

**The following Chapter 12 is added to  
Division 4, Title 2 of the Guam  
Administrative Rules and  
Regulations**

**CHAPTER 12  
PROCUREMENT APPEALS TO THE  
PUBLIC AUDITOR**

- 12101. Authority and Purpose of Rules of Procedure
- 12102. Jurisdiction of the Public Auditor; Exhaustion of Remedies
- 12103. Definitions
- 12104. Form and Filing of Appeal
- 12105. Agency Report
- 12106. Making Information on Appeals Available
- 12107. Ex Parte Communications with Hearing Officer
- 12108. Hearing Procedures
- 12109. Authority of the Hearing Officer
- 12110. Decisions of the Public Auditor
- 12111. Finality of Decisions
  
- 12201. Appeal to Public Auditor relative to Method, Solicitation, or Award
  
- 12301. Appeal to Public Auditor relative to Contract or Breach of Contract Controversies
  
- 12401. Appeal to Public Auditor of Debarment or Suspension
  
- 12501. Review of Award Pending Protest or Appeal
  
- 12601. Disqualification of Public Auditor.

**12101. Authority and Purpose of Rules of Procedure.** These Rules of Procedure are promulgated under the authority of 5 GCA Chapter 5, Article 12, and Public Law 28-68, which gives the Public Auditor the duty to be in control of and be responsible for procurement Appeals in Guam, and the authority to adopt rules of procedure pursuant to 5 GCA §5701. These rules shall be construed and applied to provide for the expeditious resolution of controversies in accordance with the requirements of 5 GCA Chapter 5 (Guam Procurement Law) and the Guam Procurement Regulations contained in 2 GAR Division 4.

**12102. Definitions.** As used in this Chapter, unless the context in which they are used requires a different meaning, the following definitions shall apply.

(a) *Appellant* means an aggrieved person who Appeals to the Public Auditor a decision of the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or the designee of such officer.

(b) *Interested Party* means an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.

(c) *Protestor* means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract and who filed a protest, or who has received a notice of suspension or debarment. Such a protestor is sometimes referred to herein as an "aggrieved person."

(d) A *prospective bidder, contractor or offeror* is one who will actually submit a bid, contract or otherwise offer his services if such person would prevail in the Appeal.

(e) The *affected agency or using agency* is that agency that has used or is intending to use the supplies, services, or construction, the procurement of which is being Appealed. If more than one affected using agency is involved, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may designate one or more representatives to be consulted in respect to this action.

(f) *File and submit* mean receipt in the Office of the Public Auditor, the Chief Procurement Officer, the Director of Public Works, or

the head of a Purchasing Agency, as the case may be.

(g) In computing any period of *time* prescribed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, a Sunday, a legal holiday or when the Office of the Public Auditor is closed by order of the Governor, in which event a period extends until the end of the next day which is not a Saturday, a Sunday, a legal holiday or when the Office is closed. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays and days that government offices are closed by order of the Governor shall be excluded in the computation.

**12103. Jurisdiction of the Public Auditor; Exhaustion of Remedies.**

(a) 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. No prior determination shall be final or conclusive on 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, public corporation or board or commission. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the Appellant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5. (Source: 5 GCA §5703)

(b) Effect of Judicial Proceedings. If an action concerning the procurement under Appeal has commenced in court, the Public Auditor shall not act on the Appeal except to notify the parties and decline the matter due to Judicial involvement. This Section shall not apply where a court requests the decision of the Public Auditor. Parties are required to notify and provide copies to the Public Auditor within 24 hours of any action in court concerning the procurement under Appeal.

#### **12104. Form and Filing of Appeal.**

(a) When Filed. Appeals shall be made in writing to the Public Auditor and shall be filed in triplicate. Timely facsimile, electronic, or magnetic filing may also be authorized by the Office of the Public Auditor upon the adoption of appropriate guidelines. An Appeal is considered filed when received by the Office of the Public Auditor, which shall cause evidence of the date of filing to be stamped upon each Appeal and triplicate. Appeals filed after the allowable filing period set forth in statute or these rules shall not be considered.

(b) Form. To expedite handling of Appeals, the envelope, transmittal letter, and the actual Appeal shall be labeled "Procurement Appeal". The written Appeal shall be in substantially the same format as Appendix A to this Chapter, and include at a minimum the following:

- (1) The name, mailing and business address of the Appellant;
- (2) Appropriate identification of the procurement or solicitation, soliciting or procuring agency, and, if a contract has been awarded, its number;
- (3) A concise, logically arranged, and direct statement of the grounds for Appeal;
- (4) A statement specifying the ruling requested;
- (5) Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for Appeal unless not available within the filing time in which case the expected availability date shall be indicated;
- (6) A copy of prior decisions or determinations of the protests, contract disputes, or debarment action that are being Appealed; or copy of the request for final decision and any agreement to extend the decision deadline;
- (7) An Appeal shall be signed by an Appellant, by an officer of the Appellant corporation or a member of the Appellant firm, or by the Appellant's duly authorized

representative or attorney, and the facts therein verified.

- (8) A protest may be dismissed for failure to comply with any of the requirements of this section, except that a protest shall not be dismissed for failure to comply with this section where the contracting officer has actual knowledge of the basis of the protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

(c) Notice of Appeal, Submission of Report and Time for Filing of Comments on Report.

- (1) The Appellant shall file a copy of the Appeal, and all supporting documents with the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency within 24 hours of filing of said Appeal with the Office of the Public Auditor. The Public Auditor shall notify the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency by telephone and in writing within 24 hours of the receipt of an Appeal. It shall be the duty of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency to give notice of the Appeal to the Attorney General or other counsel for the agency.
- (2) The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, to all Interested Parties; shall instruct said parties to communicate directly with the Public Auditor regarding the status of the Appeal, and directly with the procurement officer as allowed by law regarding the protested procurement action; and shall communicate to the Public Auditor the identities and addresses of said parties.
- (3) The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall

submit to the Public Auditor a complete copy of the procurement record relevant to the appeal within five (5) working days of receiving notice of an Appeal, in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents. It shall additionally submit an answer to the appeal in the form of a detailed Agency Report, and shall furnish a copy of the report to the Appellant. This Agency Report shall comply to the requirements of §12105 of this Chapter. The Agency Report shall be submitted within ten working days of receipt of by the Agency of the notice of Appeal of a Method, Solicitation, or Award; or notice of Appeal of a Suspension. The Agency Report shall be submitted within twenty days of receiving notice of Appeal on a Contract Dispute, or notice of Appeal of a Debarment.

- (4) Comments on the agency report by an Appellant or an Interested Party, including testimony and evidence by any competing bidder, offeror or contractor of the Appellant, shall be filed with the Public Auditor within ten (10) days after the Public Auditor's receipt of the report, with a copy to the agency office that furnished the report. Any rebuttal an Agency may care to make shall be filed with the Public Auditor within five (5) working days after receipt by the Public Auditor of the comments to which rebuttal is directed, with a copy to the Appellant. Unsolicited agency rebuttals shall be considered if filed within five (5) days after receipt by the Public Auditor of the comments to which rebuttal is directed.
- (5) The failure of an Appellant or any Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed.
- (6) If the Appellant or the Agency considers that the Appeal, the Procurement File, the Agency Report, or any other report or material submitted contains material which shall be withheld pursuant to law or

regulation, a statement advising of this fact must be affixed to the front page of the document and the allegedly exempted information must be so identified wherever it appears.

- (7) Requested Information Time for Filing. In order to expedite consideration of the Appeal, any additional information requested by the Hearing Officer shall be submitted within five working (5) days of receipt of such request unless another time is established in the request. Failure of any party to comply expeditiously with a request for information by the Hearing Officer may result in resolution of the Appeal without consideration of any information, which is untimely filed pursuant to such request.
- (8) After notice of an Appeal to the Public Auditor has been filed a party may not discontinue such Appeal without prejudice, except as authorized by the Public Auditor. (Source: 5 GCA §5708).
- (9) Any objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed. Objection to the Public Auditor hearing the Appeal shall be filed within seven (7) days after the notice of Appeal is filed. The Public Auditor shall have the right at any time and on her or his own motion to raise the issue of its jurisdiction to proceed with an Appeal and shall do so by an appropriate order.

**12105. Agency Report.** The Agency Report shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file and shall include the following, if not already submitted to the OPA as part of the procurement record required by 12104(c)(3):

- (a) A copy of the protest;
- (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest;

(c) A copy of the solicitation, including the specifications or portions thereof relevant to the protest;

(d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest;

(e) Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings;

(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant;

(g) A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal;

(h) If the award was made after receipt of the protest, the report will include the determination required under 2 GAR §9101(e); and

(i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding.

(Source: ABA 2002 Model Procurement Rules)

**12106. Making Information on Appeals Available.** The Public Auditor shall, upon written request, make available to any Interested Party or member of the public information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential shall so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

**12107. Ex Parte Communications with Hearing Officer.**

(a) No person directly or indirectly involved in an Appeal shall communicate with the Hearing Officer or the Office of the Public Auditor staff regarding any evidence, explanation, analysis, or advice,



whether written or oral, regarding any matter at issue in an Appeal except:

- (1) At a hearing; or
- (2) With the consent of all other parties or their counsel in such matters; or
- (3) In the presence of all other parties or their counsel in such matters; or
- (4) By means of papers provided for or allowed by these rules or by law.

(b) Nothing in this rule shall prevent the OPA staff from entertaining questions or complaints that are not related to the substance of the pending appeals. OPA staff shall report communications regarding pending appeals to all the parties in the pending appeal.

#### **12108. Hearings Procedures.**

(a) Request for Hearing. In all Appeals to the Public Auditor of suspension or debarment, a hearing shall be conducted. In all other Appeals, including Appeals of protests or contract disputes, the parties shall either request a hearing in writing or waive their right to a hearing and submit the case on the record without a hearing. Request for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the agency report, and shall be in a form substantially similar to Appendix D to this Chapter. Except in unusual circumstances, requests for a hearing received after such time will not be honored.

(b) Time and Place for Hearings. Hearings shall be held at the Office of the Public Auditor unless a different place is set by the Hearing Officer. The time for Hearings shall be set by the Hearing Officer. Ordinarily, only one hearing will be held on an Appeal. Such hearing may be held by telephone conference call or other means at the discretion of the Hearing Officer.

(c) Notice of Hearing. The Hearing Officer shall send a written notice of the time and place of the hearing to the Appellant and to the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency at least ten (10) days prior to the hearing unless the parties agree on a shorter period. It shall be the duty of each of these entities to notify the Attorney General or its own

counsel, and the affected using agency. Notice shall be sent by the Hearing Officer by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and shall state the nature and purpose of the proceedings, and shall substantially follow the format of Appendix C, attached to this Chapter. The notice shall also state that the Appellant may be represented by counsel. Notices of hearings shall be promptly acknowledged by the parties. The Hearing Officer can require attendance of parties he or she deems appropriate.

(d) Hearing Proceedings. Hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure except as provided by the Guam Procurement Law, Chapter 5 of Title 5, Guam Code Annotated, and with these procurement appeals regulations. The testimony presented shall be written, oral or otherwise. The weight to be attached to evidence presented in any particular form will be within the discretion of the Hearing Officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Hearing Officer may require evidence in addition to that offered by the parties. Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.

(e) Record of Hearings. A hearing shall be recorded, but need not be transcribed, except at the request and expense of the person making the request. The audio recording, together with the written record of the time, place, and persons present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record. An audio copy of the recorded hearing shall be made available to the parties in electronic or digital format at the fee prescribed by 5 GCA §10304, and shall be available on the website of the Office of the Public Auditor, [www.guamopa.org](http://www.guamopa.org).

(f) Opening Statements. Opening statements may be made unless a party waives this right, subject to time limits that may be set by the Hearing Officer.

(g) Public Hearings. Hearings shall be open and accessible to the public.

(h) Judicial Notice. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of Guam. Parties present at the hearing shall be informed of the matters to be noticed, and these matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, subject to time constraints imposed by the Hearing Officer.

**12109. Authority of the Hearing Officer.**

The Public Auditor may appoint a Hearing Officer for Procurement Appeals. If no Hearing Officer is appointed or in the event of the Hearing Officer's recusal, the Public Auditor may appoint and contract with another Guam-licensed attorney, who may be an attorney in full time service of the government of Guam, or an attorney in private practice, to act as Hearing Officer for all further proceedings with respect to that matter. The Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendations to the Public Auditor. No prior determination shall be final or conclusive. The Hearing Officer has the power, among others, to:

(a) Hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(b) Require parties to state their positions with respect to the various issues in the proceeding;

(c) Require parties to produce for examination those relevant witnesses and documents under their control;

(d) Rule on motions, and other procedural items on matters pending before such officer;

(e) Regulate the course of the hearing and conduct of participants therein;

(f) Receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(g) Fix time limits for submission of written documents in matters before such officer;

(h) Impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

- (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (2) Excluding all testimony of an unresponsive or evasive witness;
- (3) Expelling any party or person from further participation in the hearing; and
- (4) Taking official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

(i) Compel attendance and testimony of and production of documents by any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission;

(j) Consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant or appellant.

#### **12110. Decisions of the Public Auditor.**

(a) Within thirty (30) days of the hearing, the Hearing Officer shall prepare a written determination of findings and recommend a course of action and the Public Auditor shall issue a final written decision or take other appropriate action on each appeal submitted.

Both the Hearing Officer's determination and the Public Auditor's final decision shall recite the evidence relied upon, and shall be made part of the record.

(b) The final decision shall inform the parties of their right to judicial review under 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

(c) A copy of any final decision on Appeal shall be immediately mailed via certified mail, return receipt requested, or furnished by any other method that provides evidence of receipt, to the Appellant; to any other participating party; and, as appropriate, to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. All decisions shall be posted on the website of the Office of the Public Auditor within ten (10) days of issuance.

### **12111. Finality of Decision.**

(a) Appeal. Any person receiving an adverse decision, the government or any autonomous agency or public corporation, or both, may Appeal from a decision by the Public Auditor to the Superior Court of Guam. (Source: 5 GCA §5707)

(b) Authorization of Appeal by the Government. No such Appeal shall be made by the government or an autonomous agency or public corporation unless recommended by the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency involved. (Source: 5 GCA §5707)

(c) Standard of Review. Any determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless found by a court to be 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. (Source: 5 GCA §5704)

### **12201. Appeal to Public Auditor relative to Method, Solicitation, or Award.**

(a) Authority. Pursuant to 5 GCA §5425(e) a protestor may Appeal a decision under 5 GCA §5425(c) relative to the protest of a method of selection, a solicitation, an award of a contract, or a

decision under 5 GCA §5425(h) regarding entitlement to costs, within fifteen (15) days of receipt by protestor of the decision. The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.

**12301. Appeal to the Public Auditor of Contract and Breach of Contract Controversies.**

(a) Pursuant to 5 GCA §5706, Appeals shall be made in writing to the Public Auditor within 60 days after receipt by an aggrieved contractor of a decision on a contract or breach of contract controversy pursuant to 5 GCA §5427; within 60 days of the failure to render a timely decision as provided in 5 GCA §5427; or within 60 days of the time established by the parties for a decision to be rendered. Disputes having to do with money owed to or by the government of Guam shall not be submitted. (Source: 5 GCA §5703)

(b) A decision on Appeal of a contract controversy shall set forth the reasons for such action and shall inform the persons involved of his or her right to judicial review as provided in these regulations and 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

**12401. Appeal to Public Auditor of Debarment or Suspension.** This section applies to Appeals of debarment or suspensions of persons from consideration for award of contracts imposed by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Pursuant to 5 GCA §5705 an aggrieved person may Appeal a suspension or debarment action within 60 days of receipt of a decision under subsection (c) of 5 GCA §5426. The Public Auditor shall review actions between the territory and a person who is subject to a suspension or debarment proceeding, to determine whether, or the extent to which the debarment or suspension was imposed on a Contractor in accordance with applicable statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair. (Source: 5 GCA §5705)

A decision on Appeal of a suspension or debarment shall set for the reasons for such action and shall inform the debarred or suspended person involved of his right to judicial review as provided in these

regulations and 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

**12501. Review of Award Pending Protest or Appeal.**

(a) Any protestor may protest a determination by the Chief Procurement Officer or the Director of Public Works pursuant to 5 GCA §5425(g) that award of a contract without delay pending Appeal is necessary to protect the substantial interests of the government of Guam. Said protest must be filed in writing at the Office of the Public Auditor within two (2) days of receipt by protestor of the notice of determination. The Public Auditor shall either confirm or reject the determination.

(b) After an Appeal is filed with the Public Auditor relative to method of selection, solicitation, or award pursuant to 5 GCA §5425(e) and §9301 of this Chapter, the Public Auditor shall review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works pursuant to 5 GCA §5425(g) that award of a contract without delay pending Appeal is necessary to protect the interests of the government.

(c) The Chief Procurement Officer and the Director of Public Works shall file with the Office of the Public Auditor a copy of all determinations made pursuant to 5 GCA §5425(g) on the date of issuance, together with any information used or considered by the agency in making that determination.

(d) Any additional information requested by the Public Auditor or Hearings Officer for Procurement Appeals shall be submitted within the time periods established by the requesting source in order to expedite consideration of the Appeal. Failure of any party to comply expeditiously with a request for information by the Public Auditor or Hearings Officer for Procurement Appeals may result in resolution of the Appeal or review of award pending Appeal without consideration of any information, which is untimely filed pursuant to such request.

**12601. Disqualification of Public Auditor.** The Public Auditor may recuse herself or himself at any time and notify all parties, or any party may raise the issue of disqualification and state the relevant facts prior to the hearing. The Public Auditor shall make a determination and notify all parties. In the event of disqualification or

recusal of the Public Auditor, a procurement Appeal must be taken to the Superior Court of Guam in accordance with 5 GCA §5480.