



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**BASIL FOOD INDUSTRIAL SERVICES CORPORATION,**  
Plaintiff-Appellant,

**v.**

**TERRITORY OF GUAM; GENERAL SERVICES AGENCY,  
DEPARTMENT OF ADMINISTRATION; and the  
OFFICE OF PUBLIC ACCOUNTABILITY,**  
Defendants-Appellees.

Supreme Court Case No.: CVA18-030  
Superior Court Case No.: CV0995-16

**OPINION**

**Cite as: 2019 Guam 29**

Appeal from the Superior Court of Guam  
Argued and submitted on August 13, 2019  
Hagåtña, Guam

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

**MARAMAN, C.J.:**

[1] Plaintiff-Appellant Basil Food Industrial Services Corporation (“Basil”) appeals from a Findings of Fact and Conclusions of Law of the Superior Court of Guam affirming the Office of Public Accountability’s (“OPA”) administrative decision upholding the termination of Basil’s contracts with the General Services Agency (“GSA”). We affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Basil and GSA entered into two contracts to provide meals to Guam’s elderly residents—one of which was to provide congregate meals, and the other for home-delivered meals. The contracts were for one year, with the option for GSA to renew for two additional years.

[3] Section 12.9 of the parties’ contracts states:

In the event the Bidder who is awarded this [Invitation for Bid] for the provision of ENP Nutrition Services is issued a “C” rating from the Division of Environmental Health, DPHSS or is issued a “Stop Order” by the Guam Fire Department, the awarded Vendor may be terminated as the Vendor of the ENP Nutrition Services.

Record on Appeal (“RA”), tab 39, Ex. 9 (Gerardo Decl., Mar. 28, 2018).

[4] Over a period of 23 months, Basil’s facilities received several “C” and “D” ratings upon inspections by the Department of Public Health and Social Services (“DPHSS”). At one point, DPHSS found enough violations to issue a “D” rating, but the agency instead issued a temporary suspension order and gave notice to Basil to address its violations. Basil was able to correct the noticed violations and was permitted to resume work. On two subsequent inspections, DPHSS again issued a “C” and a “D” rating to Basil, and Basil again was able to correct both ratings. DPHSS issued a letter to Basil requiring Basil to submit a Hazard Analysis and Critical Control Point Principle Plan (“Hazard Analysis Plan”) within 45 calendar days. After the initial failure

to file the required plan, Basil eventually submitted a Hazard Analysis Plan, but the submission was insufficient. Basil's facility was inspected and given a "D" rating on July 8, 2015, for its repeated failure to submit an adequate plan.

[5] GSA issued Basil a Notice of Default because of its "D" rating. The notice stated that the contract may be terminated. GSA further issued a Notice of Violation with Intent to Revoke. Basil continued to receive poor ratings off and on again. In May 2016, DPHSS issued a closure notice for Basil's facility until the newly found violations were corrected. Finally, after Basil failed to correct these last set of noticed violations, GSA terminated Basil's contracts under Section 12.9 of the parties' contracts.

[6] On June 7, 2016, Basil filed an appeal with the OPA requesting that the termination be rescinded because Basil had purportedly cured default under the contracts. The OPA denied the appeal, finding that GSA's termination of the contracts with Basil was valid and permissible. The Superior Court affirmed the OPA decision, finding that the termination was valid because Basil breached the contracts by obtaining a "C" rating, and that GSA did not have to allow Basil an opportunity to cure. Basil timely appealed.

## **II. JURISDICTION**

[7] We have jurisdiction over appeals from a final judgment of the Superior Court. *See* 48 U.S.C.A. § 1424-1(a)(2) (current through Pub. L. 116-90 (2019)); 7 GCA §§ 3107, 3108(a) (2005).

## **III. STANDARD OF REVIEW**

[8] Under Guam's procurement law, a finding of fact by the Public Auditor will be "final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law." 5 GCA § 5704(a) (2005). Factual issues decided by the Public Auditor "are ordinarily not to be re-litigated." *See Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 32. Such findings, however,

may be “clearly erroneous” and therefore subject to reversal, *see* 5 GCA § 5704(a), if unsupported by substantial evidence, *see* *Guam Mem’l Hosp. Auth. v. Civil Serv. Comm’n (Chaco)*, 2015 Guam 18 ¶ 15 (citing *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999)). “Substantial evidence is more than a mere scintilla, but less than a preponderance.” *Id.* ¶ 15 (quoting *NLRB v. Int’l Bhd of Elec. Workers, Local 48*, 345 F.3d 1049, 1053-54 (9th Cir. 2003)). “It means such relevant evidence as ‘a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (quoting *Int’l Bhd.*, 345 F.3d at 1054).

[9] Questions of law, on the other hand, are to be considered by the court *de novo*, giving “great weight and [the] benefit of reasonable doubt [to] the Public Auditor’s [legal] conclusions.” *See Teleguam Holdings*, 2018 Guam 5 ¶ 32 (citing 5 GCA § 5704(b)). Whether a lawsuit is moot is a question of law reviewed *de novo*. *See Rapadas v. Benito*, 2011 Guam 28 ¶ 13. Likewise, the interpretation of a contract is a legal question reviewed *de novo*. *See Guam Resorts, Inc. v. G.C. Corp.*, 2013 Guam 18 ¶ 34.

#### IV. ANALYSIS

[10] On appeal, Basil argues that GSA had to state whether termination of the contracts was for cause or convenience, and that the procurement law requires that GSA grant Basil an opportunity to cure violations before termination. Appellant’s Br. at 7-13 (Jan. 21, 2019). Basil bases its arguments on the premise that certain procurement regulations were incorporated into the contracts under two clauses other than Section 12.9. *Id.*

##### **A. The Appeal is Not Moot Because it Presents an Issue Capable of Repetition, Yet Evading Review**

[11] Before addressing the merits of Basil’s claims, we must first address whether Basil’s appeal is moot. “The exercise of our judicial power ‘depends on the existence of a case or controversy.’” *People v. Blas*, 2016 Guam 19 ¶ 12 (quoting *Preiser v. Newkirk*, 422 U.S. 395,

401 (1975)). A case becomes moot when there are no longer live issues for the court to address. *Id.* ¶¶ 11, 13. A case can become moot even during the pendency of an appeal. *See generally Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 37 (discussing issue of mootness on appeal); *see also Blas*, 2016 Guam 19 ¶ 13 (“A case can become moot ‘at any stage of litigation.’” (quoting *Town House Dep’t Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 9)). GSA argues that Basil’s appeal is moot because it no longer seeks reinstatement of the contracts—the only remedy sought in the court below. *See Appellees’ Br.* at 13-17 (Mar. 6, 2019).

[12] In reply to GSA’s argument, Basil admits that there is no longer a live controversy but that the appeal is not moot under the well-worn “capable of repetition, yet evading review” exception to the doctrine of mootness. *See Appellant’s Reply Br.* at 3-4 (Mar. 20, 2019) (“[T]he case is not moot because even though Basil withdrew its requested remedy of reinstatement of the Contracts, a determination on the type of termination which occurred in this case must still be made for public policy reasons.”). We may reach the merits of a moot appeal if it is “capable of repetition yet evading review,” *Blas*, 2016 Guam 19 ¶ 17 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). In order to establish that this exception applies, a party must show that: (1) the duration of the challenged action is too short to be fully litigated; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* ¶ 17.

[13] The first prong of the “capable of repetition, yet evading review” exception to the mootness doctrine is satisfied when a case is “almost certain to run its course before [an appellate court] can give the case full consideration.” *In re Guardianship of Ulloa*, 2014 Guam 32 ¶ 36 (alteration in original) (quoting *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1017 (9th Cir. 2006)). In the context of procurement disputes, the United States Supreme Court has recognized that procurements lasting as short as two years are likely to satisfy this prong, as “a period of two years is too short to complete judicial review of the lawfulness of the procurement.”

*Kingdomware Techs., Inc. v. United States*, 579 U.S. --, 136 S. Ct. 1969, 1976 (2016). Here, the contract at issue was for a period of one year, with the option for the government to renew, thus satisfying this prong. We are also satisfied that Basil is likely to bid on future government contracts similar to that at issue here. See *In re Guardianship of Ulloa*, 2014 Guam 32 ¶ 37 (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam)); see also *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 37. Accordingly, we find that this case is not moot, and we now turn to the merits.

**B. GSA Was Not Required to State Whether the Contract Was Terminated for Cause or Convenience, Nor Was GSA Required to Permit Basil an Opportunity to Cure**

[14] The trial court affirmed the decision of the OPA, finding that GSA did not have to state whether termination of the contracts was for cause or convenience and that termination was proper under Section 12.9. The OPA found that, under its plain terms, Basil breached Section 12.9 when it received “C” and “D” ratings. Basil challenges the trial court’s order, arguing that because 2 Guam Administrative Rules and Regulations (“GAR”) Division 4 §§ 6101(8) and 6101(10) were incorporated into the contracts pursuant to Sections 37 and 38 thereto, GSA had to state whether termination was for cause or convenience. Appellant’s Br. at 8-13. We disagree.

[15] We look at the contracts to determine the terms that govern. If the language is clear and explicit and does not involve an absurdity, the plain language controls. 18 GCA § 87104 (2005). “It is fundamental that the key to interpretation of an agreement is ascertainment of the intent of the parties.” *State of Ariz., By & Through Ariz. Dep’t of Transp. v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978); see also *Wasson v. Berg*, 2007 Guam 16 ¶ 10 (“In construing what various terms in a contract mean, the task of the court is to discern and give legal effect to the intent of

the parties at the time of contracting.”). “When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible . . . .” 18 GCA § 87105 (2005); *Guam Hous. & Urban Renewal Auth. v. Pac. Superior Enters. Corp.*, 2004 Guam 22 ¶ 30; *Camacho v. Camacho*, 1997 Guam 5 ¶ 33.

[16] Three different provisions of the parties’ contracts are at issue: Sections 12.9, 37, and 38. Section 12.9 of the contracts permitted the GSA to terminate the contracts “[i]n the event the Bidder who is awarded this IFB for the provision of ENP Nutrition Services is issued a ‘C’ rating from the Division of Environmental Health, DPHSS.” RA, tab 39, Ex. 9 (Gerardo Decl.). Sections 37 and 38 related to potential termination of the contracts. Section 37 permitted GSA to terminate for convenience, but subject to the terms of 2 GAR Div. 4 § 6101(10). *See id.* Section 38 stated:

It is hereby understood and mutually agreed by and between the contractor and the Government that the time for delivery to final destination or the timely performance of certain services is an essential condition of this contract. If the contractor refuses or fails to perform any of the provisions of this contract within the time specified in the Purchase Order (from the date Purchase Order is acknowledged by vendor), then the contractor is in default. Defaults will be treated subject to and in accordance with the provision of 2 GAR Div. 4 § 6101(8).

*Id.*

[17] To the extent possible, we must read these terms in concert with each of the others. *See Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 47. Nevertheless, where a contract provides “different and independent ways to terminate a contract, the two clauses have different purposes and provide different rights and obligations.” *See Dart Advantage Warehousing, Inc. v. United States*, 52 Fed. Cl. 694, 707 (2002). In effect, Basil asks the court to read the application of 2 GAR Div. 4 § 6101 into the terms of Section 12.9 of the contracts. But that we cannot do.

[18] Sections 37 and 38 set forth permissive bases for termination. Guam’s procurement regulations set forth various contract clauses that may or may not be used by a procuring agency

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in seeking a procurement. But, “[i]f the clauses set forth in [the regulations] are utilized, they may be varied for use in a particular contract . . . pursuant to the provisions of 5 GCA § 5350(d) . . . .” *See* 2 GAR Div. 4 § 6101(2). In this case, GSA did not terminate the parties’ contracts under the provisions of Section 37 or 38; termination occurred under Section 12.9.

[19] In support of its interpretation of the parties’ contracts, Basil points to the fact that GSA permitted it the opportunity to cure its alleged violations of the contracts as evidence that an opportunity to cure was mandated. *See* Appellant’s Br. at 13. We need not look to extrinsic evidence, however, when the contractual terms are clear. *See* 6 GCA § 2511 (2005); *see also Bank of Guam v. Flores*, 2004 Guam 25 ¶¶ 15-18.

[20] Section 12.9 is clear and unambiguous that GSA may terminate the contracts if Basil receives a “C” rating from DPHSS. This provision is not in any way conditioned upon the requirements of 2 GAR Div. 4 § 6101. We ascertain the intent of the parties based on this writing alone because the language is clear. *See Camacho*, 1997 Guam 5 ¶ 33. Section 12.9 does not incorporate by reference Sections 37 or 38. The provision allows for immediate termination at any point Basil receives a “C” rating, at the discretion of GSA. Therefore, GSA did not have to state whether termination was for cause or convenience when terminating under this provision.

[21] Lastly, Basil invites us to adopt a broad legal rule—based on public policy and 5 GCA § 5001—that a government agency must always state whether its termination of a publicly bid contract is for convenience or cause. *See* Appellant’s Br. at 13-17; *see also* Reply Br. at 6-7 (citing no legal authority). We decline to do so. Such public policy arguments must be addressed to the Legislature. We are not free to create new statutory or regulatory requirements where none exist.

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[22] Both the Public Auditor and the Superior Court correctly interpreted the contracts in finding that GSA’s termination under Section 12.9 did not require that GSA provide Basil an opportunity to cure its defect. Accordingly, we find that the OPA’s decision was not arbitrary or capricious.

**V. CONCLUSION**

[23] For the reasons set forth above, we **AFFIRM**.

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/s/  
F. PHILIP CARBULLIDO  
Associate Justice

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/s/  
ROBERT J. TORRES  
Associate Justice

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/s/  
KATHERINE A. MARAMAN  
Chief Justice