

Jon A. Visosky, Esq.
ROBERTS FOWLER & VISOSKY LLP
865 South Marine Corps Drive, Suite 201
Tamuning, Guam 96913
Tel.: (671) 646-1222
Fax: (671) 646-1223
visosky@guamlawoffice.com

Attorneys for Appellant
Mega United Corp. Ltd.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 07-13-17
TIME: 4:07 AM PM BY: JW
FILE NO OPA-PA: 17-007

The Office of Public Accountability

In the Appeal of
Mega United Corp. Ltd.,

Appellant.

Docket No. OPA-PA-17-007

**Mega United's Opposition to
GEDA's Motion to Dismiss**

Appellant Mega United Corp. Ltd. ("Mega United") opposes the Motion to Dismiss and Appeal and Stay and Order ("Motion") filed by the Guam Economic Development Authority ("GEDA")

I. The OPA Has Jurisdiction Over Mega United's Appeal.

The Office of Public Accountability ("OPA") has jurisdiction over Mega United's appeal.

The relevant statutes, 5 GCA §§ 5427 and 5703, provide:

5 GCA § 5427. Authority to Resolve Contract and Breach of Contract Controversies.

(a) Applicability. This Section applies to controversies between the Territory and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.

(b) Authority. The Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers is authorized, prior to commencement of an action in a court concerning the controversy, to settle and resolve a controversy described in Subsection (a) of this Section. This authority shall be exercised in accordance with regulations promulgated by the Policy Office.

(c) Decision. If such a controversy is not resolved by mutual agreement, the Chief

Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers shall promptly issue a decision in writing. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the contractor of its rights to judicial or administrative review as provided in this Chapter.

(d) Notice of Decision. A copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the contractor.

(e) Finality of Decision. The decision reached pursuant to Subsection(c) of this Section shall be final and conclusive, unless fraudulent, or the contractor appeals administratively to the Public Auditor in accordance with § 5706 of this Chapter.

(Underline added.)

5 GCA § 5703. Jurisdiction of the Public Auditor.

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

(Underline added.)

5 GCA § 5427(a) and (e) make clear that the OPA has jurisdiction to resolve contract and breach of contract controversies, specifically “controversies between the Territory and a contractor and which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.” Mega United's claim with GEDA was a Request

for Adjustment of Contract Price due to Prolonged Delay. Clearly a request for adjustment of contract price is a “contract modification” request under the plain language of 5 GCA § 5427(a), and so is within the OPA’s jurisdiction under § 5427(e).

In arguing that the OPA has no jurisdiction over the appeal, GEDA misconstrues the issue as “a dispute regarding money allegedly owed by the Government.” Motion, p. 3. While Mega United agrees that money will ultimately be owed by GEDA, the dispute is not at that stage yet. First, the OPA must determine whether GEDA improperly denied Mega United’s demand for a final decision on its Request for Adjustment of Contract Price due to Prolonged Delay. In its Notice of Appeal, Mega United explained:

C) Decision being appealed is the GEDA April 10, 2017 (received by Mega United April 17, 2017) denial of Mega United’s demand for a final decision on its Request for Adjustment of Contract Price due to Prolonged Delay.”

* * *

6. Mega United requests that the Office of Public Accountability approve Mega United’s Request for Adjustment of Contract Price due to Prolonged Delay in the amount of \$460,081, in addition to attorney’s fees and interest.

Again, the OPA must first determine whether GEDA improperly denied Mega United’s request for adjustment of the contract price. If the OPA determines in this appeal that GEDA properly denied the request, the OPA would find that there should be no adjustment of the contract price. Thus there would be no “money owed to or by the government of Guam” as to the contract price adjustment.¹ Only if the OPA determines that the contract price should have been adjusted, and if GEDA does not then pay the adjusted contract price due, then Mega United would have a claim for “money owed to or by the government of Guam” under 5 GCA § 5703. The OPA would not have jurisdiction over that claim under 5 GCA § 5703.

¹ GEDA still owes Mega United other funds due under the Contract, which funds are not at issue here.

GEDA is well aware that this is a dispute regarding a requested adjustment of contract price. *See, e.g.,* December 4, 2015 Letter from Mega United's then counsel Nelson Xu to GEDA counsel Tom Fisher, discussing Request for Adjustment of Contract Price, Appeal Exhibit 3. *See also* Contract² Article 11 "Price Adjustment."

The Guam Supreme Court has expressly noted the difference between breach of contract claims seeking monetary damages (GEDA's construction of this dispute) with other contract claims (Mega United's construction of the dispute). "[B]reach of contract claims seeking monetary damages for contracts procured under the Procurement Law are distinct from other contract claims that arise under the Procurement Law. *Pacific Rock Corp. v DOE*, 2001 Guam 21, ¶ 39. In *Pacific Rock* the contractor expressly sought money damages in its dispute with the Guam Department of Education. "On March 23, 1993, Pacific Rock responded that it would be amenable to negotiations and reiterated its demand for immediate payment at least to the undisputed amount of \$272,875.05." *Pacific Rock Corp. v DOE*, 2001 Guam 21, ¶ 8 (underline added). "On July 20, 1993, Dennis L. Boaz, from the Attorney General's office, informed Pacific Rock in a letter that, based on Baldeviso's analysis, the Government would offer a total of \$281,399.24, net of liquidated damages." *Pacific Rock Corp. v DOE*, 2001 Guam 21, ¶ 9 (underline added).

In correspondence with GEDA, counsel for Mega United did occasionally loosely describe Mega United's claim as one for "compensation" rather than using the lengthier description of "request for adjustment of contract price." Regardless, GEDA correctly understood Mega

²Contract By and Between Mega United Corp., Ltd. and Guam Economic Development Authority, for the Construction of the Farmers' Cooperative Association of Guam Facility and the Relocation of the Dededo Flea Market (GEDA Invitation for Bid No. 14-002 for the Construction of the Farmers' Cooperative Association of Guam Facility and the Relocation of the Dededo Flea Market) (the "Contract") attached to Mega United's Notice of Appeal as Exhibit 1.

United's claim as one for an adjustment of contract price, rather than for money owed as compensation. "GEDA understands that 'pending claim' to be one asserted on 02 February 2016 and referencing a 'request for adjustment of contract price' dated 08 October 2014. *See letter, Xu N., 02 February 2016.*" Letter denying Mega United's claim, sent by Jay Rojas, GEDA, dated April 10, 2017, attached to GEDA's Motion (the "Denial Letter").

In its Denial Letter, GEDA expressly stated that the OPA had authority to resolve this dispute, and that Mega United was required to appeal GEDA's decision to the OPA:

As you know, such a decision was final and conclusive, unless fraudulent, or Mega United appealed administratively to the Public Auditor in accordance with § 5706 of that same title. See id at §5427(e).

In relevant part, section 5706 states "(a) Scope. This § 5706 applies to a review by the Public Auditor of a decision under § 5427 of this Chapter. (b) Time Limitation on Filing an Appeal. The aggrieved contractor shall file his/her appeal with the Public Auditor within sixty (60) days of the receipt of the decision or within sixty (60) days following the failure to render a timely decision as provided in § 5427 of this Chapter." 5 Guam Code Ann. § 5706. GEDA is not aware that Mega United filed any appeal with the Public Auditor.

(Underline added.)

Thus, by way of analogy, GEDA "cannot invoke OPA's jurisdiction selectively, inviting its jurisdiction when the decision is favorable, and challenging jurisdiction when the decision is unfavorable." *Data Management Resources, LLC v. Office of Public Accountability*, 2013 Guam 27, ¶ 50.

II. Mega United's Appeal Is Timely.

GEDA also argues that Mega United's appeal is untimely, by simply ignoring the governing language of the parties' Contract. Contract Article 21.11 "Notices, Correspondence and Payments" governs the method of providing notice to the other party, and provides:

21.11 Notices, Correspondence and Payments. All notices correspondence, demands, requests, instructions approvals, proposals and claims must be in

writing. Unless otherwise provided for by law, all notice required to be sent to either party hereunder shall be sent to the parties at the address stated below, either by mail, delivered personally, or by facsimile and confirmed by mail. Service by mail shall be by certified mail, return-receipt requested, postage pre-paid and shall be deemed effective ten (10) days after mailing or on the date actually received, whichever is earlier. Service by personal delivery shall be deemed effective on delivery and service by facsimile shall be deemed effective from the date of facsimile.

See also Contract article 21.9.2 “GEDA shall immediately furnish a copy of the decision to CONTRACTOR by certified mail with a return receipt requested, or by any other method that provides evidence of receipt.”

Here, GEDA still has not provided the Denial Letter to Mega United, at Mega United's address in the Contract, as required by Contract Article 21.11. Further, counsel for GEDA did not receive the email purportedly sent by GEDA, which email purportedly included GEDA's Denial Letter as an attachment. *See* Declaration of Jon A. Visosky. Instead, GEDA's Denial Letter was sent by way of regular mail, not certified mail, and received at the front desk of Mega United's counsel's office on April 17, 2017. No evidence of receipt was requested with the mailing. *See* Declaration of Jon A. Visosky.

Mega United's appeal was thus filed within sixty (60) days of the receipt of the Denial Letter by GEDA's counsel, according to Contract Article 21.11, and the appeal is timely.

III. The 60 Day Filing Requirement Under 5 GCA § 5706 Is Flexible.

Regardless, the 60 day filing requirement under 5 GCA § 5706 is not a jurisdictional rule. *See Castino v. G.C. Corp.*, 2010 Guam 3. *Castino* dealt with a verification requirement under Guam's mechanic's lien laws (not a deadline for filing an appeal with the OPA). Nonetheless the Guam Superior Court has applied *Castino* in the context of appeals from other agency decisions (e.g. petitions for judicial review) and held that deadlines for appealing from agency decisions are flexible and subject to tolling or other equitable principles. As explained by the U.S. Supreme

Court in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015):

In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has "clearly state[d]" as much. *Sebelius v. Auburn Regional Medical Center*, 568 U.S. —, —, 133 S.Ct. 817, 824, 184 L.Ed.2d 627 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)); see *Gonzalez*, 565 U.S., at — — —, 132 S.Ct., at 648–649. "[A]bsent such a clear statement, ... 'courts should treat the restriction as nonjurisdictional.'" "

* * *

[W]e have made plain that most time bars are nonjurisdictional. [citation] (noting the rarity of jurisdictional time limits). Time and again, we have described filing deadlines as "quintessential claim-processing rules," which "seek to promote the orderly progress of litigation," but do not deprive a court of authority to hear a case. *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); see *Auburn Regional*, 568 U.S., at —, 133 S.Ct., at 825; *Scarborough v. Principi*, 541 U.S. 401, 413, 124 S.Ct. 1856, 158 L.Ed.2d 674 (2004). That is so, contrary to the dissent's suggestion, see *post*, at 1640, 1643 – 1644, even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so "however emphatic[ally]" expressed those terms may be, *Henderson*, 562 U.S., at 439, 131 S.Ct. 1197 (quoting *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81, 130 S.Ct. 584, 175 L.Ed.2d 428 (2009)).

United States v. Kwai Fun Wong, 135 S. Ct. 1625, 1632.

Accordingly, if for any reason the finds that Mega United somehow exceeded the 60 day filing deadline, the OPA should nonetheless apply a "fair and reasonable" construction (see *Castino v. G.C. Corp.*, 2010 Guam 3, ¶ 21) of the 60 day requirement at issue. Based on GEDA's failure to provide certified mail, return receipt requested service of its Denial Letter, as required by Contract Article 21.11, and based on GEDA's failure "inform the contractor of its rights to judicial or administrative review as provided in this Chapter" as expressly required by § 5427(c)(2), GEDA should be estopped from arguing that Mega United's appeal is untimely. As explained by the Guam Supreme Court in *Mobil Oil Guam, Inc. v. Young Ha Lee*, 2004 Guam 9:

"Equitable estoppel is defined as [t]he doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from

asserting a right which he would otherwise have had.” *Heskett v. Paulig*, 722 N.E.2d 142, 145-146 (Ohio Ct.App.1999) (citation and internal quotation marks omitted); see *Hodgkins v. New England Tel. Co.*, 82 F.3d 1226, 1232 (1st Cir.1996). “The doctrine ... is designed to prevent a miscarriage of justice” and “is to be *used cautiously* because it bars the normal assertion of rights otherwise present.” *Prof'l Credit Servs. of New Orleans v. Skipper*, 543 So.2d 498, 499-500 (La.Ct.App.1989) (emphasis added). “Unlike promissory estoppel, equitable estoppel is available only as a ‘shield’ or defense.” *Estate of Hall v. HAPO Fed. Credit Union*, 869 P.2d 116, 118 (Wash.Ct.App.1994) (citations omitted). Guam has codified the doctrine of equitable estoppel in Title 6 GCA § 5106(3), which provides:

Specification of Conclusive Presumptions. The following presumptions, and no others, are deemed conclusive:

....
(3) Whenever a party has, by his own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission be permitted to falsify it;

*6 Title 6 GCA § 5106(3) (1994). Lee correctly notes that Guam’s equitable estoppel doctrine was adopted from the California Civil Procedure law (CCP § 1962). Case law applying the doctrine has set forth four elements that must be proven in an equitable estoppel analysis:

(1) the party to be estopped must be apprised of the facts;

(2) he must intend that his conduct will be acted upon, or act in such a manner that the party asserting the estoppel could reasonably believe that he intended his conduct to be acted upon;

(3) the party asserting the estoppel must be ignorant of the true state of the facts; and

(4) he must rely upon the conduct to his injury.

Mobil Oil Guam, Inc. v. Young Ha Lee, 2004 Guam 9, ¶¶ 24-25 (underline added). See also *Guam Resorts, Inc. v. G.C. Corporation*, 2013 Guam 10, ¶ 61 (citing *Limtiaco v. Guam Fire Dep’t*, 2007 Guam 10 ¶ 58).

Here, GEDA’s conduct in mailing the Denial Letter to Mega United’s counsel, in non-compliance with Contract Article 21.11, and GEDA’s failure to “inform the contractor of its

rights to judicial or administrative review” as expressly required under §5427(c)(2) is sufficient to equitably estop GEDA from now arguing that Mega United’s reliance on the mailing bars Mega United’s appeal. Accordingly, the OPA should find that Mega United’s appeal is timely.

IV. Conclusion.

Based on the foregoing, GEDA’s Motion should be denied.

Roberts Fowler & Visosky LLP



Date: July 13, 2017

By: _____

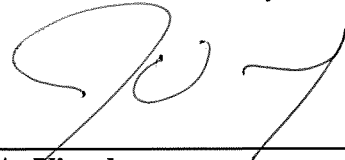
Jon A. Visosky
Attorneys for Appellant
Mega United Corp. Ltd.

Certificate of Service

I caused this document to be served upon the following, via hand-delivery:

FISHER & ASSOCIATES
Thomas J. Fisher, Esq.
Suite 101 De La Corte Building
167 East Marine Corps Drive
Hagåtña, Guam 96910
Telephone: (671) 472-1131
Facsimile: (671) 472-2886

Roberts Fowler & Visosky LLP



Date: July 13, 2017

By: _____

Jon A. Visosky
Attorneys for Appellant
Mega United Corp. Ltd.