Gmail **Jerrick Hernandez <jhernandez@guamopa.com>**

OPA-PA-19-011 & 20-003: E-Filing: GSA's Notice of Supplemental Authority

Sandra Miller <smiller@oagguam.org> Wed, Sep 23, 2020 at 11:46 AM
To: admin@guamopa.com, Jerrick Hernandez <jhernandez@guamopa.com>
Cc: Robert Kono <robert.kono@gsa.guam.gov>, "Geri E. Diaz" <gdiaz@icclawgroup.com>, Vanessa Williams <vlw@vlwilliamslaw.com>

Good morning Jerrick,
Please find attached for E-Filing a copy of GSA's Notice of Supplemental Authority.

Thank you,
Sandra Miller
Assistant Attorney General

GSA's Notice of Supplemental Authority_OPA-PA-19-011.pdf
947K

Office of the Attorney General
Leevin Taitano Camacho
Attorney General of Guam
Solicitor Division
590 S. Marine Corps Drive
ITC Bldg., Ste. 802
Tamuning, Guam 96913 ● USA
Tel. (671) 475-3324 Fax. (671) 472-2493
www.guamag.org
Attorneys for the Government of Guam

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF **BASIL FOOD INDUSTRIAL SERVICE CORPORATION,** **Appellant.**	)	Docket No. **OPA-PA-19-011** **OPA-PA-20-003** **PURCHASING AGENCY'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Purchasing Agency **GENERAL SERVICES AGENCY (GSA)** Respectfully submits this notice to inform the OPA and the Public Auditor of the recent opinion of the Guam Supreme Court iin the case of *DFS Guam L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020 Guam 14 (August 11, 2020). The opinion supports GSA's argument that Appellant Basil Food's protest is untimely because it was filed more than fourteen days after it knew or should have known of the facts

giving rise to its protest. A copy of the opinion is attached to this Notice.

In *DFS Guam*, the Supreme Court addressed the question of when the 14-day window to bring a procurement protest begins to run. 2020 Guam 14 ¶ 84. "Pursuant to [5 GCA] section 5425(a), the timeframe to protest a procurement runs from when 'such aggrieved person knows or should know of the facts giving rise thereto.'" *Id.* In order to determine the date that the 14-day window of section 5425(a) begins to run, the court must examine when the protester knew or should have known the facts *establishing the essential elements of the protest claim.* 2020 Guam 14 ¶ 88.

In its opinion, the Supreme Court held that during the RFP process for vendor space at the Guam Airport, protester DFS Guam had knowledge of purported misconducted on the part of its competitor. That knowledge was available to DFS Guam *before* award of the RFP was made and thus formed a sufficient legal basis for DFS to file a protest against the qualifications of its competitor and thereby obtain relief prior to the issuance of an award. 2020 Guam 14 ¶¶ 96, 133.

"There may be situations in which the announcement of an award reveals new facts forming the basis of a protest or where the award is a key fact itself that forms the basis of a protest. . . as a general proposition, ***when alleged misconduct forms the basis of a procurement protest, the time runs from the date on which the protesting party first learned of the purported misconduct."*** 2020 Guam 14 ¶ 89 (citations omitted; emphasis added).

The Supreme Court's opinion that the 14-day window for bringing a procurement protest begins to run from the date on which the protester learns of the purported misconduct is relevant to GSA's position in this case that the Petitioner's protest is untimely. This is because Petitioner Basil Foods had actual knowledge since *before* the IFB in GSA-056-19 was issued in September 2019, that SH Enterprises was potentially subject to disqualification because it received a C-Rating some months earlier in April 2019.

According to the holding in *DFS Guam,* the clock begins to run when knowledge of the purported misconduct is received, and not necessarily when an award is made. In the present case, Basil Food's failure to file its protest seeking the disqualification of SH Enterprises within 14 days after it knew or should have known that SH Enterprises was one of the bidders to the IFB—and certainly within 14 days after the public bid opening date of October 24, 2019, when it knew undisputedly that SH Enterprises was a bidder—renders this protest appeal untimely.

Finally, the Supreme Court's opinion also supports GSA's position that the automatic stay and two-day notice rule of Section 5425(g) do not apply to this case.

Respectfully submitted on this 23rd day of September, 2020.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By: _____
SANDRA CRUZ MILLER
Assistant Attorney General

IN THE SUPREME COURT OF GUAM

DFS GUAM L.P.,
Plaintiff-Appellee/Cross-Appellant,

v.

THE A.B. WON PAT INTERNATIONAL AIRPORT AUTHORITY, GUAM,
Defendant-Appellant/Cross-Appellee.

Supreme Court Case No.: CVA18-022
Superior Court Case No.: CV0943-14
(consolidated with CV0094-15 and CV0198-15)

OPINION

Cite as: 2020 Guam 14

Appeal from the Superior Court of Guam
Argued and submitted on July 9, 2019
Hagåtña, Guam

Appearing for Defendant-Appellant/
Cross-Appellee:
Kathleen V. Fisher, *Esq.* (argued)
Jay D. Trickett, *Esq.*
Genevieve P. Rapadas, *Esq.*
Calvo Fisher & Jacob LLP
259 Martyr St., Ste. 100
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee/
Cross-Appellant:
Jay P. Srinivasan, *Esq.* (argued)
Maurice M. Suh, *Esq.*
Gibson, Dunn & Crutcher LLP
333 S. Grand Ave.
Los Angeles, CA 90071

G. Patrick Civille, *Esq.*
Joyce C.H. Tang, *Esq.*
Civille & Tang, PLLC
330 Hernan Cortez Ave., Ste. 200
Hagåtña, GU 96910

Jehan'Ad G. Martinez, *Esq.*
William J. Blair, *Esq.*
Blair Sterling Johnson & Martinez, PC
DNA Bldg.
238 Archbishop F.C. Flores St., Ste. 1008
Hagåtña, GU 96910

BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; JOSEPH N. CAMACHO, Justice *Pro Tempore*.[1]

MARAMAN, C.J.:

[1] Defendant-Appellant/Cross-Appellee A.B. Won Pat International Airport Authority, Guam ("GIAA") appeals, and Plaintiff-Appellee/Cross-Appellant DFS Guam L.P. ("DFS") cross-appeals, from the entry of an amended final judgment. The consolidated case on appeal consists of three separate procurement protest appeals, each of which is set forth in a separate complaint, along with a petition for a writ of mandate that was separately consolidated into the lead case, Superior Court Case No. CV0943-14. For the reasons discussed below, we vacate the amended judgment and remand with directions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. GIAA Issues an RFP for Airport Concessions and DFS Protests

[2] In 2001, GIAA—the governmental agency overseeing the operation of the A.B. Won Pat International Airport ("the airport")—issued a request for proposal ("RFP") to operate a specialty retail concession at the airport. After the completion of the RFP process, DFS became the exclusive retail concessionaire for GIAA in November 2002. Retail concessions at the airport expanded on at least two occasions over the next decade, but DFS remained the sole specialty retail concessionaire for GIAA, as DFS was the sole proposer for subsequent RFPs issued by GIAA during this period. This exclusive relationship was not to last.

[3] On July 19, 2012, GIAA issued a new RFP for the specialty retail concessions at the airport. Four companies submitted bids in response: DFS, Lotte Duty Free Guam LLC ("Lotte"), Shilla Duty Free, and JR/Duty Free.

[1] The signatures in this opinion reflect the titles of the justices at the time this matter was argued and submitted.

[4] After GIAA issued this RFP, Jeju Air made its inaugural flight from South Korea to Guam. As part of the ceremonial and promotional activities associated with this event, the Guam Visitor's Bureau ("GVB") organized a delegation (hereinafter, "GVB Delegation") to go to South Korea. The GVB Delegation included two members of the GIAA Board of Directors—Francisco Santos and Rosalynda Tolan. Shortly after this trip, on October 1, 2012, DFS Vice President of Travel Industry Marketing Tak Takano spoke with a GVB employee, who informed Takano that the GVB Delegation had visited the Lotte department store in Seoul, met the president of Lotte, and received discounts and gifts from Lotte. This conversation was memorialized in a recording made by Takano.

[5] In a letter dated October 30, 2012, but that was not faxed until November 7, 2012 (hereinafter, "October 30 Letter"), DFS wrote to GIAA Executive Manager Charles Ada in order "to raise concerns that DFS ha[d] over some recent activities . . . which we feel may have been in contravention [of] the procedures stipulated under the RFP as well as violative of the spirit of the Guam procurement laws." *See* Record on Appeal ("RA"), tab 152 (Decl. Charles H. Ada II Supp. GIAA's Mot. Summ. J. ("Ada Decl."), Aug 28, 2015), Ex. B at 2 (Letter from Lamonte "Jim" Beighley to Charles Ada, Oct. 30, 2012). DFS twice referred to this as a "letter of concern." *Id.* at 2-3. The record does not indicate any action that was taken in response to the October 30 Letter. And despite the October 30 Letter, the RFP bids continued to be evaluated by an evaluation committee formed by GIAA.

[6] On March 28, 2013, the board of directors of GIAA held a regular meeting, during which they discussed the RFP. Representatives from both DFS and Lotte were present at this meeting. According to the minutes of that board meeting:

> Chairman Santos disclosed for the record that there have been some media reports relating to the trip to Korea for the inaugural flight of Jeju Air in September 2012,

> that both the Chairman and Director Tolan attended. Although there were statements of supposed gifts received by the Chairman and Director, he stated that he did not believe there were any ethical violations. However, to avoid the appearance of any wrong doing [sic], and to maintain the publics' [sic] confidence and integrity of the solicitation process, the Chairman chose to abstain from participating in any discussions or votes relating to this particular RFP. The Chairman requested the item be chaired by Vice Chair [Jesus Q.] Torres. At this time, Director Tolan also chose to abstain and removed herself from any discussion or vote on this item. As there were no objections from the members, the meeting proceeded with Vice Chair Torres presiding.

Id., Ex. C at 2 (Mins. GIAA Bd. Dirs. Regular Mtg., Mar. 28, 2013). Executive Manager Ada then presented the full board with an overview of the RFP and bidding process. The minutes reflect that Ada told the board that "[t]o maintain the confidentiality requirement of the procurement law, each of the proposers were randomly assigned a letter designation." *Id.* The proposers' random letters were designated "in the order of how the proposals were received." *Id.* at 3. Several directors questioned the use of random letter designations; Vice Chairman Torres, for example, "stated that the Airport has never done this before, and found the process to be questionable." *Id.* After these questions were raised, the board tabled discussion and a vote on the RFP in order to provide legal counsel an opportunity to review the issues raised.

[7] The day following this meeting, DFS sent an email to Frank Taitano, its single point of contact in the procurement process, to seek clarification on how the random letter designations were assigned. GIAA responded by letter, explaining the process.

[8] DFS sent a follow-up letter on April 11, 2013 (hereinafter, "April 11 Letter"). DFS stated its belief that no investigation was conducted in response to the October 30 Letter and challenged the integrity of the procurement process, as well as Lotte's bid. DFS then requested an investigation, stating:

> We believe that it is of the utmost importance for the Board of Directors of GIAA to insist that a very thorough investigation is conducted as to what exactly transpired during the GVB [Delegation] Korea trip. The nature and value of the

> gifts, the circumstances under which they were given and how they were selected by various members of the delegation are important elements to consider. It is also important to ascertain what knowledge Lotte actually had of the delegation members, when they had that knowledge, and how they chose to act subsequently.
>
> . . . . We believe that the process of the RFP must continue to move forward. There are several important steps ahead that must be followed. As the process moves forward, however, the directors who are ultimately responsible for the outcome must ensure that this investigation into what transpired is, and has been, conducted thoroughly and that as a body the board is informed of all of the relevant facts, particularly in light of the statements which have been just made during and subsequent to the last board meeting.

Id., Ex. F at 3-4 (Letter from Beighley to Taitano, Apr. 11, 2013).

[9] A day later, the board of directors of GIAA convened a special meeting that both DFS and Lotte attended. At this special meeting, the board of directors unanimously approved the evaluation committee's recommendation that GIAA enter contract negotiations for specialty retail concessions with "Proposer 'A,'" who was then revealed by the Executive Manager to be Lotte. *See id.*, Ex. G at 2 (Mins. GIAA Bd. Dirs. Special Mtg., Apr. 12, 2013). The evaluation committee had ranked DFS's proposal in third place. The April 11 Letter was not discussed at this meeting.

[10] Following the award of the RFP to Lotte, legal counsel for DFS sent a formal procurement protest to Executive Manager Ada ("April 23 Letter"). This letter stated that it was part of DFS's "continued protest of the process leading up to, and the April 12, 2013 decision, of [GIAA] to approve the recommendations of the GIAA evaluation committee ranking Lotte . . . as the 'most qualified proposer' pursuant to RFP No. GIAA 010-FY12 . . . ." *Id.*, Ex. H. at 1 (Letter from Att'y William J. Blair to Ada, Apr. 23, 2013). The letter continued:

> As you are aware, we have been protesting the actions related to the selection of Lotte since our October 30, 2012 letter, in which we specifically stated that facts related to the RFP No. GIAA 010-FY12 'have been in contravention [of] the procedures stipulated under the RFP.' Your failure to respond to our October 30 letter, as well as a follow-up letter on April 11, 2013 letter [sic], culminates in this correspondence. The Proposal Protest is made pursuant to 5 GCA Guam Government Operations, Article 9, Section 5425 *et seq.* and RFP No. GIAA 010-

> FY12, and incorporates the relevant provisions of 5 GCA Ethics and Government Employees, Article 11 and 4 GCA Standards of Conduct for Elected Officers, Appointed Officers, and Public Employees of the Government of Guam, Article 2.

Id. (first alteration in original) (citations omitted). DFS listed seven distinct bases for its protest, including: (1) Lotte's bid should be deemed non-responsive due to its attempt to influence the award during the GVB Delegation trip; (2) Lotte's bid should be deemed non-responsive because it submitted materially false affidavits in support of its bid; (3) the procurement process failed to abide by the "public policy" requirements of 5 GCA § 5625; (4) Lotte's bid should be stayed pending an investigation by criminal authorities; (5) Lotte's bid should be stayed so that DFS can appeal GIAA's denial of DFS's protest; (6) the contract between Lotte and GIAA violates Guam law; and (7) GIAA adopted an *ad hoc* procedure not authorized by the procurement law in evaluating bids. *See id.* at 2-4.

[11] GIAA denied DFS's first procurement protest, which related to both the GVB Delegation trip and the use of random letter designations, on May 17, 2013. In rejecting DFS's protest, GIAA found the protest to be untimely and denied it on the merits. The following day, GIAA resumed negotiations with Lotte and finalized the concession agreement.

B. DFS Appeals GIAA's Protest Dismissal and Simultaneously Files a Lawsuit Against GIAA and Lotte

[12] On May 30, 2013, DFS filed a procurement appeal with the Office of Public Accountability ("OPA"). DFS stated in this appeal that it "began its proposal protest on October 30, 2012" and that it "continued its proposal protest with correspondence on April 11, 2013, and April 23, 2013." RA, tab 1 (Compl., Oct. 14, 2014), Ex. B at 2 (Procurement Appeal, May 30, 2013). DFS alleged nine separate bases for its appeal. These included all seven claims initially set forth in the April 23 Letter, as well as claims that the GIAA board members engaged in conduct evidencing partiality and GIAA engaged in an improper, conflicted investigation in evaluating DFS's protest.

[13] The same day that DFS filed its procurement appeal with the OPA, DFS also filed suit in the Superior Court of Guam against GIAA, Lotte, and others. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0685-13 (Compl., May 30, 2013).[2] While this matter was pending in the Superior Court, proceedings before the OPA were stayed. *See* DFS Guam L.P. v. Brooks, SP0149-14 (V. Pet. Alternative & Peremptory Writ Mandate at 4, Oct. 30, 2014). As part of this earlier litigation, DFS sought a temporary restraining order and preliminary injunction preventing GIAA from enforcing its contract with Lotte and preventing Lotte from moving into the airport concession space. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0685-13 (*Ex Parte* Appl. TRO & Order Show Cause Why Prelim. Inj. Should Not Issue, July 15, 2013). The Superior Court held a hearing on DFS's application but dismissed the complaint for lack of subject matter jurisdiction. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0685-13 (Dec. & Order, July 19, 2013).

[14] GIAA moved to correct the judgment and for sanctions against DFS, while Lotte moved for partial reconsideration. *See DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth.*, 2014 Guam 12 ¶¶ 5-6 [hereinafter "*DFS I*"]. The trial court denied all three of these motions, and both Lotte and GIAA appealed these post-judgment decisions. *See id.* In *DFS I*, we affirmed in part and reversed in part the denial of those post-judgment motions, finding that once the trial court determined it lacked subject matter jurisdiction, any additional findings or extraneous statements were improper and should be stricken from its decision and order dismissing the complaint. *See*

[2] Generally, the court may take judicial notice of court records. *See* Guam R. Evid. 201; *see also People v. Corpuz*, 2019 Guam 1 ¶ 4 n.2 (exercising discretion to take judicial notice of two Superior Court cases preceding case on appeal); *In re N.A.*, 2001 Guam 7 ¶ 58 ("It is proper to take judicial notice of court files." (citing *In re S.S.*, 334 N.W.2d 59, 61 (S.D. 1983)).

id. ¶¶ 34-36. DFS did not separately appeal the trial court's dismissal of its complaint for failure to exhaust its administrative remedies.[3]

[15] Following our mandate and remand in *DFS I*, DFS returned to the OPA to request a scheduling order and status hearing. *See* DFS Guam L.P. v. Brooks, SP0149-14 (V. Pet. Alternative & Peremptory Writ Mandate at 4 (Oct. 30, 2014)). In response, GIAA and Lotte filed motions seeking the recusal and disqualification of the Public Auditor. On September 30, 2014, the Public Auditor issued a "dismissal order," in which she stated: "Having considered the record in this matter, including certain objections to the hearing officer in this case, the limited budgetary resources available to the [OPA], and in the interest in avoiding delays in the disposition of the issues raised, the Public Auditor declines this matter." *See* RA, tab 1, Ex. A at 2 (Dismissal Order Declining Pub. Auditor Hr'g, Sept. 30, 2014). The OPA dismissed DFS's procurement appeal and found that it "must be taken to the Superior Court of Guam." *Id.*

C. DFS Files an Appeal of the First Procurement Protest

1. DFS again files suit in the Superior Court

[16] DFS again filed suit against GIAA, Lotte, Guam,[4] and Does 1-10, under Superior Court Case No. CV0943-14. In its complaint, DFS alleged that Lotte contacted and provided improper benefits to two GIAA board members—Chairman Santos and Director Tolan—during the GVB Delegation trip to South Korea. DFS again maintained its October 30 Letter constituted a part of its first procurement protest with respect to this trip. In addition to allegations regarding the GVB Delegation trip, DFS also asserted in its complaint that the evaluation committee's use of anonymous designations when presenting proposals to the board was an irregular attempt to

[3] GIAA repeatedly states in its brief that we addressed the issue of administrative exhaustion in this earlier case. That is not correct; the issue of exhaustion was not before the court and we did not address it.

[4] Guam was later dismissed as a defendant. *See* RA, tab 140 at 3 (Bench Order, June 17, 2015).

cleanse the procurement process of various problems that were alleged to be plaguing it and that it was not actually anonymous in any event. DFS claimed further misconduct on the part of GIAA in its alleged failure to abide by the automatic stay provisions of the procurement law once GIAA had received—and rejected—DFS's initial bid protest.

[17] In total, DFS asserted twenty separate causes of action, eighteen of which were asserted against GIAA. These claims alleged violations of GIAA's enabling statute, the procurement law, and the RFP for failing to abide by the automatic stay, accepting improper benefits from Lotte, improperly denying DFS's first procurement protest, failing to act impartially in the procurement process, violating the public trust, allowing improper contingency fee arrangements, and violating the single-point-of-contact rule. The relief sought by DFS included, *inter alia*: (1) various forms of declaratory relief; (2) voiding the agreement between GIAA and Lotte and a permanent injunction barring the carrying out of this agreement; (3) an order directing that a new RFP be issued and barring Lotte from bidding on it; (4) appointment of an independent monitor to oversee future RFPs issued by GIAA; (5) special and general damages; (6) costs and attorney's fees; and (7) punitive damages.

[18] GIAA answered DFS's complaint by asserting several affirmative defenses, including lack of subject matter jurisdiction and failure to exhaust administrative remedies.

2. DFS separately files a petition seeking a writ of mandate against the Public Auditor

[19] In addition to the complaint filed under Superior Court Case No. CV0943-14, DFS also filed suit under Superior Court Case No. SP0149-14, seeking a writ of mandate against the Public Auditor to take jurisdiction or to clarify her dismissal order. *See* DFS Guam L.P. v. Brooks, SP0149-14 (V. Pet. Alternative & Peremptory Writ Mandate, Oct. 30, 2014). This writ petition

was consolidated with the main litigation pending under CV0943-14 that is the subject of this appeal.

3. The Public Auditor clarifies her dismissal order

[20] Several months after answering the complaint under CV0943-14, GIAA moved for judgment on the pleadings, arguing (as relevant to this appeal) that the court lacked subject matter jurisdiction because DFS had failed to exhaust its administrative remedies and the Public Auditor did not render a final decision on DFS's procurement protest. Shortly after GIAA moved for judgment on the pleadings, the trial court issued a writ of mandate, which directed the Public Auditor to clarify whether her dismissal order was intended as a disqualification or recusal, as well as an explanation of the factual and legal bases for her decision. The Public Auditor responded by stating: "The Dismissal Order in OPA-PA-13-006 issued on September 30, 2014, was intended as a recusal from the exercise of jurisdiction . . . ." RA, tab 72 at 2 (Resp. to Writ Mandate, Feb. 12, 2015); *see also* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Compl., Feb. 6, 2015), Ex. B at 1 (Order of Recusal, Jan. 23, 2015) ("Pursuant to 2 G.A.R. Div. 4 § [12116], . . . the Public Auditor declined taking any further action . . . and has determined to recuse herself . . . ."). In support of this position, the Public Auditor cited 2 Guam Admin. R. & Regs. ("GAR") Div. 4 § 12116,[5] and relied upon an apparent ethical conflict between the Public Auditor and counsel hired by DFS. *See* RA, tab 72 at 2-3 (Resp. to Writ Mandate). At the same time, however, the

[5] When referring to the regulations regarding the disqualification of the Public Auditor that were adopted by the OPA under 2 GAR, Division 4, Chapter 12, both the OPA and the Superior Court cited to 2 GAR Div. 4 § 12601. This citation is incorrect, as the Compiler of Laws has renumbered section 12601 following the 2009 amendments. *See* 5 GCA § 9304(a) (2005) (permitting Compiler of Laws to "make non-substantive changes in the numbering and form of the rules" submitted by agencies); 1 GCA § 1606 (2005). Both the OPA and the Superior Court should have cited to 2 GAR Div. 4 § 12116. Throughout this Opinion, any quotation or other reference by the OPA or Superior Court to section 12601 is replaced with the correct reference to section 12116.

Public Auditor also stated that she recused herself "without making a determination on the merits of the recusal requests." *Id.* at 3.

[21] The Superior Court determined that the Public Auditor's response constituted a valid recusal under 2 GAR Div. 4 § 12116.[6] It reiterated this finding on multiple occasions. *See* Transcript ("Tr.") at 16-17 (Hr'g, Apr. 30, 2015); RA, tab 170 at 10-11, 28 (Dec. & Order, Sept. 18, 2015); DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Dec. & Order at 3-5 (June 6, 2016)) (reaffirming prior determination in second procurement protest action).

D. DFS Files Two Other Procurement Protest Complaints that are Eventually Consolidated with the First Protest Complaint

[22] While the parties were litigating DFS's first procurement protest complaint, DFS was pursuing two additional procurement protests related to the RFP.

[23] Roughly two weeks after GIAA denied DFS's first procurement protest, and after the contract between Lotte and GIAA was executed, DFS filed a second procurement protest. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15, Compl., Ex. A at 1 (Second Protest Denial Letter, Jan. 15, 2015) (noting second procurement protest was filed on May 29, 2013). DFS raised five separate grounds for protest in the second protest, which broadly included claims that Lotte improperly increased its Minimum Annual Guaranteed Rent after its initial bid submission and included rental payments, capital expenditures, and other benefits outside the scope of the RFP in its bid. More than a year and a half after this procurement protest was filed,[7]

[6] As part of this Decision and Order, the trial court also dismissed many of the claims against Lotte and severed the only remaining claim such that the litigation against Lotte proceeded separately from the litigation against GIAA.

[7] While this may seem like an excessive amount of time to address a procurement protest, many of the claims in the second procurement protest were included in the original action filed by DFS that was dismissed for lack of subject matter jurisdiction. *Compare* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Compl.), Ex. A (Second Protest Denial Letter), *with* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0685-13 (Compl., May 30, 2013). This litigation lasted until September 18, 2014, when the case was officially closed. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0685-13 (Judgment, Sept. 18, 2014). Pursuant to 2 GAR Div. 4 § 9101,

GIAA denied DFS's second procurement protest on the merits. DFS appealed to the Public Auditor, and, as with DFS's first procurement protest appeal, the Public Auditor recused herself from reviewing the second procurement protest appeal.

[24] DFS thereafter filed an appeal of its second procurement protest in the Superior Court. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Compl., Feb. 6, 2015). In its complaint, DFS asserted nine causes of action against GIAA, which alleged that GIAA improperly allowed Lotte to increase the MAG Rent and that GIAA relied upon Lotte's inclusion of added benefits outside the scope of the RFP in its bid. DFS also asserted claims in the second protest complaint related to GIAA's alleged failure to abide by the automatic stay provisions of the procurement law.

[25] DFS filed a third procurement protest on June 7, 2013. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0198-15 (Compl., Mar. 10, 2015), Ex. A at 1 (Third Protest Denial Letter, Feb. 5, 2015) (noting third procurement protest was filed on June 7, 2013). DFS claimed in this third protest that the RFP issued by GIAA violated 12 GCA § 1203.1, which sets forth specific statutory obligations applicable to GIAA's relationship with concession providers. GIAA denied DFS's third protest appeal on the basis that it was untimely, as well as on the merits. On appeal by DFS, the Public Auditor again recused herself. In its third procurement protest complaint filed in the Superior Court, DFS alleged that GIAA had violated its enabling legislation by its failure to adopt approved criteria for airport concessions pursuant to 12 GCA § 1203.1(a)(2). DFS also again asserted a violation of the procurement law's automatic stay provision.

[26] Eventually, all three procurement complaints were consolidated into one action. In consolidating these complaints, however, the trial court did not require DFS to file a consolidated

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an agency may not act on a procurement protest when "an action concerning the protest has commenced in court . . . ." 2 GAR Div. 4 § 9101(i).

complaint; each separate complaint remained active, and all three proceeded under Superior Court Case No. CV0943-14.

E. The Trial Court Grants DFS Summary Judgment in the Third Protest Complaint and Denies GIAA Summary Judgment on All Three Protest Complaints

[27] After the three protest complaints were consolidated, GIAA filed three separate motions seeking summary judgment that corresponded to each of DFS's three complaints. DFS also moved for summary judgment or, in the alternative, partial summary judgment on its third procurement protest complaint. In resolving these competing motions, the trial court entered four separate orders, which collectively denied each of GIAA's motions and granted DFS's motion.

[28] In denying GIAA's motion regarding the first protest complaint, the trial court found that none of DFS's claims were barred because of a failure to exhaust administrative remedies, that DFS's claims were timely filed, and that DFS's claims were not moot. With respect to the second protest complaint, the trial court found that material questions of fact prohibited the grant of summary judgment in GIAA's favor and that this second protest was not barred by timeliness restrictions. The trial court similarly rejected GIAA's timeliness arguments with respect to DFS's third procurement complaint.

[29] The trial court found that DFS was entitled to summary judgment on its third complaint on five separate bases. First, the court found that GIAA violated the automatic stay provision of 5 GCA § 5425(g) by entering into a contract with Lotte before DFS had fully exhausted its protest rights. Second, the court found that GIAA violated its enabling statute by not promulgating non-airline concession and lease criteria pursuant to 12 GCA § 1203.1. The court further found that "[t]he instant procurement still resides in the pre-award stage," and that GIAA's failure to adopt the statutorily-required criteria was therefore not harmless. RA, tab 980 at 14 (Dec. & Order re: DFS's Mot. Summ. J. re: 3d Protest, Feb. 2, 2018). Third, the trial court found that GIAA

incorrectly administered the procurement process by using a competitive sealed proposal process. Fourth, the trial court held that GIAA failed to adequately maintain and certify a procurement record.[8] And fifth, the trial court determined that GIAA failed to treat DFS fairly and equitably as part of the procurement process, as required by statute.

[30] In a separate section of the order granting DFS summary judgment, the trial court discussed the appropriate remedies. The court held that because the procurement was still in its pre-award stage, one of two remedies was compelled by the procurement law—either the contract must be canceled, or it must be revised to comply with the law. *See id.* at 35 (citing 5 GCA § 5451 (2005)). It further found that there was no way in which it could modify Lotte and GIAA's contract, and thus, the trial court was obligated to void and set aside the contract in its entirety. Because it "recognize[d] the difficulties [GIAA] and . . . Guam will face" if Lotte was ordered to vacate the airport, the court ordered GIAA "to abide by the terms of the current Specialty Retail Concession Agreement until [GIAA] procures an operator" and that any future procurement must be in compliance with the procurement law. *Id.*

[31] The trial court entered judgment and issued two additional orders—one canceling the upcoming trial and finding that there were no longer any justiciable claims, and the other finding all pending motions moot. Pursuant to the judgment, the trial court voided "[t]he entirety of Request for Proposals No. GIAA 010-FY12" and the concessions contract between Lotte and GIAA. RA, tab 905 at 1 (Judgment, Feb. 5, 2018). The trial court also denied DFS's request for costs.

[32] After judgment was entered, DFS moved to alter or amend the trial court's Decision and Order granting DFS's motion for summary judgment on its third protest, as well as the judgment

[8] In its Decision and Order on DFS's motion to amend the judgment, the court identified these as two separate findings—i.e., a failure to maintain and a failure to properly certify.

and the order mooting all other pending motions. Over GIAA's opposition, the trial court granted this motion in part. The trial court denied DFS's request to reinstate the first and second procurement protest complaints, rejecting DFS's arguments regarding mootness. The trial court did find that it erred, however, in entering an injunction ordering GIAA to abide by the terms of its contract with Lotte until a new procurement process was completed.

[33] As a result of granting in part DFS's motion to amend, the trial court also issued an amended Decision and Order granting DFS's motion for summary judgment on its third procurement protest complaint, along with an amended judgment. GIAA timely filed a notice of appeal, and DFS timely cross-appealed.

II. JURISDICTION

[34] We have jurisdiction over an appeal from a final judgment entered in the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-151 (2020)); 7 GCA § 3107(b) (2005).

III. STANDARD OF REVIEW

A. Summary Judgment Standard

[35] We review a grant of summary judgment *de novo*. *See Hawaiian Rock Prods. Corp. v. Ocean Hous., Inc.*, 2016 Guam 4 ¶ 13. A party is entitled to summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c); *see also Hawaiian Rock*, 2016 Guam 4 ¶ 26. "A movant bears the initial burden to show that undisputed facts in the record support a *prima facie* entitlement to the relief requested." *Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citing *Hemlani v. Hemlani*, 2015 Guam 16 ¶ 18). If the movant satisfies this burden, the burden then shifts to the defendant to show that there exists a material question of fact that would preclude

the grant of summary judgment. *See id.* To avoid a grant of summary judgment in favor of the movant, "the non-movant may not simply deny the allegations to create a factual dispute, but is obligated to set forth specific facts showing there is a genuine issue for trial." *Id.* (citing *Gayle v. Hemlani*, 2000 Guam 25 ¶ 21; Guam R. Civ. P. 56(e)).

[36] In reviewing the facts of a case on a motion for summary judgment, a court "must view the evidence and draw inferences in the light most favorable to the non-movant." *Gayle*, 2000 Guam 25 ¶ 21 (citing *Iizuka Corp. v. Kawasho Int'l (Guam), Inc.*, 1997 Guam 10 ¶ 8). Nevertheless, "the non-movant may not rely on mere allegations contained in the complaint, but must offer some significant probative evidence supporting such allegations." *Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citing *Gayle*, 2000 Guam 25 ¶ 21). Moreover, minor or insignificant factual disputes will not result in the denial of summary judgment; a factual dispute prevents the granting of summary judgment only where that fact is "material" to the claims asserted in the case. *See id.* ¶ 26 (citing *Gayle*, 2000 Guam 25 ¶ 20). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *Gayle*, 2000 Guam 25 ¶ 20 (quoting *Iizuka Corp.*, 1997 Guam 10 ¶ 7).

B. Additional Standards of Review on Appeal

[37] As a general proposition, we review pure questions of law *de novo*, while reviewing those determinations made by a trial court exercising its discretion only for an abuse of that discretion. *See, e.g.*, *Basil Food Indus. Servs. Corp. v. Guam*, 2019 Guam 29 ¶ 9; *People v. Bruneman*, 1996 Guam 3 ¶ 7 ("We review the exercise of . . . discretion only for abuse." (quoting *United States v. McConnell*, 842 F.2d 105, 108-09 (5th Cir. 1988))). Questions of statutory interpretation and jurisdiction are reviewed *de novo*. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 15. This includes questions of mootness, *see Rapadas v. Benito*, 2011

Guam 28 ¶ 13, and the legal requirements necessary for a party to exhaust administrative remedies, *see Barrett-Anderson v. Camacho*, 2015 Guam 20 ¶ 15 (quoting *Guam Fed'n of Teachers v. Gov't of Guam*, 2013 Guam 14 ¶ 26).

IV. ANALYSIS

[38] Myriad issues are raised by the parties on appeal. Below, we first address the scope of review in the Superior Court. We then turn to those issues raised by the parties that bear on our jurisdiction, including (i) whether the Public Auditor properly recused herself, (ii) whether DFS adequately exhausted its administrative remedies for each of its claims, and (iii) whether DFS's procurement protests were timely. Next, we address whether the trial court erred in its merits-related decisions on the competing motions for summary judgment.

[39] We find, among other things, that GIAA is entitled to summary judgment on certain of DFS's claims and that the trial court erred in granting summary judgment in favor of DFS on its third protest complaint. We remand with directions and for further proceedings not inconsistent with this Opinion.

A. A Procurement Protest Appeal Proceeds Before the Superior Court as a "Civil Action"

[40] As an initial matter, the parties dispute what the proper scope of proceedings should have been in the Superior Court, including what standards of judicial review apply in this case. GIAA argues that the Superior Court should have limited its review to the administrative record and applied a deferential standard of review to GIAA's initial administrative determinations. *See* Appellant's Br. at 30-32 (Nov. 6, 2018); *see also id.* at 39 (stating that trial court must "giv[e] the required deference to GIAA's administrative decisions"). DFS, on the other hand, argues that the trial court properly treated DFS's appeal as a "civil action." *See* Appellee's Br. at 34-36 (Jan. 15, 2019).

[41] We have never before considered what standards govern the Superior Court's consideration of a procurement protest appeal where the Public Auditor and OPA have recused from reviewing a procuring agency's denial of a protest.[9] Despite being a question of first impression, the law in this area is clear: the Superior Court should provide no deference to the procuring agency's factual and legal conclusions in denying a protest, nor is the court limited by the record that was before the procuring agency. The proceedings before the Superior Court should proceed as a "civil action." *See Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 28 (citing 5 GCA § 5480(a) (2005)); *see also Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶¶ 23-33 [hereinafter "*Teleguam Holdings II*"].

1. An agency decision denying a procurement protest is not entitled to deference

[42] In the typical procurement protest case, a procuring agency's decision to deny a protest may be appealed to the Public Auditor. *See* 5 GCA § 5425(e) (2005). The Public Auditor has jurisdiction "to review and determine de novo any matter properly submitted to her or him." 5 GCA § 5703(a) (2005); *see also* 2 GAR Div. 4 § 12103(a). Under this *de novo* review, neither factual nor legal conclusions made by the procuring agency in denying a protest are entitled to deference. *See, e.g.*, *Port Auth. of Guam v. Civil Serv. Comm'n (Javelosa)*, 2018 Guam 9 ¶ 14 ("True *de novo* review is not limited in any way by the interpretation of a lower court or agency; by definition it is a 'new,' non-deferential review of the issues presented." (citing *Judicial Review*, *Black's Law Dictionary* (10th ed. 2014))); *see also* 5 GCA § 5703(c). After review by the Public Auditor, a party may then appeal to the Superior Court pursuant to 5 GCA § 5480. *See* 5 GCA §

[9] We interpret the Public Auditor's recusal for purposes of resolving this appeal as a recusal by the entire OPA in accordance with the current regulations. *See* 2 GAR Div. 4 § 12116 (stating that appeal should be taken to Superior Court "[i]f no member of the Public Auditor's staff or the appointed Hearing Officer is able to preside over the matter due to disqualification").

5480; *see also Xerox Corp. v. Office of Pub. Accountability*, 2014 Guam 14 ¶ 19 (stating case brought under section 5480 is an "appeal from a procurement dispute").

[43] On appeal to the Superior Court, factual findings issued by the Public Auditor are deemed "final and conclusive unless arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law." 5 GCA § 5704(a) (2005). Legal determinations are also "entitled to great weight and the benefit of reasonable doubt." *Id.* § 5704(b); *see also Javelosa*, 2018 Guam 9 ¶¶ 13-15 (noting agency decisions are generally entitled to *Skidmore* deference). Under these standards, "*factual* findings made by the Public Auditor are ordinarily not to be re-litigated," but the Superior Court has full authority to resolve "any outstanding and disputed factual questions." *Teleguam Holdings II*, 2018 Guam 5 ¶ 32. With respect to legal questions, the Superior Court should consider the Public Auditor's decision with "great weight," but ultimately the standard of review in the Superior Court is *de novo*. *Id.* We see no basis upon which to find that the procuring agency's decision to deny a procurement protest is entitled to deference simply because the OPA has recused from hearing the matter.

[44] Nor do we see any basis to find that deference is owed to the factual and legal conclusions underpinning the procuring agency's denial of a procurement protest. The Procurement Code provides that "no prior determination" by the procuring agency "shall be final or conclusive on the Public Auditor *or upon any appeal from the Public Auditor*." 5 GCA § 5703(c) (emphasis added).[10] Likewise, there is no conclusive effect or finality to any decisions made by either the

[10] There is nothing in the text of the procurement law that states that the "final administrative decision" prior to a section 5480 appeal to the Superior Court must be a decision *on the merits* of the dispute. *See infra* Part IV.B.1. The official regulations adopted by the OPA reject that interpretation. *See* 2 GAR Div. 4 § 12116 (stating that after a recusal decision by OPA, a procurement appeal "may be taken to the Superior Court of Guam in accordance with 5 G.C.A. §5480"); *cf. Javelosa*, 2018 Guam 9 ¶ 22 n.2 (discussing deference to formal agency regulations). When the Public Auditor has recused, thus making a final administrative decision, *see* 2 GAR Div. 4 § 12116, the Superior Court is in the same position as in *Teleguam Holdings II* to consider *de novo* all legal questions, as well as any factual questions left unresolved by the OPA. *See Teleguam Holdings II*, 2018 Guam 5 ¶ 32.

Public Auditor or the procuring agency where such decisions are contrary to law. *See* 5 GCA § 5480(d).

[45] GIAA asserts that the "extremely deferential" substantial evidence standard set forth in *Guam Memorial Hospital Authority v. Civil Service Commission (Chaco)*, 2015 Guam 18, should apply to GIAA's denial of DFS's protests. GIAA's reliance on *Chaco* is misplaced. In *Chaco*, we held that the administrative agency responsible for reviewing the employing agency's conduct was entitled to deference. 2015 Guam 18 ¶¶ 14-16. The analogous deference in the context of a procurement appeal would be deference to the Public Auditor's decision, responsible for reviewing the procuring agency's conduct, not deference to the procuring agency.[11] Additionally, *Chaco* dealt with a review under the civil service laws, *see id.*, not the "comprehensive remedial scheme" set forth in the Procurement Code, *Pac. Rock Corp. v. Dep't of Educ.*, 2001 Guam 21 ¶ 36 n.6 [hereinafter "*Pac. Rock II*"]. *Accord Teleguam Holdings II*, 2018 Guam 5 ¶ 12 ("[P]rocurement law is a unique statutory scheme."). The Procurement Code sets forth its own standards of review, and nothing in the Procurement Code provides that the procuring agency's decision—as opposed to the Public Auditor—is entitled to deference. We therefore reject the assertion that an agency's decision to deny a protest is entitled to deference by the Public Auditor or Guam's courts.

[46] In this case, all three of DFS's active complaints were filed pursuant to 5 GCA § 5480. Under the express language of the statute, the Superior Court owes no deference to the factual and legal conclusions of a procuring agency that denies a procurement protest. It matters not that the

[11] If a procurement decision is not supported by a rational or reasonable basis, Guam's procurement law appears to allow an aggrieved bidder to have that decision set aside as arbitrary or capricious, or as an abuse of discretion. *See* 5 GCA § 5245 (2005); 5 GCA § 5704(a); *Pac. Data Sys., Inc. v. Superior Court of Guam*, Civ. No. 90-00029, 1990 WL 320357, at *2 (D. Guam App. Div. Oct. 24, 1990); *see also Axiom Res. Mgmt., Inc. v. United States*, 564 F.3d 1374, 1382 (Fed. Cir. 2009). We do not read DFS's various complaints as asserting that GIAA's procurement decisions were an arbitrary and capricious use of its authority. Therefore, in resolving this appeal, we do not address whether a claim that a procuring agency's *decision to deny a protest*—rather than the *decision to award a contract*—may fairly be subject to a claim of arbitrariness or capriciousness. *Cf. Pac. Data Sys.*, 1990 WL 320357, at *2 (finding that emergency declaration needed to award procurement was not arbitrary).

OPA is recused from the matter; the standard of review is the same as that set forth in *Teleguam Holdings II*. *See* 2018 Guam 5 ¶ 32.

2. The Superior Court's review is not limited to the administrative record

[47] GIAA additionally argues that the Superior Court should have limited its review to the administrative record. *See* Appellant's Br. at 31-32. This position is equally baseless.

[48] As noted above, in a procurement appeal, the Public Auditor is not limited in any way or bound by the factual conclusions reached by the procuring agency. *See* 5 GCA § 5703(a), (c). A corollary to the Public Auditor's *de novo* factual review is the Public Auditor's authority to compel testimony and the production of documents, as well as the authority to consider evidence and testimony submitted by any competing bidder. *See id.* § 5703(d)-(e). In other words, the Public Auditor is not limited to the record before the procuring agency. Nor is the Superior Court in any way limited to the administrative record. In *Teleguam Holdings II*, we found such limited review would be "unduly restrictive." *See* 2018 Guam 5 ¶ 27. Procurement protest appeals filed in the Superior Court proceed as a "civil action," *Town House*, 2012 Guam 25 ¶¶ 24-28, and discovery is permitted in accordance with the Guam Rules of Civil Procedure, *Teleguam Holdings II*, 2018 Guam 5 ¶¶ 30-31.

[49] In a procurement protest appeal, the Superior Court has the authority to "entertain dispositive motions or conduct a trial on any outstanding and disputed factual questions." *Id.* ¶ 32. "Limitations on what the Superior Court may consider would remove a safeguard in maintaining a procurement system of quality and integrity." *Id.* ¶ 33 (citing 5 GCA § 5001(b)(7)). This is no less true where the Public Auditor and OPA have recused from hearing the matter. In the procedural posture of this case, the Superior Court was free to order additional discovery and

hear all the evidence it deemed fit to consider in order to resolve any factual or legal questions. Its decision to do so was not in error.

B. All Claims Arising Under the Procurement Code Must Be Administratively Exhausted

[50] GIAA next argues that the Superior Court lacked jurisdiction to hear this case because DFS failed to exhaust its administrative remedies—first, by failing to obtain a final administrative decision from the Public Auditor, *see* Appellant's Br. at 34-35, and second, by not pursuing all of its claims during the procurement appeal process, *see id.* at 35-40. We find the OPA properly recused itself in this case and this satisfies any exhaustion requirements under the Procurement Code. We further find that all claims arising under the Procurement Code must be administratively exhausted, and—on the record before the court and viewing the facts in the light most favorable to DFS—it is clear that DFS failed to exhaust its claims against GIAA related to any "success fee" paid by Lotte. *See* RA, tab 1 at 6, 11, 29-30 (Compl.) (alleging promise and payment by Lotte of "success fees" for being awarded concessions contract). Accordingly, GIAA is entitled to summary judgment on those claims that DFS failed to administratively exhaust.

1. The OPA properly recused itself, and this satisfies any administrative exhaustion requirement

[51] Before a party may bring its procurement-related claims before the Superior Court, it must exhaust its administrative remedies. *See Holmes v. Territorial Land Use Comm'n*, 1998 Guam 8 ¶ 9 ("When an administrative remedy has been provided by statute, this remedy must be exhausted before the courts will act."); *Palladian Partners, Inc. v. United States*, 783 F.3d 1243, 1254 (Fed. Cir. 2015) (finding administrative exhaustion was required in federal procurement protests). In the context of a challenge under the procurement law, exhaustion requires that an aggrieved bidder protest to the procuring agency, *see* 5 GCA § 5425(a)-(c), and appeal any adverse decision to the Public Auditor, *see id.* § 5425(e), before bringing an "action" in the Superior Court, *see id.* §

5480(a). We set forth the appropriate procedure applicable to procurement disputes at length in our decision in *Town House Department Stores, Inc. v. Department of Education*, 2012 Guam 25 ¶¶ 21-30.

[52] GIAA asserts in its brief that the Superior Court lacked jurisdiction "because the administrative phase of the procurement law's mandatory remedial scheme was never completed." Appellant's Br. at 34. In support of this position, GIAA relies entirely upon the Public Auditor's initial decision declining jurisdiction and argues that this ruling was too abstract to constitute "a proper recusal or disqualification under 2 GAR Div. 4 § 12116 for conflict of interest." Appellant's Br. at 35. This argument entirely ignores large parts of the record, and we reject it.

[53] The regulations adopted in accordance with the procurement code specifically permit the Public Auditor and OPA to recuse from hearing a procurement protest appeal in an appropriate case. Under 2 GAR Div. 4 § 12116:

> 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, the Public Auditor shall designate a member of his or her staff or the appointed Hearing Officer for procurement appeals to preside over the matter. If no member of the Public Auditor's staff or the appointed Hearing Officer is able to preside over the matter due to disqualification, then such matter may be taken to the Superior Court of Guam in accordance with 5 G.C.A. §5480.

2 GAR Div. 4 § 12116. This rule was adopted in accordance with 5 GCA § 5701(a) (2005), which permits the Public Auditor to adopt rules of procedure, and is consistent with section 5703(f), which provides that "[t]he 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(f); *see also* 2 GAR Div. 4 § 12103(a); 5 GCA § 9222 (2005) (permitting disqualification of a "hearing officer or agency member" in the event that he or she "cannot accord a fair and impartial hearing or

consideration"). In *Teleguam Holdings II*, we noted that "[b]ypassing the Public Auditor appears to be available in at least cases where the Public Auditor is recused." 2018 Guam 5 ¶ 23 n.4 (citing 2 GAR Div. 4 § 12116).

[54] As provided in 5 GCA § 5481, appeals to the Superior Court must come after a "final administrative decision" by the Public Auditor. 5 GCA § 5481(a) (2005). The term "final administrative decision" is not defined in the procurement law or its regulations. *See generally* 5 GCA, Ch. 5, art. 9; 2 GAR Div. 4 § 12102. All that is required by the Public Auditor is that he or she "issue[s] a decision in writing *or take other appropriate action* on each appeal submitted." 5 GCA § 5702 (emphasis added); *see also* 2 GAR Div. 4 § 12110. Nothing in the statutory text states that this decision must be a decision on the merits of the protest[12] before jurisdiction may be vested in the Superior Court. Indeed, the reference to "tak[ing] other appropriate action," 5 GCA § 5702, strongly implies that a hearing on the merits is not required in all cases—particularly when necessary to "promote the integrity of the procurement process," 5 GCA § 5703(f); *see also* 2 GAR Div. 4 §§ 12103(a), 12116. The Public Auditor and OPA deciding to step aside when a conflict of interest, or the appearance thereof, arises undoubtedly furthers the integrity of the procurement process.

[55] In its initial decision refusing to take jurisdiction over DFS's first procurement protest appeal, the Public Auditor stated: "Having considered the record in this matter, including certain objections to the hearing officer in this case, the limited budgetary resources available to the [OPA], and in the interest of avoiding delays in the disposition of the issues raised, the Public

[12] Similarly, neither 5 GCA § 5702 nor the applicable regulations require the Public Auditor to make a *recusal or conflict decision* on the merits—contrary to what GIAA argues, *see* Appellant's Br. at 34-35. In other words, the Public Auditor or OPA need not make a finding that an actual conflict of interest exists for the recusal decision to be valid. *Cf. Dizon v. Superior Court of Guam (People)*, 1998 Guam 3 ¶¶ 8-10 (noting that there need not be actual partiality or a conflict of interest for recusal of trial judge to be appropriate).

Auditor declines this matter," and that the appeal "must be taken to the Superior Court of Guam." RA, tab 1, Ex. A at 2 (Dismissal Order Declining Pub. Auditor Hr'g). The parties and the lower court all believed clarification was necessary. *See generally supra* Parts I.C.2-I.C.3 (discussing DFS's petition for writ of mandate, GIAA's request that writ be granted, and trial court's issuance of writ). Accordingly, the trial court issued a writ of mandate directing the Public Auditor to clarify its decision, to which the Public Auditor responded: "The Dismissal Order in OPA-PA-13-006 . . . issued on September 30, 2014, was intended as a recusal from the exercise of jurisdiction." RA, tab 72 at 2 (Resp. to Writ Mandate); *see also* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15, Compl., Ex. B at 1 (Order of Recusal, Jan. 23, 2015).

[56] The Public Auditor stated that she relied upon 2 GAR Div. 4 § 12116 and the existence of an apparent ethical conflict in reaching her decision to recuse. RA, tab 72 at 2-3 (Resp. to Writ Mandate). The Public Auditor similarly recused herself from both the second and third procurement protest appeals.

[57] Following the Public Auditor's clarification, the Superior Court found—on at least four separate occasions—that the Public Auditor properly recused herself under 2 GAR Div. 4 § 12116. *See* RA, tab 157 at 2-3 (Dec. & Order, Sept. 1, 2015); RA, tab 170 at 10-11, 25, 28 (Dec. & Order, Sept. 18, 2015); DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Dec. & Order at 3-5 (June 6, 2016)) (reaffirming prior determination in second procurement protest action); Tr. at 16-17 (Hr'g, Apr. 30, 2015). Previously, GIAA itself admitted that "[s]ubject matter jurisdiction exists if the Court determines that the Public Auditor appropriately recused herself through her February 12, 2015 response." RA, tab 87 (GIAA's Reply Supp. Mot. J. on Pleadings, Mar. 5, 2015); *see also* DFS Guam L.P. v. Brooks, SP0149-14 (GIAA Mot. Modify Proposed Form Writ Mandate to Pub. Auditor at 2 (June 25, 2015)).

[58] The trial court found that the Public Auditor's actions in this case were sufficient to permit an appeal to be filed in the Superior Court under section 5480. We agree. The Public Auditor's recusal in this matter was adequate to satisfy any administrative exhaustion requirements necessary before proceeding in the Superior Court.

2. A party must administratively exhaust all claims under the Procurement Code over which the procuring agency or Public Auditor would have jurisdiction

[59] It is beyond dispute that procurement claims must be administratively exhausted. *See Pac. Rock II*, 2001 Guam 21 ¶ 33 (stating that in contract dispute where government procurement is implicated, review by OPA under 5 GCA § 5427 "provide[s] the last administrative remedy that a claimant must exhaust before pursuing legal recourse"). As noted above, DFS exhausted its administrative remedies as a result of the Public Auditor's recusal. GIAA additionally argues, however, that exhaustion of each claim is required and that DFS failed to exhaust its "success fee"-related claims in the first protest complaint, as well as several claims raised during the summary judgment phase of the third protest complaint. *See* Appellant's Br. at 35-40. In contrast, DFS posits that section 5480 is a broad grant of jurisdiction permitting judicial review of any claim bearing on the veracity of the procurement process, so long as at least one claim is properly protested to the procuring agency. *See* Appellee's Br. at 38. Determining the requirements necessary to exhaust administrative remedies presents a question of law that we review *de novo*. *See Barrett-Anderson*, 2015 Guam 20 ¶ 15.

[60] The Superior Court found that it had authority to hear causes of action related to procurement complaints that were not protested to GIAA in the first instance. *See* RA, tab 976 at 6-10 (Dec. & Order re: 1st Protest, Feb 2, 2018). The court reasoned that where the OPA has recused from a specific matter, there are effectively no exhaustion requirements for procurement appeals heard in the Superior Court. *See id.* at 8-9. This holding is squarely at odds with our

decisions in *Pacific Rock II* and *Town House*, wherein we explained that without proper administrative exhaustion, the Legislature has not waived sovereign immunity and the Superior Court lacks jurisdiction. *See Town House*, 2012 Guam 25 ¶ 32 (quoting *Pac. Rock Corp. v. Dep't of Educ.*, 2000 Guam 19 ¶ 26 [hereinafter "*Pac. Rock I*"], *as mod. on reh'g*, 2001 Guam 21 ¶ 36 n.6). The decision of the Public Auditor to recuse from a procurement appeal does not *annul* the obligation to exhaust administrative remedies; it *satisfies* the exhaustion requirement. *See* 5 GCA § 5481(a); 2 GAR Div. 4 § 12116; *see also supra* Part IV.B.1. Administrative exhaustion is required with respect to each and every claim arising under the Procurement Code that a plaintiff seeks to raise in the Superior Court under section 5480. The failure to properly protest and exhaust such remedies deprives the Superior Court of jurisdiction over individual claims that were not administratively exhausted.

a. Exhaustion is required as to each and every claim arising under the Procurement Code

[61] "When an administrative remedy has been provided by statute, this remedy must be exhausted before the courts will act." *Holmes*, 1998 Guam 8 ¶ 9. We have referred to this as a "universal principle." *Limtiaco v. Guam Fire Dep't*, 2007 Guam 10 ¶ 27. Exhaustion under the Procurement Code is no exception. *See, e.g.*, *Town House*, 2012 Guam 25 ¶ 32 (citing *Pac. Rock I*, 2000 Guam 19 ¶ 26, *as mod. on reh'g*, 2001 Guam 21 ¶ 36 n.6).

[62] There are several reasons for the administrative exhaustion requirement—some jurisdictional and some practical. In the context of claims against the government, such as those arising under the procurement law, we have explained that exhaustion requirements stem, at least in part, from the fact that the Guam Legislature has waived sovereign immunity against Government of Guam agencies only where procedural requirements have been adequately complied with. *See id.*; *see also Guam Police Dep't v. Superior Court of Guam (Lujan)*, 2011

Guam 8 ¶ 8. In other words, where sovereign immunity is implicated, "compliance with [the] procedure" required by statute "satisfies the jurisdictional prerequisite to commencing an action against the Government of Guam." *Pac. Rock I*, 2000 Guam 19 ¶ 26.

[63] The rule mandating administrative exhaustion, however, is not a purely jurisdictional rule. *See generally Fort Bend Cty. v. Davis*, -- U.S. --, 139 S. Ct. 1843, 1851-52 (2019) (explaining differences between jurisdictional and non-jurisdictional exhaustion requirements); *see also Davis & Assocs. v. Williams*, 892 A.2d 1144, 1148-49 (D.C. 2006); *State v. Zia, Inc.*, 556 P.2d 1257, 1260 (Alaska 1976). Administrative exhaustion serves important other purposes. Exhaustion requirements help lessen the burden on the courts by providing an opportunity for agencies to correct mistakes, and it promotes efficiency by taking advantage of the specialized expertise of administrative agencies. *See Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006); *see also Carlson v. Perez*, 2007 Guam 6 ¶ 69; *Rojo v. Kliger*, 801 P.2d 373, 384 (Cal. 1990) (in bank). But even if a statute's exhaustion requirements are not jurisdictional in nature, the failure to exhaust nevertheless presents a complete defense to a plaintiff's claims, absent waiver or some other countervailing interest. *See, e.g.*, *Fort Bend*, -- U.S. --, 139 S. Ct. at 1851-52.

[64] DFS has not provide a single example of a statutory scheme that permits the sort of partial-exhaustion requirement that it asks the court to adopt. And we know of none that exist.[13]

[13] Federal courts have required that plaintiffs exhaust their administrative remedies with respect to each and every claim asserted in a complaint in a wide variety of contexts, including: immigration appeals, *see Laboski v. Ashcroft*, 387 F.3d 628, 630 (7th Cir. 2004); *Mariko v. Holder*, 632 F.3d 1, 9 (1st Cir. 2011); section 1983 civil rights litigation under the Prison Litigation Reform Act, *see O'Neal v. Solis*, 586 F. App'x 440, 440 (9th Cir. 2014); claims under the Americans with Disabilities Act, *see Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1186 (10th Cir. 2007); claims under the Civil Rights Act, *see Randel v. U.S. Dep't of Navy*, 157 F.3d 392, 395 (5th Cir. 1998); claims under the Employee Retirement Income Security Act of 1974 (ERISA), *see Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1299 (9th Cir. 2014); and lawsuits brought under the federal Freedom of Information Act, *see Oglesby v. U.S. Dep't of Army*, 920 F.2d 57, 71 (D.C. Cir. 1990). These are just a few examples. *See, e.g.*, *Fort Bend Cty. v. Davis*, -- U.S. --, 139 S. Ct. 1843, 1849-50 (2019) (citing additional examples of statutes that have non-jurisdictional exhaustion requirements) (collecting cases).

State courts have similarly required exhaustion as to each and every claim where an administrative proceeding is provided by law, including in the context of procurement protests. *See Pacificorp Capital, Inc. v. State*

[65] The Procurement Code serves the vital function of protecting the public expenditure of funds. *See* 5 GCA § 5001(b) (2005). For this reason, it is "an important goal of the Procurement Code . . . that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and of assuring the fairness of the procurement process." *James Hamilton Constr. Co. v. State ex rel. N.M. State Highway & Transp. Dep't*, 68 P.3d 173, 174 (N.M. Ct. App. 2003). Permitting a party to raise only some of its claims as part of the Procurement Code's administrative review and then raise additional claims in the Superior Court would undermine this important goal.

[66] While we have addressed the broad requirements of administrative exhaustion in a number of contexts, we have not had the opportunity to address whether each and every claim must be administratively exhausted under any Guam law that provides for a form of administrative review. We have, however, held that administrative exhaustion in the context of a procurement appeal presents a jurisdictional bar to filing suit under section 5480. *See Town House*, 2012 Guam 25 ¶ 32 (citing *Pac. Rock I*, 2000 Guam 19 ¶ 26, *as mod. on reh'g*, 2001 Guam 21 ¶ 36 n.6). Most recently, we confirmed this in our opinion in *Teleguam Holdings II*. In that case, we addressed the Superior Court's subject matter jurisdiction to hear a challenge to the entirety of an invitation for bids, sometimes called an invitation to bid (separately and collectively, an "IFB"). *See Teleguam Holdings II*, 2018 Guam 5 ¶¶ 21-22. We held that the Superior Court did not have jurisdiction to hear procurement-related complaints regarding certain aspects of the IFB that were not appealed to the Public Auditor or the Superior Court within the appropriate timeframe. *See id.* Moreover, we held that the court had jurisdiction only over claims protested within the statutory

ex rel. Div. of Admin., 604 So. 2d 710, 713 (La. Ct. App. 1992) ("[A]ll actions pertaining to the solicitation or award of contracts, and the validity of contracts, including whether they are in violation of any aspect of the Louisiana Procurement Code, should first exhaust the administrative remedies prescribed in the . . . Procurement Code before proceeding in [court]."); *see also Brownsville Indep. Sch. Dist. v. Alex*, 408 S.W.3d 670, 676 (Tex. App. 2013); *Farrow v. Saint Francis Med. Ctr.*, 407 S.W.3d 579, 594 (Mo. 2013) (en banc); *Soldinger v. Nw. Airlines, Inc.*, 58 Cal. Rptr. 2d 747, 769 (Ct. App. 1996).

window. *See id.* Put differently, we held that the statutory time limits to protest under the procurement law were jurisdictional in nature, and this bar to jurisdiction applied to each and every claim raised in the Superior Court under section 5480. *See id.* It would be logically inconsistent for us to find that a party must timely protest each individual claim or be jurisdictionally barred from bringing it, but also find that a party need not exhaust its protest rights with respect to that same claim. *See, e.g.*, *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002) ("To exhaust administrative remedies, a person must follow the rules governing filing and prosecution of a claim. . . . [T]hese include time limits.").

[67] Although the great weight of authority—both in our jurisdiction and others—indicates that exhaustion is a necessary prerequisite for pursuing each individual claim in the Superior Court under section 5480, we are mindful that at least two of our decisions could be read to imply the opposite. First, in *Fleet Services, Inc. v. Department of Administration*, 2006 Guam 6, we invalidated an RFP on the basis that the procuring agency was required to use a competitive sealed bid process, even though the plaintiff did not protest the solicitation on this basis to the procuring agency. *See* 2006 Guam 6 ¶¶ 12-35. Additionally, in a portion of our decision in *Teleguam Holdings II*, we noted that the trial court vacated a decision by the Public Auditor as a result of the discovery during Superior Court proceedings that the procurement record was incomplete. *See* 2018 Guam 5 ¶¶ 7-8. Upon a second appeal from the Public Auditor, the Superior Court addressed claims related to the inadequacy of the procurement record on the merits. *See id.* ¶ 8. We also addressed these claims on further appeal, even though such claims were not originally protested to the procuring agency. *See id.* ¶¶ 34-42. While the crux of *Teleguam Holdings II* is strongly supportive of the notion that administrative exhaustion is required with respect to each and every

claim raised in the Superior Court under section 5480, the portion of the opinion discussing the completeness of the administrative record could be read to imply the opposite.

[68] To the extent that either *Fleet Services* or *Teleguam Holdings II*, or any portion of those decisions, could be read to imply a rule contrary to the exhaustion requirements we set forth today, we reject that reading of those cases. Neither case specifically discussed the issue of administrative exhaustion, and we have never relied upon our decisions in *Fleet Services* or *Teleguam Holdings II* for any exhaustion-related principles. Because "we have never squarely addressed the issue" presented in this appeal, the principles of *stare decisis* do not apply and "we are free to address the issue on the merits." *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *see also Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 119 (1993) (O'Connor, J., dissenting) ("The rule we applied in *Brecht*, which limits the *stare decisis* effect of our decisions to questions actually considered and passed on, ensures that this Court does not decide important questions by accident or inadvertence.").

[69] DFS argues that requiring exhaustion with respect to each and every claim would permit agency misconduct to "escape judicial review," especially where that misconduct is revealed only during civil discovery. Appellee's Br. at 39. We are not convinced that the parade of horribles DFS imagines will come to pass for at least four reasons.

[70] First, the broad factfinding inquiry the Public Auditor is permitted to undertake during his or her review makes late discovery of government malfeasance unlikely. *See* 5 GCA § 5703(a); *see also* 2 GAR Div. 4 § 12103(a); *Teleguam Holdings II*, 2018 Guam 5 ¶¶ 32, 35. Though it is certainly possible that misconduct will be uncovered during the discovery process in the Superior Court, given that the Public Auditor has "the power to compel attendance and testimony of, and

production of documents by any employee of the government of Guam," 5 GCA § 5703(d), we think it would be the rare case in which this occurs.[14]

[71] Second, any late discovery of misconduct does not mean that such misconduct would go unredressed. Individuals engaging in misconduct may be subject to dismissal or other adverse action under the civil service laws. *See* 2 GAR Div. 4 § 12109; *id.* § 9104. A government employee engaging in misconduct may also be subject to potential criminal liability if they engage in criminal conduct, such as the theft of honest services. *See, e.g.*, 18 U.S.C. § 1346 (2006).

[72] Third, late discovery of malfeasance would not leave plaintiffs without a civil remedy. The requirement to exhaust administrative remedies applies only to those claims that directly arise under the Procurement Code and are filed in the Superior Court under 5 GCA § 5480. The exhaustion requirement would not bar a party from filing suit against parties other than the procuring agency or raising claims that do not arise under the Procurement Code. In this very case, in fact, DFS filed claims against Lotte for interference with prospective economic advantage. *See* RA, tab 1 at 37 (Compl.). Such claims are not subject to the same exhaustion requirements as those claims filed pursuant to section 5480, as exhaustion is not required "where the administrative agency lacks jurisdiction to make a judicial determination of the type involved."[15] *Nat'l Union Ins. Co. of Pittsburgh, Pa. v. Ins. Comm'r of Guam*, Civ. No. 83-0037A, 1984 WL 48863, at *5 (D. Guam App. Div. May 4, 1984); *see also Rojo*, 801 P.2d at 383-88 (finding that statutory

[14] The automatic stay provision of Guam's Procurement Code also provides a significant safeguard against government malfeasance negatively impacting the public fisc. *See* 5 GCA § 5425(g) (2005).

[15] The fact that the procurement law may provide "broad judicial review even of claims and remedies that *could not have been sought* before the agency," as DFS argues, Appellee's Br. at 38, is beside the point. In focusing so heavily on the grant of jurisdiction under section 5480 to consider claims for declaratory or other relief, DFS intermingles two distinct concepts: (1) whether a party must exhaust their administrative remedies with respect to each and every claim asserted; and (2) whether a court may hear claims, and whether exhaustion is required of claims, over which the administrative bodies have no jurisdiction. It is axiomatic that a party need not exhaust claims over which the relevant administrative agencies would not have jurisdiction. *See, e.g.*, *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004) ("[O]ne need not exhaust administrative remedies that would be futile or impossible to exhaust.").

employment discrimination claims must be exhausted but non-statutory claims over which administrative body did not have jurisdiction need not be exhausted).

[73] Fourth, even for claims that do arise under the Procurement Code, we know of nothing that would bar a plaintiff from raising additional procurement-related claims in an appropriate case or from filing additional protests. While the OPA's regulations prohibit the Public Auditor from addressing protests that are already pending in court, this is limited to "action[s] concerning *the protest*," not actions concerning the *procurement*. *See* 2 GAR Div. 4 § 9101(i) (emphasis added). Even in this *sui generis* case at bar, where the Public Auditor recused herself, DFS was still able to assert multiple procurement protests.

[74] In short, none of the arguments raised by DFS justify permitting a party to lie in wait during the procurement protest process only to raise defects in the solicitation, evaluation, or award for the first time in the Superior Court. While there may be situations where this would be permissible, such as where exhaustion of administrative remedies would be futile, a broad-based rule excusing a party from properly exhausting each of its claims is not justified by the statutory text or sound policy.[16] Rather, an aggrieved bidder must raise known defects in the solicitation process during the administrative review phase before pursuing such claims in Superior Court. This allows the Public Auditor and OPA to do what they were designed—and required—to do under the statutory

[16] DFS also asserts that "pure questions of law" need not be administratively exhausted. *See* Appellee's Br. at 44-45. Such an exception under the Procurement Code would undermine the reason for imposing an exhaustion requirement in the first place, including the quick resolution of procurement disputes, the protection of the island's public funds, and the preservation of all prospective bidders' interest in the fair award of government contracts. *See James Hamilton Constr. Co. v. State ex rel. N.M. State Highway & Transp. Dep't*, 68 P.3d 173, 174 (N.M. Ct. App. 2003). We have never adopted such an exception to the administrative exhaustion requirement and decline to do so for those claims arising under the Procurement Code. *Cf. Barrett-Anderson v. Camacho*, 2015 Guam 20 ¶ 24 ("[T]he doctrine of exhaustion of administrative remedies may not be circumvented by bringing . . . actions for declaratory relief." (second alteration in original) (quoting *Bleeck v. State Bd. of Optometry*, 95 Cal. Rptr. 860, 871 (Ct. App. 1971))); *Chen v. Bd. of Trs. of Guam Mem'l Hosp. Auth.*, D.C.A. No. 84-0046A, S.C. Civ. No. 51-84, 1986 WL 68521, at *4-6 (D. Guam App. Div. Apr. 17, 1986) (finding trial court did not abuse discretion in refusing to grant declaratory relief where plaintiff failed to exhaust administrative remedies).

scheme. Accordingly, when a party raises the failure of plaintiff to exhaust administrative remedies, the court must examine each issue or claim in the case to see if any falls within the jurisdiction of the trial court.

b. GIAA is entitled to summary judgment on DFS's "success fee" claims in the first procurement protest complaint

[75] Having determined that DFS was required to exhaust each of its claims arising under the Procurement Code before filing suit in the Superior Court, we turn now to the question of whether DFS has actually exhausted each claim. In its motion for summary judgment on DFS's first procurement protest claim, GIAA argued that DFS failed to exhaust its claims related to a "success fee" paid by Lotte, including DFS's Twelfth and Thirteenth Causes of Action. *See* RA, tab 493 at 10-11 (GIAA's Mem. P. & A. Supp. Mot. Summ. J. re: 1st Protest, Apr. 13, 2017). Below, the trial court determined that exhaustion was not necessary and therefore never addressed whether DFS had exhausted its claims as a factual matter. *See* RA, tab 976 at 6-10 (Dec. & Order re: 1st Protest). Generally, this question should be considered in the first instance by the Superior Court. *See, e.g.*, *Spinedex Physical Therapy USA Inc. v. United Healthcare of Ariz., Inc.*, 770 F.3d 1282, 1299 (9th Cir. 2014). Where the record is sufficiently developed, however, we may address questions on appeal in the first instance. *See Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 99; *Guam Imaging*, 2004 Guam 15 ¶ 32. Because the entire procurement record has been made part of the record on appeal, we find the record to be sufficiently developed to address this issue ourselves.

[76] We review the facts in the light most favorable to DFS. *See Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citing *Iizuka Corp.*, 1997 Guam 10 ¶ 8). In the first protest complaint, DFS asserted two causes of action against GIAA related to Lotte's payment of a "success fee" to a consultant used as part of the procurement process. The first claim, DFS's Twelfth Cause of Action, seeks

declaratory relief based upon an alleged violation of 5 GCA § 5631(a). The second claim, DFS's Thirteenth Cause of Action, alleged that GIAA improperly denied its first protest by violating this same provision. Both claims were based on allegations that Lotte paid two consultants fees that were contingent on Lotte being awarded the procurement. Upon our review of the record, we find that DFS failed to raise any issue related to the payment of a success fee by Lotte in any of the three procurement protests filed with GIAA or in any of the three appeals to the Public Auditor. There is no factual dispute in this respect. Accordingly, we find that GIAA is entitled to summary judgment on DFS's Twelfth and Thirteenth Causes of Action in the first protest complaint.[17]

C. Timeliness and the Procurement Law

[77] Procurement protests must be "submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 GCA § 5425(a); *see also Guam Imaging*, 2004 Guam 15 ¶ 25. "Protests filed after the 14 day period shall not be considered." 2 GAR Div. 4 § 9101(c)(1). This statutory and regulatory mandate is clear. In *Teleguam Holdings II*, we held that the timeframes set forth in the Procurement Code are jurisdictional in nature—i.e., the failure to abide by these timeframes will deprive the Superior Court of jurisdiction. *See Teleguam Holdings II*, 2018 Guam 5 ¶¶ 20-21; *see also Rivera v. Guerrero*, 4 N.M.I. 79 (1993).

[78] GIAA argues on appeal that the trial court committed a series of legal errors in analyzing the timeliness of DFS's protests, including adopting an incorrect view of when the time period to protest starts to run and relying on the doctrine of equitable tolling to excuse DFS's late-filed protests. *See* Appellant's Br. at 40-47. Because GIAA appeals the trial court's decision on competing motions for summary judgement, we must first determine the law in this area. *See*

[17] We address DFS's third protest complaint separately below.

generally Guam R. Civ. P. 56(c). Thereafter, we consider the timeliness of DFS's protests "in relation to the underlying facts," *Guam Imaging*, 2004 Guam 15 ¶ 24, viewed in the light most favorable to the non-moving party, *see Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citing *Iizuka Corp.*, 1997 Guam 10 ¶ 8). In applying this standard, we find that: (1) the trial court committed legal error in applying the doctrine of equitable tolling; (2) DFS's claims related to the GVB Delegation trip were untimely as a matter of law; (3) material questions of fact prohibit the grant of summary judgment in favor of GIAA on DFS's claims related to the use of random letter designations; and (4) there exists material questions of fact related to the timeliness of claims asserted in DFS's third procurement protest complaint.

1. The trial court erred in adopting equitable tolling for determining the timeliness of a procurement protest

[79] We first consider the doctrine of equitable tolling. The trial court relied upon this doctrine to find that the time period to assert both the second and third procurement protests was "tolled by the activation of the First Protest's automatic stay." RA, tab 978 at 18 (Dec. & Order GIAA's Mot. Summ. J. re: 2d Protest, Feb. 2, 2018); RA, tab 981 at 8, 19 (Dec. & Order GIAA's Mot. Summ. J. re: 3d Protest, Feb. 2, 2018); RA, tab 980 at 6, 9 (Dec. & Order re: DFS's Mot. Summ. J. re: 3d Protest). This was legal error.

[80] "Equitable tolling suspends the running of a limitations period . . . ." *Guam Hous. & Urban Renewal Auth. v. Dongbu Ins. Co.*, 2001 Guam 24 ¶ 10 [hereinafter "*GHURA*"]. We first adopted this doctrine in *GHURA*, but later noted that we had done so in that case only "in the narrow context of insurance claims." *Taitano v. Calvo Fin. Corp.*, 2008 Guam 12 ¶ 44 n.4 (citing *GHURA*, 2001 Guam 4 ¶ 14); *see also Ignacio v. People*, 2012 Guam 14 ¶ 42 n.4 (per curiam). Since *GHURA*, we have not adopted this doctrine in any other case. *See Taitano*, 2008 Guam 12 ¶ 44 n.4 (noting similarity between application of equitable tolling and discovery rule).

[81] There are two types of statutes of limitation. *See In re Dep't of Agric. v. Guam Civil Serv. Comm'n (Rojas)*, 2014 Guam 22 ¶ 11 n.4 (citing *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011)). One type is treated as an affirmative defense in that it protects an individual defendant's case-specific interest in timeliness. *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008). This category of timeliness limitation "typically permit[s] courts to toll the limitations period in light of special equitable considerations." *Id.* The second category, in contrast, represents a "jurisdictional" bar and seeks "to achieve . . . broader system-related goal[s], such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Id.* at 133-34 (internal citations omitted). Under our decision in *Teleguam Holdings II*, the time limits set forth for prosecuting a procurement protest fall into this second category. *See* 2018 Guam 5 ¶¶ 20-21; *see also* 2 GAR Div. 4 § 9101(c)(1); *Rivera*, 4 N.M.I. at 79.

[82] Statutes of limitations like that under the procurement law are treated "as more absolute" and "forbid[] a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand & Gravel Co.*, 552 U.S. at 133-34. Likewise, and contrary to the position put forth by DFS, *see* Appellee's Br. at 48, such statutes cannot be waived by the government, *see John R. Sand & Gravel Co.*, 552 U.S. at 134; *see also Dolan v. United States*, 560 U.S. 605, 610 (2010) ("The expiration of a 'jurisdictional' deadline prevents the court from permitting or taking the action to which the statute attached the deadline. The prohibition is absolute. *The parties cannot waive it*, nor can a court extend that deadline for equitable reasons." (emphasis added)).

[83] Time limits that are jurisdictional must be enforced "even if equitable considerations would support extending the prescribed time period." *United States v. Kwai Fun Wong*, 575 U.S. 402,

409 (2015) (citing *John R. Sand & Gravel Co.*, 552 U.S. at 133-34). For this reason, we vacate those portions of the trial court's decisions on GIAA's second[18] and third motions for summary judgment that found that DFS's second and third procurement protests were timely based upon the doctrine of equitable tolling.

2. When does the statutory time begin to run?

[84] We turn now to the question of when the 14-day window to protest begins to run. Our analysis of this question begins with the statutory text. *See, e.g.*, *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6. Pursuant to section 5425(a), the timeframe to protest a procurement runs from when "such aggrieved person knows or should know of the facts giving rise thereto." 5 GCA § 5425(a). We have stated that a party becomes "aggrieved" under the procurement law at the point at which they become entitled to a remedy. *See Teleguam Holdings II*, 2018 Guam 5 ¶ 37 (citing *Party*, *Black's Law Dictionary* (10th ed. 2014)). This remedy may be premised on the conduct or "actions of [government] employees, bidders, offerors, contractors, or other persons." 2 GAR Div. 4 § 9104(a)(2). It must be based, however, on allegations that the procurement is not "in accordance with the statutes, regulations, and the terms and conditions of the solicitation." 5 GCA § 5480(a). Thus, a party becomes "aggrieved" when they become aware of a violation of one of the procurement law's substantive provisions or the terms of the RFP. *Cf. MSG Grp., Inc. v. Dep't of Pub. Welfare*, 902 A.2d 613, 617 (Pa. Commw. Ct. 2006) ("[A]s an aggrieved prospective bidder, any rights it has to protest the bid solicitation are derived solely from the Procurement Code.").

[18] Unlike in its decision denying GIAA's motion for summary judgment on the third protest complaint, the court below did not substantively address the timeliness of DFS's second procurement protest beyond its holding that equitable tolling made the second protest timely. GIAA did not argue on appeal that we should direct the trial court to enter summary judgment in its favor with respect to the second procurement protest complaint on the basis of timeliness. Therefore, this issue has been waived for purposes of this appeal, and vacatur—rather than reversal—is the appropriate disposition with respect to DFS's second procurement protest complaint. *See Ukau v. Wang*, 2016 Guam 26 ¶ 55.

For this reason, "[p]rotestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer." 2 GAR Div. 4 § 9101(c)(2). And "there may be multiple events in any given solicitation that could legitimately trigger protests." *Guam Imaging*, 2004 Guam 15 ¶ 28 (citing 26 GAR § 16901(c)(2)).

[85] DFS asserts that "timeliness is evaluated based on the notice of the proposed award, not notice of the underlying facts that gave rise to the protest." Appellee's Br. at 77. We reject this argument, which is directly contrary to the statutory text. *See* 5 GCA § 5425(a). In support of this argument, DFS puts much stock into our statement in *Teleguam Holdings II* that "[a]n aggrieved party is '[a] party entitled to a remedy.'" 2018 Guam 5 ¶ 37 (alteration in original) (quoting *Party*, *Black's Law Dictionary* (10th ed. 2014)). This statement, however, was nothing more than a recognition that an "aggrieved" bidder is one that has standing to bring a protest. *See id.* ¶ 14 ("A party must be 'legally aggrieved' to have standing."). Courts have consistently rejected DFS's argument that a party becomes "aggrieved" for purposes of a procurement protest "only when it loses the potential business, that is, when a bidder learns that it was not awarded a contract." *In re Acme Am. Refrigeration, Inc. v. N.Y.C. Dep't of Educ.*, 933 N.Y.S.2d 509, 513 (Sup. Ct. 2011); *see also Legal Aid Soc'y v. City of New York*, 662 N.Y.S.2d 303, 306 (App. Div. 1997); *Gateway Health Plan, Inc. v. Dep't of Human Servs.*, 172 A.3d 700, 705 (Pa. Commw. Ct. 2017) (collecting cases).

[86] How a protest is framed by the aggrieved bidder—including whether they frame the protest as a challenge to the solicitation, the evaluation, or the award—does not dictate when the time period to file a protest begins to run.[19] *See, e.g.*, *Blue & Gold Fleet, L.P. v. United States*, 492

[19] GIAA argues that the trial court erred in making an inference in DFS's favor that the protest was to the award and not a solicitation. *See* Appellant's Br. at 46, 81-83. A court should not be making an inference in favor of

F.3d 1308, 1313 (Fed. Cir. 2007) ("While [protester] characterizes this as a challenge to the evaluation of [other bidder's] proposal, we agree with the Court of Federal Claims that this argument is properly characterized as a challenge to the terms of the solicitation."); *Certified Constr., Inc. v. Crawford*, 382 P.3d 127, 132 (Haw. 2016) (examining protest and determining that it was a challenge to bid disqualification rather than solicitation for purposes of determining timeliness). For example, when "an offeror misses its opportunity to fairly challenge the terms of a solicitation, it cannot then be allowed to avoid the timeliness bar by mischaracterizing its case as an evaluation challenge." *Amazon Web Servs., Inc. v. United States*, 113 Fed. Cl. 102, 113 (2013).

[87] Section 5425(a) speaks not in terms of *what* is being protested but in terms of knowledge of the facts giving rise to a protest. 5 GCA § 5425(a); *see also* 2 GAR Div. 4 § 9101(c)(1). Therefore, a protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely. This is true "even if no contract has yet been awarded, even if the protest was filed within [14] days of the agency's selection of bidders or offerors, and even if the protestant did not subjectively understand or appreciate the ground for protest." *Gateway Health Plan*, 172 A.3d at 705 (collecting cases); *see also UnitedHealthcare of Pa., Inc. v. Dep't of Human Servs.*, 172 A.3d 98, 108 (Pa. Commw. Ct. 2017) (collecting cases) (same). As we stated in *Guam Imaging*:

> [A] protest filed by an actual offeror in the context of a . . . procurement of services through an RFP that may be aggrieved by the solicitation is timely if the protest is received by the [procuring agency] within fourteen days of when the protestor knew or should have known of the facts giving rise to the protest.

2004 Guam 15 ¶ 25 (citations omitted).

either party with respect to determining the legal basis for a party's protest; it was improper for the trial court to do so in this case. Only factual inferences may be drawn in the non-moving party's favor. *See Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 289 (6th Cir. 1999).

[88] Where the question of when the statute of limitations begins to run turns on what a reasonable person should have known, a mixed question of law and fact is presented. *See Rose v. United States*, 905 F.2d 1257, 1259 (9th Cir. 1990); *Heimer v. Antelope Valley Improvement & Serv. Dist.*, 226 P.3d 860, 864 (Wyo. 2010) ("The application of the discovery rule to a statute of limitations involves a mixed question of law and fact . . . ."); *Scharf v. Edgcomb Corp.*, 864 A.2d 909, 916 (Del. 2004); *see generally Guam Imaging*, 2004 Guam 15 ¶¶ 33, 36. Therefore, in order to determine the date on which the 14-day window of section 5425(a) begins to run, the court must conduct an analysis examining what facts are necessary to establish a protest claim and when the protester knew, or should have known, facts establishing the essential elements of that protest claim. *See* 5 GCA § 5425(a); *see also Omnicare, Inc. v. Dep't of Pub. Welfare*, 68 A.3d 20, 26 (Pa. Commw. Ct. 2013) (finding challenge to solicitation was timely and that date of posting of contract was date on which timeliness requirement began to run because that is when protester was informed of facts on which its protest was based). This determination "depends on the cumulation of facts available to the protester." *City & Cty. of San Francisco v. United States*, 130 F.3d 873, 877-78 (9th Cir. 1997); *Scharf*, 864 A.2d at 916; *see also Airline Constr. Co. v. Ascension Parish Sch. Bd.*, 568 So. 2d 1029, 1035 (La. 1990).

[89] There may be situations in which the announcement of an award reveals new facts forming the basis of a protest or where the award is a key fact itself that forms the basis of a protest. *See, e.g.*, *Guam Imaging*, 2004 Guam 15 ¶¶ 33, 36; *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1560-61 (Fed. Cir. 1996) (affirming finding by General Services Administration that protest filed within 10 days of announcement of reinstatement of award was timely); *In re Bos. Culinary Grp., Inc. v. N.Y. State Olympic Reg'l Dev. Auth.*, 796 N.Y.S.2d 188, 190 (App. Div. 2005) (finding statute of limitations ran from date successful bidder was announced). But as a general proposition, when

alleged misconduct forms the basis of a procurement protest, the time runs from the date on which the protesting party first learned of the purported misconduct. *See Widnall v. B3H Corp.*, 75 F.3d 1577, 1585 (Fed. Cir. 1996) (finding party failed to adequately plead that protest was timely because it did not plead facts related to when it first learned of misconduct).

3. Were DFS's claims barred as a matter of law under the procurement law's timeliness requirements?

[90] In the trial court, GIAA sought summary judgment on three categories of claims asserted by DFS based upon DFS's alleged failure to timely protest those claims. First, GIAA sought summary judgment on DFS's claims related to the GVB Delegation trip in the first protest complaint. Second, GIAA argued that claims related to the use of random letter designations as part of the procurement, as also pleaded in the first protest complaint, were untimely. And third, GIAA sought summary judgment on the entirety of DFS's third protest complaint.

[91] We address each of these categories of claims in turn, viewing the facts in the light most favorable to DFS, the non-movant. *See Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citing *Iizuka Corp.*, 1997 Guam 10 ¶ 8).

a. The undisputed facts establish that DFS filed its first procurement protest on April 23, 2013

[92] In order to determine whether the claims asserted in DFS's first protest complaint were timely, we must determine when DFS filed its first protest with GIAA. At the trial court level, DFS maintained that its first procurement protest was filed pursuant to the October 30 Letter. *See* RA, tab 1 at 12 (Compl.). The trial court, however, found that DFS did not file its first protest until April 23, 2013. On appeal, DFS appears to have abandoned its original argument. *See* Appellee's Br. at 76 ("DFS timely lodged its First Protest on April 23, 2013 . . . ."). *But see* Appellee's Br. at 85 ("DFS's October 30, 2012 letter to GIAA . . . is sufficient to constitute a

protest, and protect DFS's rights."). In any event, even if viewed in the light most favorable to DFS, the trial court's conclusion is the "only . . . reasonable conclusion [that] can be drawn from the undisputed facts." *Quijano v. Atkins-Kroll, Inc.*, 2008 Guam 14 ¶ 33. The undisputed facts establish that both the October 30 Letter and the April 11 Letter were informal "complaints" made under 2 GAR Div. 4 § 9101(b)—not formal protests.

[93] By its own internal terms, the October 30 Letter stated that it was a mere "letter of concern." RA, tab 152 (Ada Decl.), Ex. B at 2 (Letter from Lamonte "Jim" Beighley to Charles Ada). DFS's internal admissions likewise questioned whether it should "change [its] 'letter of concern' to a formal protest with a stated objective to have [Lotte] disqualified." RA, tab 497 (Decl. Genevieve P. Rapadas Supp. GIAA's Mots. Summ. J. ("Rapadas Decl."), Apr. 13, 2017), Ex. 9 (Email from Jim Beighley to Michael Schriver & Philippe Schaus, Oct. 30, 2012); *see also id.*, Ex. 10 (Email from Jim Beighley to Clifford Guzman, Oct. 30, 2012) ("We need to consider together at some point whether we want to move our position from a 'letter of concern' to a formal protest with a request for disqualification."). There is also no evidence in the record that the October 30 and April 11 Letters were accompanied by the formalities required by 2 GAR Div. 4 § 9101(b)-(c) in submitting a procurement protest. Rather, the October 30 Letter was sent via informal facsimile transmission.

[94] These facts establish a *prima facie* case that neither the October 30 Letter nor the April 11 Letter constituted a formal protest under the Procurement Code. As a result, the burden then shifted to DFS to rebut these claims; DFS could not "simply deny the allegations to create a factual dispute." *Hawaiian Rock*, 2016 Guam 4 ¶ 27. Rather, DFS was "obligated to set forth specific facts showing there is a genuine issue for trial." *Id.* (citing *Gayle*, 2000 Guam 25 ¶ 21; Guam R. Civ. P. 56(e)). DFS has not done so. For these reasons, there can be no "genuine dispute" that

DFS filed its first protest on April 23, 2013. *See Hawaiian Rock*, 2016 Guam 4 ¶ 26 (citing Guam R. Civ. P. 56(c)).

b. The undisputed facts establish that DFS's protest claims related to the GVB Delegation trip were untimely as a matter of law

[95] DFS's first procurement protest contained six causes of action against GIAA related to the GVB Delegation trip. These claims—i.e., the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action—are premised upon an alleged violation of either 5 GCA § 5630(a) or section 5630(d). Under section 5630, it is a breach of ethical standards to either solicit or accept gratuities on behalf of oneself or on behalf of Guam "in connection" with any procurement decision. 5 GCA § 5630(a), (d). The undisputed facts establish that DFS first learned of all of the information underlying its protests regarding the GVB Delegation trip to South Korea no later than October 1, 2012. On that day, DFS Vice President Tak Takano conducted and recorded an interview in which he learned about the trip and the fact that Lotte had provided gifts to GIAA board members. Every factual premise set forth in the first protest letter and the first protest complaint underlying these six claims were uncovered as a result of that interview. The start of the 14-day window to protest based upon these claims therefore started to run on October 1, 2012, when DFS first learned of this misconduct. *See Widnall*, 75 F.3d at 1585.

[96] Despite DFS's efforts to frame its claims differently, *see* Appellee's Br. at 76-80, nothing about the announcement of Lotte as the winning bidder affected DFS's underlying protest or claims concerning the GVB Delegation trip. In its initial protest, DFS sought disqualification of Lotte's bid, a remedy that DFS could obtain prior to the issuance of an award, *see Guam Imaging*, 2004 Guam 15 ¶ 28; 2 GAR Div. 4 § 9101(c)(2). DFS itself acknowledged in its protest letter that this protest could be "*made at any time during the evaluation process* . . . if information surfaces that would result in a determination of non-responsibility." RA, tab 152 (Ada Decl.), Ex. H at 9

(Letter from Att'y William J. Blair to Ada, Apr. 23, 2013) (emphasis added) (quoting RFP); *see also* RA, tab 738 (Decl. G. Patrick Civille Supp. DFS's Mot. Summ. J. re: 3d Protest ("Civille Decl."), Oct. 27, 2017), Ex. 2 at 5 (Req. for Proposal Specialty Retail Merch. Concession ("RFP"), Oct. 31, 2011). DFS asserts that "had GIAA disqualified Lotte for its misconduct . . . DFS and the other proposers never would have been aggrieved and would have had nothing to protest." Appellee's Br. at 79. But this is belied by the express language of DFS's first protest complaint, wherein it asserts in a number of its claims that GIAA's misconduct "deprived [the other proposers] of their right to the full and fair consideration of their respective proposals." RA, tab 1 at 16-37 (Compl.). In other words, DFS's own complaint acknowledges that it was not the award that was the relevant point of injury; rather, the injury occurred when GIAA considered a non-qualifying bid alongside the qualifying bids. This injury started, at its earliest, when Lotte submitted its bid and continued to be considered even though it should allegedly have been disqualified.[20] This injury could easily be remedied by a protest seeking to disqualify Lotte, as internal DFS communications acknowledge.

[97] In *City & County of San Francisco*, the Ninth Circuit found that where—like here—a protester is on notice that another party was submitting a bid proposal but "did nothing to exclude [the other bidder] from the competition," the aggrieved bidder could not be excused from timely filing a protest. 130 F.3d at 878. DFS, for example, specifically questioned whether it needed to "change [its] 'letter of concern' to a formal protest." RA, tab 497 (Rapadas Decl.), Ex. 9 (Email from Jim Beighley to Michael Schriver & Philippe Schaus; *id.*, Ex. 10 (Email from Jim Beighley

[20] DFS additionally asserts that it could not have submitted a protest until at least October 17, 2012, when Lotte submitted its bid proposal. *See* Appellee's Br. at 85. Assuming *arguendo* that the submission of a protest is a key fact necessary to seek disqualification of a bidder, an issue we need not address, this would not save DFS's first protest vis-à-vis the GVB Delegation trip. As noted, *see supra* Part IV.C.3.a, the undisputed facts establish that the first protest was filed on April 23, 2013, which is more than 14 days after October 17, 2012.

to Clifford Guzman). Unlike a situation where a "protester had no basis to believe that an awardee would be considered eligible for award until the protester heard rumors of the agency's award decision[,] . . . there are additional facts on record here to show that the [protester] should have been aware that [the procuring agency] would not exclude [the other bidder] from competition." *City & Cty. of San Francisco*, 130 F.3d at 878. This includes the fact that, like in *City & County of San Francisco*, DFS knew that Lotte "intended to submit a bid proposal in the competitive procurement process" and that "[r]epresentatives of the [DFS] and [Lotte] were present at meetings held by [GIAA] to assist potential bidders." *Id.*; *see also* RA, tab 497 (Rapadas Decl.), Ex. 1 (Email from Michael Schriver to Martin Moodie, Oct. 17, 2012); *id.*, Ex. 18 at 1 (Email from Jim Beighley to Philippe Schaus & Michael Schriver, Mar. 28, 2013) ("[W]e believe we watched Lotte and Shilla submit their proposals."); *id.*, Ex. 19 at 1 (Email from Jim Beighley to Michael Schriver & Harold Brooks, Aug. 24, 2012). Indeed, DFS was informed on October 30, 2012, after bids were submitted, that "[t]here is some expectation that Lotte is a primary contender to DFS and is going to give us a run for our money. (Its [sic] between them and us)." *Id.*, Ex. 9 (Email from Clifford Guzman to Jim Beighley, Oct. 30, 2012).

[98] The Ninth Circuit in *City & County of San Francisco* also specifically rejected the argument that a protester should be excused from timely protesting because it reasonably believed that the procuring agency would disqualify the other bidder after initial proposals were submitted. 130 F.3d at 878. "In relying on its belief that [the procuring agency] would exclude the proposal, the [protester] acted at its peril." *Id.*; *see also Saco Def. Sys. Div. v. Weinberger*, 806 F.2d 308, 313-14 (1st Cir. 1986) (rejecting plaintiff's reliance on belief that agency would not act as it did for purposes of timeliness determination).

[99] We reject DFS's argument that "[r]egardless of when DFS allegedly knew or should have known about GIAA's and Lotte's underlying misconduct, none of that underlying misconduct became relevant—to the extent it would serve as the basis for a protest—unless GIAA proposed to award the concession to Lotte." Appellee's Br. at 78; *see, e.g.*, *Saco Def. Sys.*, 806 F.2d at 314 (rejecting plaintiff's "attempts to circumvent this [protest] deadline by asserting that the [action being protested] 'could not have been known to it until after the competition was over and the contract awarded'"). The mere granting of a procurement award will not resuscitate the timeliness of a protest where the aggrieved bidder was aware of all the facts necessary to file a protest at an earlier point in time. *See Amazon*, 113 Fed. Cl. at 113-14. "Vendors cannot sit on their rights to challenge what they believe is an unfair solicitation, roll the dice and see if they receive the award and then, if unsuccessful, claim the solicitation was infirm." *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 175 n.14 (2005); *see also Blue & Gold Fleet*, 492 F.3d at 1314; *CRAssociates, Inc. v. United States*, 102 Fed. Cl. 698, 712-713 (2011) (finding that protester cannot "hold[] its fire until after the contract was awarded to its competitor"). The same must be true for the evaluation process. To hold otherwise would undermine "important goal[s] of the Procurement Code," such as ensuring "that protests are to be made and resolved quickly and in furtherance of protecting the public fisc and . . . assuring the fairness of the procurement process." *James Hamilton Constr. Co.*, 68 P.3d at 174.

[100] DFS is correct in its statement that *Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308 (Fed. Cir. 2007), a case relied upon heavily by GIAA, set forth a rule of waiver not directly applicable in this protest appeal, as that case dealt with the distinction between patent and latent errors in a solicitation. *See* Appellant's Br. at 82 n.19; *see also Blue & Gold Fleet*, 492 F.3d at 1313-14. The underlying rationale of *Blue & Gold Fleet* that parties should not be able to sit on

their rights, however, is expressed throughout the public bidding case law. For example, in *Airline Construction Co. v. Ascension Parish School Board*, 568 So. 2d 1029 (La. 1990), the Louisiana Supreme Court found that a protest is untimely where an aggrieved bidder does not protest at the time "when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder and when corrective action as a practical matter can be taken by the public body." 568 So. 2d at 1035. "[T]imeliness . . . depends on the facts and circumstances of the particular case . . . ." *Id.* But, "[i]t is expected that an aggrieved bidder will 'zealously protect' the public interest and the public purse by taking legal action to ensure that a contract is not awarded to the wrong bidder." *PRN Assocs. LLC v. Dep't of Admin.*, 766 N.W.2d 559, 571 (Wis. 2009). "[G]amesmanship [that] undermines the integrity of the procurement process . . . should not be rewarded with circumvention of the timeliness requirement." *Amazon*, 113 Fed. Cl. at 114. If a party "acquiesce[s]" in an agency's conduct in a procurement, it waives any right to protest that conduct. *Airco, Inc. v. Energy Research & Dev. Admin.*, 528 F.2d 1294, 1300 (7th Cir. 1975) (per curiam). Indeed, some courts have expressly found that the reasoning in *Blue & Gold Fleet* should be applied in other contexts, including the evaluation of proposals. *See Synergy Sols., Inc. v. United States*, 133 Fed. Cl. 716, 739-40 (2017). Thus, "any defects that could potentially be raised and resolved prior to the contract award" places "an obligation [on the aggrieved bidder] to raise its concern" as soon as practicable. *Id.*

[101] DFS relies almost entirely on the Federal Circuit's decision in *Data General Corp. v. Johnson*, 78 F.3d 1556 (Fed. Cir. 1996), to support its position. That case, however, presents a unique factual and procedural posture that readily distinguishes it from the facts here. DFS knew all along that Lotte was bidding on the RFP and was being seriously considered by GIAA. In *Data General*, in contrast, the protester "became aware of the communications between GSA and [the

winning bidder] during the prior protest proceedings, [which] challenged only the initial award of the contract to [the winning bidder]." 78 F.3d at 1560. In this way, the facts here are much more analogous to those of *City & County of San Francisco*. *See* 130 F.3d at 878. Additionally, the court in *Data General* was concerned with the unique procedural posture of the protest and the potential unfairness that would result if the protester were not allowed to raise its challenge in the later-filed protest. *See* 78 F.3d at 1560. The court stated:

> GSA terminated that contract in the summer of 1994, . . . after the Board had dismissed the protest with prejudice. If Data General had raised in that earlier protest proceeding its present contention regarding the communications between GSA and [the winning bidder], the Board's dismissal of that protest would have mooted both Data General's protest and the issue. After those actions by the Board and GSA, there no longer existed any agreement between GSA and [the winning bidder].

Id. There is no potential unfairness on the facts of the case at bar, where DFS knew GIAA board members had accepted gifts from Lotte before bids were even submitted and that Lotte was in consideration for the award throughout the bidding process.[21]

[102] While there are different remedies provided in the procurement law based upon whether a protest is pre-award or post-award, *see* 5 GCA § 5451, there is only one form of action—a protest, *see* 5 GCA § 5425(a). And while this protest may be based on any number of events, *see Guam Imaging*, 2004 Guam 15 ¶ 28; 2 GAR Div. 4 § 9101(c)(2), whether the granting of an award is a material fact depends on the circumstances of the case. With respect to DFS's claims related to

[21] As a final argument, DFS asserts that its protest was timely with respect to claims related to the GVB Delegation trip under the doctrines of "continuing wrong" and the futility exception. *See* Appellee's Br. at 85-86. The futility exception adopted in *Barrett-Anderson* might excuse a party from exhausting its administrative remedies, but it does not excuse a delay in seeking timely relief. *See* 2015 Guam 20 ¶ 32. We have never adopted the "continuing offense" doctrine in the context of the procurement law, and DFS cites no authority for the proposition that it should apply in this case. Unlike here, the statute of limitations begins to run on an employment claim—the type of claim at issue in *Limtiaco v. Guam Fire Dep't*, 2007 Guam 10—"*either* when the course of conduct is brought to an end . . . *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain." 2007 Guam 10 ¶ 54 (alterations in original) (quoting *Richards v. CH2M Hill, Inc.*, 29 P.3d 175, 190 (Cal. 2001)). That is not the case with respect to claims arising under the procurement law. This rule therefore does not apply in this context.

the GVB Delegation trip, the grant of the award to Lotte did not disclose any material facts, nor was the award a material fact in and of itself. For all these reasons, we reverse the trial court's decision that DFS's protest was timely filed with respect to its claims related to the GVB Delegation trip. These claims were not filed within 14 days of when DFS knew or should have known of the facts giving rise to these protest claims. 5 GCA § 5425(a); *see also Widnall*, 75 F.3d at 1585. We therefore direct the trial court to enter summary judgment in favor of GIAA on DFS's Third, Fourth, Fifth, Sixth, Seventh, and Eighth Causes of Action in its first procurement protest complaint.[22]

c. Viewed in the light most favorable to DFS, its protest of GIAA's use of random letter designations was timely filed

[103] In its first protest complaint, DFS asserted in its Ninth, Tenth, and Eleventh Causes of Action that GIAA had not acted impartially in violation of 5 GCA § 5625. These claims were based, in part, on allegations that GIAA used an ad hoc "magical process" to select Lotte as the most qualified bidder, including by assigning bidders random letter designations as part of the evaluation process.[23] *See* RA, tab 1 at 11-12, 25-28 (Compl.). DFS argues that it did not become aware that random letter designations would be used until April 12, 2013, at the earliest, when GIAA accepted management's rankings based upon the random letter designation process. GIAA,

[22] To the extent that DFS has raised claims that GIAA did not adequately investigate the GVB Delegation trip, *see* RA, tab 152 (Ada Decl.), Ex. H at 2-4 (Letter from Att'y William J. Blair to Ada, Apr. 23, 2013); RA, tab 1 at 13 (Compl.), or "ignored Lotte's misconduct," RA, tab 1 at 25 (Compl.), this timeliness finding should not apply to these claims. It is not clear in the record when DFS knew, or reasonably should have known, that GIAA had conducted an inadequate investigation. GIAA has not raised this defense in its summary judgment motion or on appeal. Likewise, GIAA has not raised the timeliness of DFS's false affidavit claims on appeal. To the extent these claims are based on the affidavits containing false information related to the GVB Delegation trip, it is not clear from the record when DFS become aware that false affidavits were submitted.

[23] We note that these claims are also premised on additional factual allegations, including Lotte "submitting false affidavits in its RFP proposal" and "orchestrat[ing] a denial of DFS's protest in a manner that deprived DFS of its right to obtain a prompt review of GIAA's and Lotte's misconduct while taking the additional, self-serving step of purportedly clearing Lotte and GIAA's Board members of any wrongdoing." *See* RA, tab 1 at 26-27 (Compl.). Accordingly, we view GIAA's motion for summary judgment as a motion for partial summary judgment with respect to these claims.

on the other hand, argues that DFS became aware of the use of random letter designations no later than March 28, 2013. *See* Appellant's Br. at 50. Viewed in light most favorable to DFS, the non-moving party, we find that material questions of fact exist regarding when DFS reasonably knew, or should have known, that random letter designations would be used by the GIAA board in selecting the most qualified proposer. Accordingly, the trial court properly denied summary judgment in favor of GIAA on any portion of DFS's Ninth, Tenth, and Eleventh Causes of Action in its first protest complaint.

[104] Random letter designations were first assigned to each of the competing bids on March 28, 2013. Later that same day, DFS became aware of the potential use of these designations when the GIAA Board met in order to approve the award of the specialty retail concession, as indicated on the agenda of that meeting. As revealed in the minutes of the March 28 board meeting, the order of rankings based upon the random letter designations were disclosed. "Director Untalan inquired about the random letter designation, to which Legal Counsel Damian responded that the letter designation was in the order of how the proposals were received," and Director Untalan questioned how the designations were handled after being assigned. RA, tab 492 (Decl. Charles H. Ada II Supp. GIAA's Mot. Summ. J. re: 1st & 2d Protests ("Ada Decl. re: 1st & 2d Protests"), Apr. 13, 2017), Ex. D at 3 (Mins. GIAA Bd. Dirs. Regular Mtg., Mar. 28, 2013); *see also* RA, tab 497 (Rapadas Decl.), Ex. 17 at 3-4 (Emails between Jim Beighley and Kevin Kerrigan, Apr. 1, 2013).

[105] After some additional questions, "[d]iscussion followed with Acting Chairman Torres questioning the assignment of the random letter designation, leaving the names of the proposers confidential. He stated that the Airport has never done this before, and [he] found the process to be questionable." RA, tab 492 (Ada Decl. re: 1st & 2d Protests), Ex. D at 5 (Mins. GIAA Bd. Dirs. Regular Mtg., Mar. 28, 2013). Following a brief recess, approval of the award was tabled so

that legal counsel could review the matters raised. Representatives of both Lotte and DFS were present at this meeting. In light of the questions raised by the GIAA board members, and viewed in the light most favorable to DFS, *see Hawaiian Rock*, 2016 Guam 4 ¶ 27, it was not clear as of this meeting that the preliminary process for maintaining confidentiality—and the use of random letter designations—would continue to be used by GIAA to award the RFP going forward.

[106] The following day, DFS's executive vice president emailed Frank Taitano, the single point of contact for GIAA, "to seek clarification on statements that were made" during the board meeting. *See* RA, tab 492 (Ada Decl. re: 1st & 2d Protests), Ex. E at 1 (Email from Jim Beighley to Frank Taitano, Mar. 29, 2013). According to this email, legal counsel to GIAA stated at the meeting that "the process was 'random' and also that the letters were assigned 'based on the order in which the proposals were received.'" *Id.* By letter, dated April 5, 2013, GIAA responded by stating the following:

> To clarify, letters (A, B, C, or D) were randomly selected by lottery and then assigned to the proposers starting with the first proposal received. The first proposal received was assigned a randomly selected letter (A, B, C, or D), then, the second proposal received was assigned a randomly selected letter from among the remaining letters (A, B, C, or D), and so on. The proposers were not assigned letters in alphabetical order.

Id., Ex. F at 1 (Letter from Charles H. Ada II to Lamonte J. Beighley, Apr. 5, 2013). While this correspondence explained how the initial letter designations were assigned, it did not indicate that the legal questions raised by GIAA board members had been resolved or that the board would continue to use this process in approving the award. It was not until the next board meeting, which occurred on April 12, 2013, that it ultimately became clear that the board would utilize the random letter designations in approving the award. DFS also attended this meeting.

[107] There is some evidence in the record indicating that DFS *believed* that the random letter designations would be used in approving the award. *See* RA, tab 497 (Rapadas Decl.), Ex. 17 at

1 (Email from Jim Beighley to Kevin Kerrigan, Apr. 5, 2013) ("Board will approve award based on letter system and then the GM will announce who proposer A is following Board approval."). But this does not establish that DFS knew this for certain, or that a reasonable person would know for certain. In light of the questions raised by the GIAA board's own members, there was significant reason to believe that the board might consider reversing course and adopt a more traditional process for selecting the most qualified proposer. The transcript of the April 12 board meeting indicates that it was not until this time that the directors indicated that their questions had been adequately addressed to their satisfaction.

[108] Viewing these facts in the light most favorable to DFS, it is entirely possible that despite the expectation by DFS that the random letter designations would continue to be used, the questions raised by board members were significant and had the potential to cause GIAA to abandon its preliminary use of random letter designations. In the procedural posture of the case as it currently stands, the time in which DFS had to file a protest regarding the use of random letter designations did not begin to run until the April 12, 2013 board meeting. The first procurement protest on April 23, 2013, was therefore timely with respect to DFS's claims regarding the use of these random letter designations, *see* 5 GCA § 5425(a). We thus affirm the trial court's denial of summary judgment in GIAA's favor on DFS's Ninth, Tenth, and Eleventh Causes of Action in the first protest complaint.

4. There are disputed questions of fact regarding whether DFS's third procurement protest was timely filed

[109] In DFS's third protest complaint, all of its claims (except those related to the procurement law's automatic stay provisions) were premised on GIAA's failure to adopt non-airline concessions criteria as required by 12 GCA § 1203.1. *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0198-15 (Compl. at 10-14 (Mar. 10, 2015)). Section 1203.1 provides as follows:

> (a) Any agreement between [GIAA] and any other party concerning the operation of a concession, other business or a service provider at [GIAA] shall conform to the following:
>
> . . .
>
> (2) criteria established for the operation of a concession, other business or service provider at the [GIAA], which criteria shall be reviewed at a public hearing held within ninety (90) days of the effective date of this Section, and held in accordance with the Administrative Adjudication Law[.]

12 GCA § 1203.1(a)(2) (2005). In moving for summary judgment, GIAA asserted that DFS was aware for years prior to the RFP that GIAA had failed to formally adopt non-airline concessions criteria as required by this statute. If that were established, then DFS's third protest would be untimely. The record before the court, however, is not so clear.

[110] In denying GIAA's motion and in granting DFS's competing motion for summary judgment on the third protest complaint, the trial court found that DFS's claims were equitably tolled. As noted above, this was legal error. The trial court held in the alternative, however, that if the time to file DFS's third protest was not tolled, material questions of fact prohibited a grant of summary judgment on the question of timeliness. *See* RA, tab 981 at 8-10 (Dec. & Order GIAA's Mot. Summ. J. re: 3d Protest). Upon a review of the facts, viewed in the light most favorable to DFS, we agree with this alternative holding and find that GIAA was not entitled to summary judgment on these claims.

[111] DFS's third procurement protest was filed on June 7, 2013. DFS argues that it became aware that non-airline concessions criteria were not adopted by GIAA just four days earlier, on June 3, 2013. On that day, GIAA responded to a Sunshine Act request for documents, by stating that it "found no documents responsive" to DFS's request for materials related to the criteria mandated by 12 GCA § 1203.1(a). RA, tab 738 (Civille Decl.), Ex. 16 (Letter from Charles H.

Ada II to Att'y William J. Blair, June 3, 2013). DFS argues that, prior to that date, GIAA took inconsistent positions regarding whether it had adopted the required criteria. *See* Appellee's Br. at 49. GIAA, on the other hand, argues that DFS was expressly informed that no criteria were adopted as early as 2001 and were again so informed in 2003. *See* Appellant's Br. at 56. Therefore, according to GIAA, the time for DFS to protest the solicitation started to run on the date it was issued. *See id.* at 57. In addressing whether GIAA is entitled to summary judgment on these claims, we must resolve any factual questions in favor of DFS. *See Hawaiian Rock*, 2016 Guam 4 ¶ 27 (citations omitted).

[112] Pursuant to section 1203.1, GIAA promulgated a proposed non-airline lease and concession policy (hereinafter, "the Non-Airline Concession and Lease Policy"). A public hearing on these proposed policies was held on October 19, 1995. A representative of DFS gave public testimony during this hearing and submitted written testimony afterwards. It is unclear what happened after this public hearing—and therein lies the crux of the parties' dispute regarding the timeliness of DFS's third procurement protest.

[113] GIAA has taken the position in this litigation that it "has not been able to locate any record that it finally adopted the 1995 Draft Policies or any other non-airline and concession criteria." RA, tab 498 at 1 (Decl. Charles H. Ada II Supp. GIAA's Mot. Summ. J. re: 3d Protest ("Ada Decl. re: 3d Protest"), Apr. 13, 2017). But that was not always the case. In the years that followed GIAA's initial proposal of the Non-Airline Concession and Lease Policy, GIAA appears to have gone back and forth on whether these policies were finalized and formally adopted in accordance with the Administrative Adjudication Law.[24]

[24] DFS also notes that GIAA's own internal communications seemed confused as to whether the Non-Airline Concession and Lease Policy had been adopted. *See* Appellee's Br. at 50-51. We do not consider this evidence relevant, as the pertinent question is what *DFS* knew (or reasonably should have known), and there is no evidence that DFS was made aware of these internal communications prior to being produced during discovery in this litigation.

[114] First, in undated testimony before the 24th Guam Legislature, which sat from 1997-1999, the acting executive director of GIAA represented that "[i]n 1995, the Authority finalized a non-airline lease and concession policy" that "was coordinated with the Guam Legislature." RA, tab 738 (Civille Decl.), Ex. 4 at 3 (GIAA Test. on Pub. Hr'g for Bill No. 543 (COR); An Act to Amend Section 1203.1 of Title 12).

[115] Several years later, in 2001, as part of the prior RFP process for which DFS was the sole proposer, GIAA issued an addendum to the RFP in order to address certain questions raised by DFS. In one question, DFS asserted that:

> [Title] 12 GCA 1203.1(a)(ii) provides that any concession agreement must also conform to operational criteria reviewed at a public hearing held in accordance with the Administrative Adjudication Act within 90 days of the enactment of the statute. Pursuant to the statute, the GIAA on October 19, 1995, held a public hearing on proposed Non-Airline Lease and Concession Policies, date August 1995. *It is DFS' understanding these proposed policies (the "Criteria") were later adopted by the GIAA*.

RA, tab 498 (Ada Decl. re: 3d Protest), Ex. 2 at 1 (Req. for Proposal Airport Retail Merch. Concession Add. #2, Oct. 31, 2001) (emphasis added). In response, however, GIAA stated: "[B]ased on information and belief, the proposed Non-Airline Lease and Concession Policies, dated August 1995 or the 'Criteria' were not fully and properly adopted and promulgated in accordance with the Administrative Adjudication Law pursuant to 12 GCA § 1203.1(a)(ii)." *Id.* at 2.

[116] In June 2003, after a change in gubernatorial administrations, GIAA sent DFS a letter stating that certain of the terms in its concession agreement were not in accord with the law and

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The internal communications of GIAA, however, are indicative of the larger confusion surrounding the question of whether the proposed non-airline concession criteria were formally adopted in accordance with the Administrative Adjudication Law. For purposes of this litigation, both parties have adopted the position that GIAA never adopted concessions criteria as required under statute. In resolving this appeal, we need not, and do not, weigh upon the question of whether the proposed non-airline concessions criteria were formally adopted.

would need to be revised. In writing this letter, GIAA specifically relied upon the 1995 Non-Airline Lease and Concession Policies as authority for asserting that certain lease terms were illegal and in need of reformation. *Id.*, Ex. 4 at 3 (Letter from William R. Thompson to Joseph F. Camacho, June 11, 2003) (citing Non-Airline Lease and Concession Policies, art. 22 §§ 3, 6.1 (Aug. 1995)); *see also id.*, Ex. 5 at 2 (Letter from Joseph F. Camacho to William R. Thompson, June 27, 2003) (DFS noting that current representations were contrary to those made by GIAA in 2001). In an email dated June 26, 2007, counsel for GIAA again stated to counsel for DFS that the draft policy "is the same version which was then finalized after the public hearing." RA, tab 738 (Civille Decl.), Ex. 8 (Email from Att'y Maria T. Cenzon-Duenas to Att'y William J. Blair, June 26, 2007).

[117] In two agreements entered into by DFS and GIAA—one dated March 17, 2006, and the other dated September 2009—a provision was included that specifically stated that GIAA "is subject" to the "Authority's Non-Airline Concession Lease Policies." RA, tab 498 (Ada Decl. re: 3d Protest), Ex. 7 at 9, § 5.1.3 (Concession Agreement Between GIAA & DFS, Mar. 17, 2006); *id.*, Ex. 9 at 7, § 5.1.3(Concession Agreement Between GIAA & DFS, Sept. 2009). This same term was included in the draft Specialty Retail Concession Agreement attached to the 2012 RFP. No bidders asked for clarification regarding the applicability of the Non-Airline Concession and Lease Policy as part of the new RFP solicitation and evaluation process. In this posture, prior to the receipt of GIAA's response to DFS's Sunshine Act request, the last time that GIAA had taken a position on the existence or non-existence of formal non-airline concession criteria, GIAA had led DFS to believe that such criteria had been formally adopted. Viewed in the light most favorable to DFS, a jury could therefore conclude that a reasonable person in the position of DFS would believe that the 1995 draft policies were effective.

[118] GIAA invites the court to ignore its repeated representations made over the course of many years. In GIAA's view, DFS should be held to have constructive knowledge that GIAA failed to adopt non-airline concession and lease criteria because section 1203.1 requires public notice of the criteria being formally adopted. *See* Appellant's Br. at 57; *see also* 12 GCA §§ 1105(l), 1203.1(a)(2) (2005). Constructive notice is notice that "is imputed by law." 1 GCA § 718 (2005). Under Guam law, "[e]very person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of that fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact." *Id.* § 719 (2005). The publication of notice may be sufficient to impart constructive notice on a party for purposes of knowledge of agency action. *See, e.g.*, *Kelley v. Sec'y, U.S. Dep't of Labor*, 812 F.2d 1378, 1379-80 (Fed. Cir. 1987). Here, however, GIAA asks the court to do the opposite—i.e., find that DFS had constructive notice due to the *lack* of publication. GIAA provides no legal support for such a proposition, and we have been unable to find any.

[119] Our constructive notice statute relies upon the "prudent man" standard, 1 GCA § 719, and therefore constructive notice must be "objectively based upon the totality of the circumstances," *Rogers v. Andrus Transp. Servs.*, 502 F.3d 1147, 1152 (10th Cir. 2007) (citation omitted); *see also City & Cty. of San Francisco*, 130 F.3d at 877-78. With this understanding, the lack of publication must be weighed against GIAA's repeated representations—some of which were made during testimony to the Legislature and in official procurement-related correspondence—that the proposed non-airline concessions criteria were officially adopted. In other words, the fact that there was no final publication is a fact placed on the side against DFS in weighing the quantum of facts necessary to put a reasonable person on notice that no criteria were finalized, but this alone is insufficient on the factual record before the court.

[120] Based upon this record, there are material questions of fact regarding when DFS knew or reasonably should have known that GIAA had not adopted non-airline concession and lease criteria as required under section 1203.1. Viewed in the light most favorable to DFS, a jury could conclude based upon representations made by GIAA that DFS was reasonably unaware that GIAA failed to adopt non-airline concession criteria until it received GIAA's response to its Sunshine Act request on June 3, 2013. GIAA is therefore not entitled to summary judgment on these claims on the basis of timeliness.

D. The Trial Court's Grant of Summary Judgment in Favor of DFS on the Third Protest Complaint Must Be Vacated

[121] As the trial court aptly noted, with respect to the timeliness of DFS's third protest complaint, the parties' "competing versions of events utilize identical exhibits and dates, but come to vastly different conclusions." RA, tab 981 at 10 (Dec. & Order GIAA's Mot. Summ. J. re: 3d Protest). The trial court, however, awarded DFS summary judgment on its third protest complaint. Summary judgment is appropriate only when there are no genuine issues of material fact left for trial, including the issue of timeliness. *See* Guam R. Civ. P. 56(c). "The general rule . . . is that where the very statute which creates the cause of action also contains a limitation period, the statute of limitations not only bars the remedy, but also destroys the liability, and hence, plaintiff must *plead and prove* facts showing that he is within the statute." *Baden v. Craig-Hallum, Inc.*, 646 F. Supp. 483, 487 n.2 (D. Minn. 1986). Viewing the facts in the light most favorable to GIAA (as opposed to DFS), as we must in resolving DFS's motion for summary judgment, we find that DFS has failed to establish that its claims pleaded in the third protest complaint are timely as a matter of law. Thus, viewed under the appropriate standard, the trial court's grant of summary judgment in favor of DFS on claims pleaded in the third protest complaint must be vacated. This includes

the automatic stay claims raised in the third protest complaint, which by necessity rely upon the timeliness of the third protest.

[122] Similarly, we must also vacate the grant of summary judgment in favor of DFS on those claims raised for the first time in DFS's motion for summary judgment. *See* Appellee's Br. at 30 (DFS admitting it did not plead certain claims for which trial court granted summary judgment). Putting aside the issue of whether these claims were properly raised at the summary judgment stage,[25] DFS must establish that these claims were both properly exhausted and timely protested in order to be granted judgment on these unpleaded claims. In opposition to DFS's motion for summary judgment, GIAA raised both of these issues. The trial court, however, failed to address them. Failing to address these arguments was error for the reasons noted above, and the grant of summary judgment in favor of DFS must therefore be vacated. In the event that DFS continues to pursue its unpleaded claims on remand, the trial court should consider in the first instance whether they were timely protested and adequately exhausted. *See, e.g.*, *Spinedex Physical Therapy*, 770 F.3d at 1299.

[25] Guam Rule of Civil Procedure 15(b), which allows unpleaded claims to be "tried by express or implied consent of the parties," is identical to the pre-2007 version of Federal Rule of Civil Procedure 15(b). *See Camacho v. Neri*, Civ. No. 76-028A, 1978 WL 13517, at *2 (D. Guam App. Div. Apr. 17, 1978). Therefore, we consider case law interpreting this prior version of the federal rule as a useful guide for interpreting our current local rule. *See, e.g.*, *Shorehaven Corp. v. Taitano*, 2001 Guam 16 ¶ 10 n.5; *Portis Int'l, LLC v. Marquardt*, 2018 Guam 22 ¶ 7 n.1. Under the prior version of the federal rule, there was a circuit split regarding whether Rule 15(b) permitted a court to consider an unpleaded claim at the summary judgment stage (as opposed to during trial). Some circuits permitted this practice. *See Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 569 (2d Cir. 2000), *superseded on other grounds by N.Y.C. Local L. No. 85*; *Suiter v. Mitchell Motor Coach Sales, Inc.*, 151 F.3d 1275, 1279-80 (10th Cir. 1998), *superseded on other grounds by* 49 U.S.C.A. § 32705(a)(5); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1030 (6th Cir. 1992); *Walton v. Jennings Cmty. Hosp., Inc.*, 875 F.2d 1317, 1320 n.3 (7th Cir. 1989); *United States ex rel. Canion v. Randall & Blake*, 817 F.2d 1188, 1193 (5th Cir. 1987). Other circuits, however, did not. *See Cook v. City of Bella Villa*, 582 F.3d 840, 852 (8th Cir. 2009); *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 344 n. 3 (D.C. Cir. 1997); *Crawford v. Gould*, 56 F.3d 1162, 1168-69 (9th Cir. 1995); *Blue Cross & Blue Shield of Ala. v. Weitz*, 913 F.2d 1544, 1550 (11th Cir. 1990). We have never addressed this question, and need not address it here, because even in those jurisdictions that permitted the practice, it was allowed only in situations where the opposing party was provided a full opportunity to attack the newly raised claims. *See, e.g.*, *Cruz*, 202 F.3d at 569; *Suiter*, 151 F.3d at 1279-80. That was not the case here, as the trial court failed to address the questions of timeliness and exhaustion with respect to these claims.

E. The Trial Court Properly Denied Summary Judgment on the Merits of DFS's Second Procurement Protest

[123] Under the terms of the RFP, proposers were entitled to submit only one proposal, and any modifications to a proposal were permitted only if they occurred prior to the submission due date. Once the submission period closed, an evaluation committee was then tasked with "review[ing] and scor[ing] written proposals based on the Evaluation Criteria" set forth in the RFP. RA, tab 497 (Rapadas Decl.), Ex. 23 at 11 (Req. for Proposal Specialty Retail Merch. Concession ("RFP"), July 19, 2012). These evaluation criteria included the following: (i) "Facility Design and Capital Investment"; (ii) "Concepts & Theme and Merchandise and Marketing Plan"; (iii) "Experience, Qualifications and Financial Capability"; (iv) "Management and Operations Plan"; and (v) "Annual Rent and Projected Sales." *Id.* at 21-22. With respect to the fifth criterion, two components made up the proposed annual rent from proposers: a percentage of sales and the Minimum Annual Guaranteed Rent ("MAG Rent").

[124] In its second procurement protest, DFS asserted that GIAA inappropriately "gave Lotte the opportunity to include in its proposal additional items of value" and that Lotte made "subsequent revisions to its proposal" after submission. *See* RA, tab 492 (Ada Decl. re: 1st & 2d Protests), Ex. L at 2, 4 (Notice of Protest, May 29, 2013). DFS alleged in its second protest complaint filed in the Superior Court that "GIAA unlawfully allowed Lotte to revise its proposal after the deadline for submitting proposals by permitting Lotte to increase its MAG rent" when, "[o]n November 29, 2012, . . . Lotte submitted modifications to its proposal during its interview with GIAA's Evaluation Committee." *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Compl. at 5-6 (Feb. 6, 2015)). These allegations served as the basis for the Sixth and Seventh Causes of Action alleged in DFS's second protest complaint, as well as a portion of the Eighth and Ninth Causes of Action (collectively, the "MAG Rent claims"). DFS also alleged in the second

protest complaint that GIAA improperly considered benefits outside the scope of the RFP in evaluating Lotte's bid, including: (1) the creation of a downtown store and the payment of a "marketing fee" based upon sales at this store; and (2) capital expenditures for a renovation to the food court and restrooms, the creation of a children's play area, and an additional investment of $32 million in airport infrastructure development. *See id.* at 8-9. These allegations served as the basis for DFS's Third, Fourth and Fifth Causes of Action, in addition to a portion of the Eighth and Ninth Causes of Action in the second protest complaint (collectively, "the out-of-scope benefits claims").

[125] In moving for summary judgment, GIAA argued that the undisputed facts establish that the alleged MAG Rent switch never happened and that the "additional benefits" claims fail as a matter of law. *See* Appellant's Br. at 61-65. The trial court denied this motion, finding that material questions of fact exist that preclude summary judgment on both DFS's out-of-scope benefits claims and its MAG Rent claims. We agree with the trial court that GIAA has failed to establish its entitlement to summary judgment on both sets of claims.

1. Material questions of fact prevent granting summary judgment on DFS's protest claims related to Lotte's "MAG Rent"

[126] Under the terms of the RFP, the amount of rent owed by the winning bidder would be the higher of either a MAG Rent or a percentage of the winning bidder's annual gross revenue. The MAG Rent was a key evaluation criterion. Part III.D of the RFP stated that "[m]ultiple proposals from a single Proposer will not be accepted," and "[p]roposals may be modified or withdrawn at any time prior to the Proposal Due Date." RA, tab 738 (Civille Decl.), Ex. 2 at 9 (RFP, Oct. 31, 2011). A violation of these rules served as a basis under the terms of the RFP to disqualify a bidder. *See id.* at 4.

[127] Lotte submitted its initial bid on October 17, 2012, the bid submission deadline. This initial bid by Lotte showed a proposed MAG Rent of $13 million and a percentage rent rate of 30.1%. *See* RA, tab 497 (Rapadas Decl.), Ex. 24 at 15 (Excerpts of Lotte Proposal, Oct. 17, 2012). Each proposer was provided an opportunity to present its proposal in person as part of an interviewing process. Lotte's interview occurred on November 29, 2012.

[128] During its post-bid interview, on a page of Lotte's presentation labeled "Proposed Rent," and in the section entitled "Annual Rent and Projected Sales," Lotte continued to identify its MAG Rent as $13 million and its percentage rent rate as 30.1% of sales. *See* RA, tab 497 (Rapadas Decl.), Ex. 27 at 117-18 (Lotte's presentation materials, Nov. 29, 2012). The final six pages of Lotte's presentation deck, however, present the crux of the parties' MAG Rent dispute. The final page of the presentation appears to show an updated MAG Rent and percentage rent rate, which was "UPDATE[D] FROM INITIAL SUBMISSION." *Id.* at 136. The earlier chart—but not the later chart—matched the MAG Rent figures from Lotte's original bid submission.

[129] GIAA itself recognized this inconsistency; the GIAA executive director wrote to Lotte several months after the post-submission interviews, stating:

> [Y]ou indicated in your initial proposal that your proposed [MAG Rent] is $13 million. The $13 million MAG rent was again included in the presentation booklet you circulated during your interview on November 29, 2012. However, the presentation booklet also indicated that your proposed MAG rent is $15.4 million over the course of ten years. Could you please clarify what the $13 million and $15.4 million represent?

Id., Ex. 31 (Letter from Charles H. Ada II to SK Lee, Feb. 26, 2013). In its response, Lotte stated that its proposed MAG Rent remained $13 million, but that number did not include "additional rental revenue based on two potential initiatives that were addressed at the interview presentation, that elaborated on items already contained in the original proposal," such as a potential new retail

space on the third floor of the airport and revenue from a downtown store. *Id.*, Ex. 32 at 1 (Letter from CEO Steve Park to Charles H. Ada II, Feb. 28, 2013).

[130] While Lotte was quick to note in this letter that its response to GIAA's question "constitutes a clarification, and not a modification of the Bid," *id.* at 2, when viewed in the light most favorable to DFS, there is significant reason to doubt the veracity of that assertion. Most importantly, the $15.4 million figure was set forth directly under a column heading indicating that it was only for the "Main Concession," and not any additional revenue streams as later claimed by Lotte. *See id.*, Ex. 27 at 136 (Lotte's presentation materials). After GIAA sought even further clarification, Lotte included a chart indicating that its proposed MAG Rent for the third-floor retail area was only $600,000 per year. *See id.*, Ex. 34 at 2 (Letter from Steve Park to Charles H. Ada II, Mar. 15, 2013). This number does *not* match the $2.4 million increase contained in the post-bid interview presentation. Nor is it clear why Lotte would be required to pay "rent" for a downtown location that is not owned by GIAA and that Lotte would develop independently of GIAA. Lotte's own consultant, Anthony Sgro, testified during a deposition that it appeared that the initial MAG Rent was increased as part of the presentation. As the trial court also pointed out in its decision and order, and as DFS now notes on appeal, no explanation was ever provided for the increased percentage rent rate from 30.1% to 33%.

[131] The consultancy Leigh|Fisher was hired by GIAA to help analyze the RFP bids. In its analysis, Leigh|Fisher utilized the $13 million MAG Rent for Lotte's submission. There is some indication, however, that Leigh|Fisher used the $13,864,000 figure that included the additional third-floor retail MAG Rent of $600,000, which was not included in Lotte's initial proposal. *See* RA, tab 672 (Decl. Daniel L. Weiss Supp. DFS Opp'n to GIAA Mot. Summ. J. re: 2d Protest ("Weiss Decl."), Oct. 6, 2017), Ex. 2 at 183-86 (Tr. of Dep. of Pedro Roy Martinez, Apr. 26, 2017);

id., Ex. 17 at 3, 6 (Leigh|Fisher Report, Mar. 21, 2013) (stating that Lotte bid included $600,000 MAG Rent for a third level and "Lotte are [sic] the only proposer to include a Third Level space and this revenue would be dependent upon the timing of this facility"). There was also internal confusion at Leigh|Fisher regarding what MAG Rent should be used in analyzing Lotte's bid. At one point, an employee of Leigh|Fisher even stated that based upon the post-submission presentation "*the new MAG* and % rent is quite clear." *Id.*, Ex. 16 (Email from Justin Powell to Mark D. Taylor, Mar. 1, 2013) (emphasis added). The $13 million figure was used in the evaluation score sheets for two members of the evaluation committee. On two of the other score sheets, however, there is no indication what figure was used in evaluating Lotte's proposal. Although it is not entirely clear from the record, there is also some indication that the evaluators relied on one of the versions of the Leigh|Fisher report that contained a MAG Rent greater than the initial $13 million figure.

[132] The final contract entered between GIAA and Lotte provided for a combined MAG Rent of $15.4 million, which consisted of $15.16 million attributable to "Main and Future Retail Space" and $240,000 attributable to "Arrivals Retail Space." RA, tab 497 (Rapadas Decl.), Ex. 43 at 13 (Specialty Retail Merch. Concession Agreement, May 18, 2003).

[133] Based upon this quantum of evidence, and viewed in the light most favorable to DFS, there are material questions of fact regarding whether the alleged MAG Rent increase actually occurred. A reasonable jury could conclude based upon this evidence that the increased MAG Rent—even if only an additional $600,000 for the third floor build-out—was considered by the evaluators in evaluating Lotte's bid or, alternatively, that Lotte attempted to increase its MAG Rent and then backtracked, which could also have potentially led to Lotte's disqualification. For these reasons,

the trial court properly denied summary judgment to GIAA on DFS's MAG Rent claims in its second procurement protest.

2. GIAA failed to establish its entitlement to judgment as a matter of law on DFS's out-of-scope benefits claims

[134] DFS asserts that at least two aspects of Lotte's proposal were outside the scope of the RFP: (1) Lotte's proposal to renovate the food court, bathrooms, and smoking lounge; and (2) Lotte's proposal to install a children's play zone and internet stations. *See* Appellee's Br. at 91. DFS's second protest complaint also highlighted the inclusion of a downtown store in its proposal as another example of a benefit outside the scope of the RFP.[26] *See* DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., CV0094-15 (Compl. at 8 (Feb. 6, 2015)). The trial court found that the parties were not disputing that Lotte's proposal contained "additional benefits" outside the scope of the RFP. *See* RA, tab 978 at 12 (Dec. & Order GIAA's Mot. Summ. J. re: 2d Protest). This is supported by the record. For example, Anthony Sgro, Lotte's consultant, stated in deposition testimony that he knew the bathroom improvements were "outside of the bid package," that they were "not part of the RFP," and "had nothing to do with the RFP." RA, tab 807 (Decl. G. Patrick Civille Supp. DFS Opp'n to GIAA Mot. Leave Suppl. Evid., Dec. 5, 2017), Ex. C at 11-12, 15 (Tr.

[26] Lotte included in its bid proposal a sub-section dedicated to a "Downtown Duty Free Store." *See* RA, tab 497 (Rapadas Decl.), Ex. 24 at 16 (Excerpts of Lotte Proposal, Oct. 17, 2012). Lotte stated that it "will potentially look to build a downtown store, similar to DFS' operation but with one crucial difference–Lotte proposes to create a mechanism where the airport receives a percentage payment on all downtown duty free revenues." *Id.* This sub-section was included on the page of Lotte's submission that was purporting to respond to the "Other Information" section of the RFP. *See id.* Also included in the "Other Information" section of Lotte's bid proposal was a sub-section entitled "International Arrivals Corridor at Guam Airport." *Id.* at 17. In this sub-section, Lotte "propose[d] to build a new wing-cluster retail area, comprising a food and beverage offering, grab and go style shop and a convenience store," and indicated its willingness to "enter into discussions with the GIAA about how it could provide assistance with funding this project and supporting the construction." *Id.* Lotte's suggestion to overhaul the food court area, bathrooms, children play area, smoking lounge, and internet ports was included in the section of its bid regarding "Concession Concept Design, Construction and Investment." *See* RA, tab 672 (Weiss Decl.), Ex. 4 at 3-13 (Excerpts of Lotte Proposal, Oct. 2012). During its post-submission interview, Lotte also included in its presentation a commitment to put capital into renovating the non-retail sections of the airport, including the food court, a play area, and internet stations, among other things. Similarly, Lotte reiterated at the interview its intent to create a downtown retail location and its intent to pay GIAA a marketing fee, as well as its willingness to invest up to $32 million to fund third-level infrastructure development, both of which were subject to negotiation.

of Dep. of Anthony Sgro, Nov. 16, 2017). In his view, improving the bathrooms "ha[d] nothing to do with the RFP, but it was a way just to, you know, kind of sweeten things a little bit, if that's the proper thing to say, make things better for . . . the airport." *Id.* at 16.

[135] In resolving GIAA's motion, the trial court framed the issue as simply "whether 'those additional benefits' were permitted by the Procurement Law and the terms of the Procurement, and whether [GIAA] was permitted to consider those 'additional benefits' in their evaluation of the proposals." *See* RA, tab 978 at 12 (Dec. & Order GIAA's Mot. Summ. J. re: 2d Protest). GIAA similarly frames the issue this way on appeal, arguing that it was permitted to consider these additional benefits as a matter of law. *See* Appellant's Br. at 64-65. Considering all the various provisions in the RFP, the trial court determined that GIAA had not met its burden to establish a *prima facie* entitlement to judgment as a matter of law. We agree.

[136] Regardless of whether GIAA was required to obtain a concessions contract pursuant to an IFB or an RFP—an issue that the parties continue to dispute—GIAA was obligated to evaluate the proposals only according to evaluation criteria set forth in the solicitation. *See* 5 GCA §§ 5211(e), 5216(c), 5216(e) (2005); *see also* 2 GAR Div. 4 §§ 3109(c)(2)(B), (n), 3114(f)(2); *cf.* 5 GCA § 5030(t) (as used in the Procurement Code, "[s]hall denotes the imperative"). "It is 'hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation.'" *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 47 (2009) (quoting *Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 386 (2003)). Doing so broadly supports the underlying policies and purpose of the Procurement Code. *See* 5 GCA § 5001(b); *accord Fairbanks N. Star Borough Sch. Dist. v. Bowers Office Prods., Inc.*, 851 P.2d 56, 58 (Alaska 1992) ("[A] government agency which solicits bids for goods or services has an implied contractual duty to fairly and honestly consider bids . . . ."). Accordingly, if the evaluation criteria do not permit GIAA to

consider the additional benefits included in Lotte's proposal, then GIAA would not be entitled to judgment as a matter of law on DFS's out-of-scope-benefit claims. In order to resolve this question, we therefore must analyze the RFP itself.

[137] We review the terms of a government solicitation *de novo*. *See generally Banknote Corp. of Am., Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004) ("Interpretation of [a] solicitation is a question of law over which we exercise independent review."). In doing so, we apply general contract and statutory interpretation principles, including the following: a solicitation is given its plain, ordinary meaning; a solicitation is to be interpreted as a whole and in a manner that harmonizes all of its provisions; and we do not rely upon parol evidence to interpret an otherwise unambiguous solicitation. *See id.*; *see also Stratos Mobile Networks USA, LLC v. United States*, 213 F.3d 1375, 1380 (Fed. Cir. 2000) ("The RFP, like any contract, must be read in light of its purpose and consistently with common sense."). As the trial court correctly found, whether GIAA was permitted to consider the out-of-scope benefits contained in Lotte's proposal is, at best, ambiguous.

[138] As set forth in the RFP, GIAA sought "a qualified concessionaire to provide for the sale of high quality, branded merchandise products," which would include a set of merchandise that would be exclusive to the winning bidder, as well as additional merchandise that would not be exclusive to the winning bidder. *See* RA, tab 497 (Rapadas Decl.), Ex. 23 at 16 (RFP, July 19, 2012). The winning bidder would "have the sole and exclusive right, for the first five years of the term of the concession agreement, to sell and deliver at the Airport" the exclusive merchandise. *Id.* at 17. Three locations were offered in the proposal, including the concourse level, the apron level, and the basement level of the airport. However, the RFP permitted proposers to "propose additional locations within the Main Terminal Building for the operation [of] the Proposer's concession." *Id.*

[139] Part VI of the RFP set forth the "Proposal Requirements & Format." *Id.* at 23. Fourteen categories of information were required to be incorporated into every proposal, including a provision for "Other Information." *See id.* The "Other Information" section provided the following: "Proposer should provide any other information that it believes would be helpful in evaluating its proposal and the Proposer's ability to successfully develop and operate the concession." *Id.* at 30. While this provision could be thought of as a broad "catch-all" provision, permitting proposers the opportunity to include information relevant to GIAA's evaluation, the additional information included under this provision could not be detached from the evaluation criteria. This is dictated by the procurement laws and regulations. *See* 5 GCA §§ 5211(e), 5216(c), 5216(e); 2 GAR Div. 4 §§ 3109(c)(2)(B), (n), 3114(f)(1)(H)(vi), (f)(2); *see also NEQ, LLC*, 88 Fed. Cl. at 47. But the RFP itself also similarly provided that "[t]he evaluation committee will review and score written proposals based on the Evaluation Criteria identified" in the RFP. RA, tab 497 (Rapadas Decl.), Ex. 23 at 11 (RFP, July 19, 2012).

[140] The RFP included five categories of evaluation criteria. In the description of the first criterion, for "Facility Design and Capital Investment," the RFP states that:

> GIAA is seeking attractive, exciting and innovative facility designs, which will enhance the image of the Airport, attract the interest of the passengers, and complement the Airport terminal. Interiors should utilize innovative concepts in marketing that will maximize the use of the retail space from a revenue generating standpoint and provide for adequate circulation. To that end, the Committee will evaluate the physical design and construction of the retail space(s) including, but not limited to, consideration of such factors as innovation, creativity of design concepts, quality of materials/improvements, floor plans, presentation of Guam and Buy Local themes, circulation and queuing; graphics and signage, and visual interest. GIAA will also evaluate the Proposer's proposed capital investment, including construction cost per square foot, and the use of sustainable practices and energy efficient fixtures and lighting.

Id. at 21. GIAA argues on appeal that it could consider Lotte's "additional benefits" under this provision. *See* Appellant's Br. at 64-65.

[141] The references to both capital expenditures and construction in the RFP relate solely to the retail spaces subject to the RFP. Nowhere in the RFP did GIAA suggest that additional capital expenditures beyond those associated with the retail space would be used to evaluate submissions. Likewise, the term "facility" as used in the first sentence of the description of the first criterion does not clearly refer to the airport as a whole, as opposed to just the retail areas. *See* RA, tab 497 (Rapadas Decl.), Ex. 23 at 21 (RFP, July 19, 2012). Nor does the term "capital investment," as used in the last sentence, clearly refer to *all* capital investment proposed or the capital investment specifically regarding the retail areas. *Id.* The remainder of this provision references only the retail area by using terms such as "interiors" and "physical design and construction of the retail space(s)." *See id.* The "Facility Design and Capital Investment" evaluation criterion could easily be interpreted to reference only the facility design and capital expenditures associated with the retail space subject to the RFP, rather than the airport as a whole. In other words, the RFP did not establish an unequivocal right for GIAA to consider the additional benefits included in Lotte's proposal.[27]

[27] GIAA argues that even DFS believed proposals outside the actual concession space were permitted. *See* Appellant's Br. at 65. This is irrelevant for purposes of our analysis because the interpretation of a solicitation's terms is a legal question—not a factual question. *See Banknote Corp.*, 365 F.3d at 1353. But nevertheless, the evidence that GIAA cites in support of this position merely establishes a recognition by DFS that the RFP permitted proposers to suggest additional areas of the airport that could be turned into more retail space. This was expressly permitted in the RFP. *See* RA, tab 497 (Rapadas Decl.), Ex. 23 at 17 (RFP, July 19, 2012) (permitting proposers to "propose additional locations within the Main Terminal Building for the operation [of] the Proposer's concession"). Indeed, one of the documents cited by GIAA to support this proposition—an internal DFS email chain—actually says exactly the opposite of what GIAA suggests. In that email chain, the DFS representatives acknowledge a rumor that Lotte offered to renovate the food court in its proposal, but one employee further states that "it has been made clear that because that offer is not part of the scope of the RFP that it can have no impact on the scoring." *Id.*, Ex. 46 (Emails between Jim Beighley & Brent Ehrenreich, Feb. 1, 2013). To the extent DFS indicates its willingness to make a similar concession, one DFS employee stated: "We'll see. We need to get to [the] contract stage first"—i.e., DFS would first need to be the winning bidder. *Id.* The other documents cited by GIAA do not support the proposition that DFS believed including additional benefits outside the scope of the RFP in its proposal was permitted. *See id.*, Ex. 50 at 1-2 (Email from David Tydingco to Jim Beighley, Aug. 9, 2012) (email from potential consultant discussing possible elements of bid and including a children's play area); *id.*, Ex. 51 at 1-2 (Emails between Bryan Cunningham and Jim Beighley, Nov. 10-11, 2012) (discussing other "pressure points" DFS could leverage such as FAA and DOD connections); *id.*, Ex. 52 at 1-4 (Email Chain, Oct. 29-30, 2012) (internal DFS communications not discussing bid).

[142] In its reply, GIAA asserts that DFS does not cite legal authority to support its position on appeal. *See* Appellant's Reply Br. at 51 (Feb. 28, 2019). While true, *see* Appellee's Br. at 91-93, this argument also attempts to improperly shift the burden in this procedural posture. As the movant, GIAA has the initial burden to establish a *prima facie* case that it is entitled to judgment as a matter of law. *See Hawaiian Rock*, 2016 Guam 4 ¶ 27; *Hemlani*, 2015 Guam 16 ¶ 18. GIAA has failed to meet this burden due to the fact that it can point to no specific provision in the RFP that unambiguously permitted GIAA, or the evaluation committee, to consider the additional benefits included in Lotte's proposals. *See Gov't of Guam v. Gutierrez*, 2015 Guam 8 ¶ 30 ("If a contract's terms remain ambiguous, summary judgment may be granted only 'if the evidence presented about the parties' intended meaning [is] so one-sided that no reasonable person could decide the contrary.'" (alteration in original) (quoting *Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 232 F.3d 153, 158 (2d Cir. 2000))); *Hawaiian Rock*, 2016 Guam 4 ¶ 35 (finding "[e]ach provision [of settlement agreement] is unambiguous and has not been rebutted by any evidence" and therefore movant "established a *prima facie* case to prevail on their quiet title action"); *Stratos Mobile*, 213 F.3d at 1379-81 (holding evaluation criteria of solicitation were unambiguous and reversing grant of summary judgment in favor of protesting party).

[143] This issue on appeal presents a simple failure of a party to meets its burden under Guam Rule of Civil Procedure 56(e). We need not, and do not, consider the question of whether the RFP unambiguously established that GIAA was *not* permitted to consider the additional benefits included in Lotte's submission. The burden of proof in this posture is on GIAA. By failing to identify an unambiguous legal right to consider these benefits, GIAA has not shown a *prima facie* entitlement to judgment as a matter of law. *See, e.g.*, *Hemlani*, 2015 Guam 16 ¶ 49. Accordingly,

we affirm the trial court's denial of summary judgment in favor of GIAA on DFS's out-of-scope benefits claims.

F. The Trial Court Properly Rejected GIAA's Mootness and Equitable Arguments Regarding DFS's Automatic Stay Claims

[144] GIAA next argues that DFS's automatic stay claims in each of the three separate protest complaints were moot due to the substantial completion of its contract with Lotte and DFS's purported failure to maintain the status quo. *See* Appellant's Br. at 85-92. We find that DFS's automatic stay claims are not moot and they are not otherwise barred based upon the equitable arguments asserted by GIAA. Therefore, the trial court did not err in denying GIAA's motions for summary judgment on the automatic stay claims asserted in DFS's three protest complaints.

[145] "A claim becomes moot only when the issues are no longer live or the parties lack a legally cognizable interest in the outcome." *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 32 ¶ 9 (quoting *United States v. Ripinsky*, 20 F.3d 359, 361 (9th Cir. 1994)). "The test for mootness is whether 'the issues involved in the trial court no longer exist' because intervening events . . . [have] render[ed] it impossible for the [reviewing] court to grant the complaining party effectual relief." *Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 37 (alterations in original) (quoting *Ahn*, 2000 Guam 32 ¶ 9). The party arguing in favor of mootness bears a "heavy burden of establishing that there is no effective relief remaining for a court to provide." *United States v. Strong*, 489 F.3d 1055, 1059 (9th Cir. 2007) (citation omitted).

[146] In each active complaint, DFS asserted claims arising under 5 GCA § 5425(g), arguing that it was entitled to a declaratory judgment and other relief related to GIAA's alleged violation of the automatic stay. Under the Procurement Code, a successfully protesting party is entitled to injunctive relief. *See* 5 GCA § 5480(c). Other remedies, however, are also permitted. Where a protest is sustained, and certain requirements have been met, a "protestant shall be entitled to the

reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs." *Id.* § 5425(h). This remedy is "[i]n addition to any other relief or remedy granted under" the Procurement Code. *Id.* DFS specifically requested costs under this provision in each of its three protest complaints. Thus, if DFS was able to obtain a ruling that GIAA violated the automatic stay provision, it could still potentially recover costs regardless of whether it would be entitled to injunctive relief.[28]

[147] GIAA cites a number of cases that stand for the proposition that a procurement challenge is moot, and that a court may not issue a stay of a procurement contract, following the substantial completion of that contract. Each case cited by GIAA, however, involved a factual scenario in which an earlier stay was not in existence prior to the award of the procurement contract. *See Ainsworth Aristocrat Int'l Pty. Ltd. v. Tourism Co. of Commw. of P.R.*, 693 F. Supp. 1354, 1356 (D.P.R. 1988) (noting that procurement was awarded after earlier request for stay was denied); *Westinghouse Elec. Corp. v. Grand River Dam Auth.*, 720 P.2d 713, 714 (Okla. 1986) (noting that plaintiff's claim was moot because of "failure to seek a temporary injunction before judgment was entered by the trial court . . . , or to stay the enforcement of the agency decision or the judgment of the district court"); *Forestry Surveys & Data v. United States*, 44 Fed. Cl. 485, 487 (1999) (noting that protest was a post-award protest); *see also PRN Assocs.*, 766 N.W.2d at 571 (noting that party did not seek an injunction prior to award and that no automatic stay was issued). Under our statutory scheme, in contrast, a plaintiff "[i]s not required to request injunctive relief pursuant

[28] GIAA argues in its briefing that DFS has not satisfied the requirements of section 5425(h) and therefore is not entitled to costs. *See* Appellant's Reply Br. at 97-98 (Feb. 28, 2019). Assuming *arguendo* this is correct, this is a matter that goes to the merits of DFS's claims—not the court's subject matter jurisdiction to hear the dispute. "A case becomes moot only when it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (emphasis added) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)); *see also Rapadas v. Benito*, 2011 Guam 28 ¶ 16. Accordingly, even if DFS could not establish on the merits that it is entitled to costs under section 5425(h), this would not make DFS's automatic stay claims moot, as DFS retains a "legally cognizable interest in the outcome" on the merits. *See Tumon Partners, LLC v. Shin*, 2008 Guam 15 ¶ 37.

to GRCP 65 to preserve the 5 GCA § 5425 automatic stay while the procurement dispute was being decided by the trial court." *Teleguam Holdings, LLC v. Guam*, 2015 Guam 13 ¶ 35 [hereinafter "*Teleguam Holdings I*"].

[148] We have consistently held that the stay following a timely, pre-award procurement protest applies "automatically." *See id.* ¶ 24; *Guam Imaging*, 2004 Guam 15 ¶ 23. In other words, the stay under section 5425(g) is "triggered by [a] timely protest[]." *Guam Imaging*, 2004 Guam 15 ¶ 23. It applies where a protest is "both factually timely and . . . pursued before the award has been made." *Id.*; *see also id.* ¶ 24 ("If the protest was both factually timely and filed before the award was made, the automatic stay provision was triggered . . . ."). This is in accord with the mandatory nature of 5 GCA § 5425(g). *See* 5 GCA § 5425(g) ("[T]he Territory shall not proceed further . . . ."); *see also* 1 GCA § 715(h)(9). For this reason, "[o]nce a party brings a timely protest, an automatic stay of procurement until final resolution of that protest is required . . . ." *Teleguam Holdings I*, 2015 Guam 13 ¶ 24. While our cases have indicated that parties have sought to enforce the automatic stay by court order, our case law is equally clear that the automatic stay is a legal entitlement that vests upon a timely, pre-award protest. No court order is necessary for the automatic stay to become effective. "[T]he automatic stay set forth in section 5425(g) *remains in effect*" from the date of protest "and continues until final resolution of the action by the Superior Court." *Id.* ¶ 31 (emphasis added).

[149] While intervening events may make a claim moot, *see, e.g.*, *Rapadas*, 2011 Guam 28 ¶ 16, this is not the case where a party's wrongful misconduct—in this case, the alleged violation of the automatic stay—was the purported intervening event. "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Sananap v. Cyfred, Ltd.*, 2009 Guam

13 ¶ 22 (quoting *Porter v. Lee*, 328 U.S. 246, 251 (1946)). This rule stems from the foundational premise that a party should not be permitted to benefit from its conduct taken in violation of law. *See Hornick v. Boyce*, 280 F. App'x 770, 773 (10th Cir. 2008) ("Although the [defendants'] legal arguments have some facial appeal, we will not allow them to unjustly benefit from their unchallenged misconduct in breaching the parties' option agreement."). It matters not that DFS failed to obtain a temporary injunction; by going forward with entering into a contract with Lotte, GIAA "act[ed] at [its] peril and [it is] subject to the power of the court to restore the status quo." *Sananap*, 2009 Guam 13 ¶ 22 (quoting *Nat'l Forest Pres. Grp. v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973)).

[150] For these reasons, DFS's automatic stay claims are not moot and the court can still award effectual relief. The trial court did not err in denying those portions of GIAA's three motions for summary judgment that sought judgment on DFS's automatic stay claims on the basis of mootness.

V. CONCLUSION

[151] For the reasons discussed above, we:

(1) **AFFIRM** that portion of the Decisions and Orders, dated September 1, 2015, RA, tab 157 at 2-3 (Dec. & Order), and September 18, 2015, RA, tab 170 at 10-11 (Dec. & Order), which found that the Public Auditor properly recused herself;

(2) **AFFIRM IN PART and REVERSE IN PART** the February 2, 2018 Order denying GIAA's Motion for Summary Judgment on the first protest complaint, RA, tab 976 (Dec. & Order re: 1st Protest), and specifically:

   a. **AFFIRM** that portion of this decision and order that denied GIAA's motion with respect to DFS's claims related to the use of random letter designations;

b. **REVERSE** that portion of this decision and order that denied GIAA's motion with respect to DFS's claims related to the GVB Delegation trip; and

c. **REVERSE** that portion of this decision and order that denied GIAA's motion with respect to DFS's claims related to the payment of a "success fee" by Lotte;

(3) **DIRECT** the trial court to **ENTER JUDGMENT** in favor of GIAA on DFS's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Twelfth, and Thirteenth Causes of Action in the first protest complaint;

(4) **VACATE IN PART and AFFIRM IN PART** the February 2, 2018 Order denying GIAA's Motion for Summary Judgment on the second protest complaint, RA, tab 978 (Dec. & Order GIAA's Mot. Summ. J. re: 2d Protest), and specifically:

a. **VACATE** that portion of this decision and order that found DFS's second protest was timely under the doctrine of equitable tolling; and

b. **AFFIRM** that portion of this decision and order denying GIAA's motion on the merits of the claim;

(5) **VACATE IN PART and AFFIRM IN PART** the February 2, 2018 Order denying GIAA's Motion for Summary Judgment on the third protest complaint, RA, tab 981 (Dec. & Order GIAA's Mot. Summ. J. re: 3d Protest), and specifically;

a. **VACATE** that portion of the motion that found DFS's third protest was timely under the doctrine of equitable tolling; and

b. **AFFIRM** that portion of the motion that found in the alternative that there are material questions of fact regarding the timeliness of DFS's third procurement protest, which prohibits the grant of summary judgment in favor of GIAA;

(6) **VACATE** the February 2, 2018 Order, as amended on July 16, 2018, granting DFS's Motion for Summary Judgment on the third protest complaint, RA, tab 980 (Dec. & Order DFS's Mot. Summ. J. re: 3d Protest, Feb. 2, 2018); RA, tab 1120 (Am. Dec. & Order, July 16, 2018);

(7) **VACATE** the February 5, 2018 Order, RA, tab 984 (Order); the February 6, 2018 Order, RA, tab 1002 (Order); the July 16, 2018 Decision and Order, RA, tab 1120 at 5-9 (Dec. & Order); and the Amended Judgment entered on July 16, 2018, RA, tab 1121 (Am. Judgment).

[152] While a number of additional issues were raised by the parties on appeal, in light of our disposition of the issues above, we need not consider those issues at this time. *See Hemlani*, 2015 Guam 16 ¶ 33. We **REMAND** for further proceedings not inconsistent with this Opinion.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
JOSEPH N. CAMACHO
Justice *Pro Tempore*

/s/
KATHERINE A. MARAMAN
Chief Justice