auditor appears to be available in at least cases where the Public Auditor is recused. *See* 2 Guam Admin. R. & Regs. § 12116.

action to be known as 'civil action.'" Guam R. Civ. P. 2. In *Data Management Resources, LLC v. Office of Public Accountability*, this court clarified that the *Town House* holding's intended "focus was on providing formal notice to the adverse parties of the lawsuit." 2013 Guam 27 ¶ 26. Under 5 GCA § 5480, it is also necessary to name government defendants to overcome sovereign immunity. *Town House*, 2012 Guam 25 ¶ 33. The statutes also specify certain government officials upon whom service must be made. 5 GCA § 6209 (2005) (requiring service upon the Claims Officer and Attorney General).

[25] As to how civil actions in procurement appeals are filed, we hold that consistent with Superior Court rules, a civil action is commenced by filing a complaint in the Superior Court. Guam R. Civ. P. 3. The complaint should name and be served upon all relevant defendants. *See* Guam R. Civ. P. 4(c). The complaint should comply with the Guam Rules of Civil Procedure and any other applicable laws. *See* Guam R. Civ. P. 7-16.

[26] GTA complied with these requirements.

2. The civil action proceeds under the laws and rules applicable to the Superior Court.

[27] Next, we hold that the law and rules applicable to the Superior Court, including the Guam Rules of Civil Procedure, govern "appeals" from Public Auditor decisions. While the parties provide substantial argument on this point, we look first to Guam statutes for the rule. Under Guam Procurement Law, 5 GCA § 5480, "[a]ll actions permitted by this Article shall be conducted as provided in the Government Claims Act." 5 GCA § 5480(f). The Government Claims Act provides, in part: "All actions brought under this Chapter shall be governed by the law and rules of procedure of the Superior Court of Guam. Service of process shall be made upon the Claims Officer and upon the Attorney General." 5 GCA § 6209. Based on this

statutory language, PDS's attempt to create only appellate review by the Superior Court is unduly restrictive. Additionally, limiting the Superior Court to appellate review would require piecemeal adaptation of the Guam Rules of Appellate Procedure, which only govern proceedings in this court. *See* Guam R. App. P. 1. ("These rules govern procedure in appeals to the Supreme Court of Guam from the Superior Court of Guam and in other proceedings before the Supreme Court."). It would also circumvent the Superior Court's "original . . . jurisdiction over all causes in Guam . . . ." as provided in the Organic Act. 48 U.S.C.A. § 1424-1(d). Procurement appeals are governed by law and rules of procedure of the Superior Court of Guam, which include the Guam Rules of Civil Procedure. Special rules for procurement cases would complicate procurements, instead of simplifying them. *See* 5 GCA § 5001(b)(1) (2005).

[28] The case below correctly proceeded according to the law and rules applicable to the Superior Court.

3. The Superior Court must consider the "whole record" when reviewing actions of the Public Auditor.

[29] GTA and PDS dispute what record the Superior Court may consider when reviewing the Public Auditor's procurement decisions. Therefore, we must ask: What evidence may the Superior Court consider in these actions, and is further discovery permitted?

[30] Under the Guam Rules of Civil Procedure, discovery is broadly permitted. *See* Guam R. Civ. P. 26-37; *cf. Payton v. N.J. Turnpike Auth.*, 691 A.2d 321, 326 (N.J. 1997) ("New Jersey's discovery rules are to be construed liberally in favor of broad pretrial discovery."). Further, trial judges have broad discretion in overseeing litigation and discovery. *See, e.g., Guam Econ. Dev. Auth. v. Affordable Home Builders, Inc.*, 2013 Guam 12 ¶ 16 ("[W]e must give due deference to the trial court for matters lying within its discretion . . . ."); *Wenz v. Nat'l Westminster Bank,*

PLC, 91 P.3d 467, 469 (Colo. App. 2004) (finding "regulation of pretrial discovery" to be "within the trial court's discretion"). Having already held that the laws and rules applicable to the Superior Court govern procurement appeals, we find that discovery is not prohibited in these actions.

[31] While it would certainly be inadvisable to allow re-discovery of items already exchanged during the proceedings before the Public Auditor, nothing prohibits the trial court from overseeing additional discovery of matters not already developed on the record. The Superior Court is entitled to examine "the whole record," *see, e.g.*, *Guam Mem'l Hosp. Auth. v. Civil Serv. Comm'n (Chaco)*, 2015 Guam 18 ¶ 16, not just that which GSA or the Public Auditor unilaterally chooses to submit. Effective review depends on the presentation of all relevant materials. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). Like federal district courts, the Superior Court must be enabled to conduct "a thorough, probing, in-depth review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Fagan v. Dell'Isola*, we performed a thorough review of a decision of the Worker's Compensation Commissioner and impliedly criticized the Superior Court for not conducting a sufficient review. 2006 Guam 11 ¶ 43. Unlike its federal counterparts, the Superior Court is governed by the processes set out in Guam Procurement Law and the Government Claims Act, not the federal Administrative Procedures Act. Since "the law and rules of procedure of the Superior Court of Guam" control Superior Court actions in procurement appeals, the Guam Rules of Civil Procedure apply and additional discovery is allowed to establish the whole record. 5 GCA § 6209. Indeed, in this case, the Superior Court authorized

and GTA conducted discovery only to the extent it was not previously developed before the Public Auditor. In instances where parties seek duplicative or irrelevant discovery, the other party may move the Superior Court for an order limiting discovery. Guam R. Civ. P. 26(b)(2).

[32] After discovery, the trial court may entertain dispositive motions or conduct a trial on any outstanding and disputed factual questions. The standard of review when weighing the evidence is supplied by statute. 5 GCA § 5704 (2005). 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 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 re-litigated. 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. In procurement actions, the Superior Court could recite the Public Auditor's facts in any decision it made, or the parties could reference them by paragraph number in motions for summary judgment, should the material facts be uncontested. In ruling, the Superior Court may set aside the Public Auditor's factual findings only if they are arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. However, the Superior Court has the opportunity to pass on *legal* questions *de novo*. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law

is."). If there is an ambiguous question of law, the Superior Court may reference the conclusions of the Public Auditor and should consider with great weight and benefit of reasonable doubt the Public Auditor's conclusions, but is in no way bound to follow them. 5 GCA § 5704(b). Appeals from the Superior Court are heard in this court.

[33] Limitations on what the Superior Court may consider would remove a safeguard in maintaining a procurement system of quality and integrity. *See* 5 GCA § 5001(b)(7). The Superior Court appropriately allowed discovery to ascertain the whole record. It also properly considered both the Public Auditor's findings and the additional evidence in conducting a thorough and probing review.

D. GTA Established that the Procurement Record Was Materially Incomplete

[34] Guam law specifies that "[e]ach procurement officer shall maintain a complete record of each procurement." 5 GCA § 5249 (2005). The statute further identifies the specific records that must be kept. *Id.* § 5249(a)-(e). These records include "a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement," *id.* § 5249(b), and "brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and dated by the draftsman, and other papers or materials used in the development of specifications," *id.* § 5249(d). The statutes also require a complete record and dictate that "[n]o procurement award shall be made . . ." without one. *Id.* § 5250.

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1. The Public Auditor must substantively engage the evidence in the record.

[35] GTA, through the deposition of Dr. Okamura, discovered that the procurement record was missing drafts of the IFB and communications with Dr. Okamura—the government-hired expert. The Superior Court, on this basis, vacated the Public Auditor's original decision and remanded for consideration of the new evidence. On remand, the Public Auditor did not engage in a substantive analysis of the evidence or procurement record, but instead simply refused to change her decision. She stated: "No new evidence was presented that alters the Public Auditor's previously issued Consolidated Decisions." RA, tab 77, Ex. A at 6 (Dec. on Remand, Dec. 15, 2014); RA, tab 78, Ex. 1 at 6 (Dec. on Remand, Dec. 14, 2014). This was improper. The Public Auditor, like the Superior Court and GSA, is bound by the language of the procurement statutes. Once GTA established that the procurement record was incomplete and that issue was before the Public Auditor, she was required to substantively engage it. The procurement statute specifies that the Public Auditor's decision must be "in writing," 5 GCA § 5702 (2005), and the Guam Administrative Rules and Regulations state that "[t]he Public Auditor's final decision . . . shall recite the evidence relied upon . . . ." 2 GAR § 12110(a). This provision contemplates real analysis of the issues. Since the trial court properly presented the Public Auditor with questions related to an incomplete procurement record—and a complete procurement record is required by law for an award—a reasoned decision was required. Because the Public Auditor failed to substantively analyze the incomplete record and its potential consequences, we agree with the trial court that the Public Auditor's decision on remand was "devoid of analysis." RA, tab 138 at 7 (Dec. & Order, Aug. 18, 2016).

2. Prejudice is not required under 5 GCA § 5250.

[36] Title 5 GCA § 5250 states simply that "[n]o procurement award shall be made unless . . ." the record is certified as complete. 5 GCA § 5250. PDS argues that, even if the procurement record is incomplete, GTA must show it was "prejudiced" by the incompleteness. Appellant's Br. at 38 (Jan. 13, 2017). Under PDS's theory, GTA cannot prevail because it was not the lowest bidder. However, PDS reads a prejudice requirement into 5 GCA § 5250 that does not exist and fails to capture the complete harm that may result from an incomplete record. First, potential harm is not merely shown through a showing of being the lowest bidder. In this case, GTA presented itself as the lowest bidder for the 1 Gbps service and argued that the GSA's decision to award only one contract for both the 1 Gbps and 10 Gbps service was arbitrary and capricious. If the contents of the missing communications and drafts contained information regarding the costs and benefits of linking the 1 Gbps and 10 Gbps services, the missing evidence may directly address GTA's claims. However, the contents of the drafts and communications will never be known, as the procurement officers failed to abide by their statutory mandate to keep records. PDS would have us hold that GTA must show prejudice essentially by establishing the contents of the missing records. This would require GTA to prove a negative. The procurement statute does not require this level of showing, which would be impossible for any litigant.

[37] Guam procurement law allows that "[a]ny 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." 5 GCA § 5425. An aggrieved party is "[a] party entitled to a remedy." *See Party*, Black's Law Dictionary (10th ed. 2014). GTA claims

aggrieved-party status by alleging that the single award for 1 Gbps service and 10 Gbps service was improper and by showing it was the lower bidder for the 1 Gbps service. Whether GTA ultimately wins its claimed remedy is a question for litigation, but its protest and complaint are sufficient to allow GTA to complain of the procurement award and the incomplete records relating to the award. *See Twombly*, 550 U.S. at 556 (well-pleaded complaint rule). Our reading of 5 GCA § 5250 reveals no prejudice requirement.

[38] In the absence of a complete record, GTA is entitled to challenge the award.

3. An appealing party must show that missing procurement records were material to the procurement.

[39] While we hold that a showing of prejudice is not required, we do find that an appealing party must establish that the items missing from the procurement record were material to the procurement. *See Precise Sys., Inc. v. United States*, 120 Fed. Cl. 586, 601-03 (Fed. Cl. 2015) (setting aside procurement award for materially incomplete record); *cf. United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913 (4th Cir. 2003) (finding that false statements by procurement bidders must be material to impose liability); *FMC Corp. v. Manitowoc Co.*, 835 F.2d 1411, 1414-15 (Fed. Cir. 1987) (finding that documents missing from patent application must be material to hold patent invalid). Missing procurement records are material when, as a result of their absence, judicial review is thwarted in determining whether the appealing party is entitled to the relief requested. *See Material*, Black's Law Dictionary (10th ed. 2014) ("3. Of such a nature that knowledge of the item would affect a person's decision-making; significant; essential."). GTA has satisfied a "materiality" standard.

[40] In its Verified Complaint, GTA complained that GSA arbitrarily and capriciously failed to split the 1 Gbps service from the 10 Gbps service, resulting in higher costs. RA, tab 1 at 2-8 (Verified Compl.). The GSA's stated reason for linking the services was that higher administrative costs and confusion would result from multiple providers. *See, e.g.*, RA, tab 45 at 1847 (Gov't Ex. List, Mar. 25, 2014). However, if the savings from multiple providers would outweigh any additional administrative costs, the GSA would have been required to consider this cost analysis. *See* 5 GCA § 5001(b)(5). There is no substantive evidence related to the GSA's conclusion regarding higher administrative costs, and the incomplete record thwarts judicial review of the matter. Complete and thorough judicial review of the cost analysis is impossible in this case because documents from and communications with Dr. Okamura, the government-hired expert, are missing. If the documents existed, they might have supported the Government's position or they might not have.[5] However, it is sufficient for our materiality analysis that the documents may have included this information and their absence impacts our decision-making. Because there are material records missing from the procurement record, GTA's challenge to Part E of the procurement was proper.

4. The Superior Court did not exceed its authority in canceling Part E of IFB GSA-064-11.

[41] The Superior Court's order canceling Part E is also proper based on the facts of this case. Dr. Okamura's deposition revealed the incomplete procurement record, and on remand to the Public Auditor, the record was not completed. *See* RA, tab 60 at 21, 74 (Dep. Tr. of Norman

[5] If the documents contained no analysis of costs, we would still be skeptical of the basis for the GSA's conclusion of higher administrative costs and confusion. It appears from the record before us that the GSA reached this conclusion without reference to any underlying facts or evidence-based analyses. While we express concern here, the incomplete record otherwise thwarts our review, and we need not decide today whether the absence of this cost analysis renders the procurement arbitrary, capricious, or contrary to law.

Okamura, Ph.D., June 19, 2014). The trial judge found that the record was materially incomplete and that the record could not be made complete; he canceled the IFB. RA, tab 138 at 7, 9 (Dec. & Order). Guam procurement law allows both pre-award and post-award procurements to be canceled or terminated if the solicitation, proposed award, or contract is in violation of law. *See* 5 GCA § 5451 (2005) (pre-award remedies); *id.* § 5452 (2005) (post-award remedies). In this case, the Superior Court found the procurement to be in the "pre-award" stage. RA, tab 138 at 8 (Dec. & Order).[6] We find no reason to disturb this finding, and we determine that cancellation and revision were both appropriately considered remedies. The trial judge properly observed that the law requires a complete procurement record. 5 GCA § 5250. When faced with this materially incomplete procurement record, the trial judge acted within the law when he canceled Part E.

[42] Since GTA showed the procurement record was materially incomplete and the trial judge has the authority to cancel an award where the procurement record is incomplete, Part E was not improperly canceled.

V. CONCLUSION

[43] First, because GTA sued PDS in the Superior Court and PDS's interests were adversely impacted, we conclude that PDS has appellate standing in this case.

[44] Second, because the Superior Court's jurisdiction was not properly invoked over Parts A-D and Parts F-J of IFB GSA-064-11, we **REVERSE** the portion of the Superior Court's Judgment canceling those parts. Finally, since GTA demonstrated that the required procurement

[6] The parties dispute whether the procurement was "pre-award" or "post-award." While in some cases the election of certain remedies is relevant, cancellation is allowed in both stages. Even if the trial court's conclusion regarding the ripeness of the award was wrong, the elected remedy is still not an abuse of discretion here.

record was materially incomplete and the trial judge canceled Part E consistent with the statutorily prescribed remedies, we **AFFIRM** the portion of the trial court's Judgment canceling Part E of IFB GSA-064-11.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Chief Justice