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Attorney for Petitioner  
TRC ENVIRONMENTAL  
CORPORATION

IN THE SUPERIOR COURT OF GUAM

TRC ENVIRONMENTAL CORPORATION,  
  
Plaintiff,  
  
vs.  
  
OFFICE OF THE PUBLIC AUDITOR,  
  
Respondents.

SP CASE NO. SP **SP 0160-07**  
  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
WRIT OF MANDATE

Petitioner, TRC ENVIRONMENTAL CORPORATION ("TRC"), submits this memorandum of points and authorities in support of his petition for an alternative writ of mandate directed to respondent, OFFICE OF THE PUBLIC AUDITOR ("OPA").

JURISDICTION

This Court has jurisdiction over the original proceedings for mandate, pursuant to 7 Guam Code Annotated section 3105 and 3107 (b).

PROCEEDINGS BELOW

1. In this matter, the Guam Power Authority ("GPA") issued a request for proposal, GPA-RFP-07-002 ("RFP") on October 17, 2006 with a closing date of November 17, 2006. The RFP solicited proposals from companies, one of which was petitioner, to operate and maintain continuous emission monitoring systems at GPA's

Tenjo Power Plant and its Tenjo Operating Stations.

On January 22, 2007, GPA notified, Emission Technologies, Inc., ("ETI") an offeror that GPA had selected petitioner for the RFP. On January 30, 2007, ETI submitted a letter of protest alleging GPA's bias in favor of petitioner ("First Protest").

On March 26, 2007, GPA denied ETI's protest. An appeal from a protest denial must be filed with in fifteen (15) days of receipt of the denial with the Office of The Public Auditor ("OPA"), ETI filed its appeal on April 20, 2007. See 5 G.C.A., Section 5425 (e). Thus the appeal period of its first protest expired on April 11, 2007. On April 6, 2007, ETI submitted a second letter of protest ("Second Protest"), alleging the same essential basis as its First protest: either bias in favor of petitioner or bias against ETI. GPA served its denial of the second protest on April 13, 2007, indicating it was without jurisdiction to entertain it.

On May 1, 2007, ETI submitted An Amended Notice of Appeal, which omitted the previous allegations and substituted a new allegation.

On July 17, 2007, OPA ruled that it had jurisdiction to entertain ETI's collective appeals and recommended that GPA cease consideration of TRC for an award of the RFP.

#### I. SUMMARY OF ARGUMENT

OPA exceeded its jurisdiction by assuming jurisdiction of an untimely appeal and then adjudicating the issues improperly raised by the untimely appeal in clear violation of 5 G.C.A., Section 5425. OPA lacked subject matter over claimant's protest and thus was without jurisdiction and its action is void ab initio.

Pending compliance with the law, petitioner should be re-instated for consideration for the RFP reward, respondent's Findings and Recommendations set

aside and respondent should be restrained from further action that violates the law.

## II. ARGUMENT

### A. WRIT OF MANDATE LIES IN THIS MATTER

A writ may issue by any court to any inferior tribunal to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right to which he is entitled and from which he is unlawfully precluded by such inferior tribunal, 7 G. C. A., Section 31202. A writ may issue when, "there is not a plain, speedy, adequate remedy in the course of law." Id., Section 31203.

The Guam Supreme Court has previously held that, since the Guam statutes dealing with mandamus are borrowed from California, it is appropriate to consider California cases interpreting these statutes in interpreting the Guam mandamus statutes. Holmes v. TLUC, 1998 Guam 8, page 4 . . See also, Apusento Garden (Guam) Inc. v. Superior Court of Guam, 94 F. 3d 1346, 1350 (9<sup>th</sup> Cir. 1996) (California cases are persuasive authority in interpreting Guam mandamus statutes).

Mandamus lies to correct an act that exceeds the power or competency of a court, board or tribunal that acts in excess of its jurisdiction. A Belleira v. District Court of Appeal, 17 CR 2<sup>nd</sup> 280, 109 P2nd 642 (1941) (A court or Board or tribunal jurisdiction is limited in manner, relief and subject to procedural prerequisites)

Mandamus lies to compel an agency to comply with its rules. Stationary Eng's Local 39 v. County of Sacramento, 59 CA4th 1177, 69 CR2d 598 (1997) (County exceeded its authority by bypassing its civil service rules; mandate issued). See, California Correctional Peace Officers Ass'n v. State Personnel Bd., (10 4<sup>th</sup> 1133, 43 CR2d 693) (same; mandamus lies to compel State Personnel Board to comply with

administrative regulations). See also, Hardin Oldsmobile v. New Motor Vehicle Bd, 52 Cal 4<sup>th</sup> 585, 60 CR2nd 583 (1997) (exhaustion of remedies not required when agency asserts jurisdiction over claims it lacks authority to decide).

In this matter, petitioner has requested that the Court initially issued an alternative writ of mandate. The alternative writ is in the nature of an order to show cause. See, San Agustin v. Cameron, Superior Court of Guam Special Proceedings Case No. SP0193-98, Decision and Order, September 29, 1999, at p.2, n.1. The alternative writ commands the respondent to either do the act required to be performed, or show cause before the court why it has not done so. 7 GCA Section 31204.

Under Guam law, if an agency decision is not in accordance with law, the court shall order the agency to take action according to law. 5 GCA Section 9240.

**B. THE OPA FAILED TO COMPLY WITH TITLE 5, G.C.A,  
SECTION 5425**

1. As OPA Was Without Jurisdiction, Its Action Is Void Ab Initio.

While an administrative agency has discretion in how it proceeds, this discretion is not unfettered. Skelly v. State Personnel Board, 15 Cal. 3d 194, 218, 124 Cal.Rptr. 14 (1975). See also, County of Santa Clara v. Willis, 179 Cal. App. 3d 1240, 225 Cal.Rptr. 244 (1986) (Board abused its discretion; administrative agency does not have absolute or unlimited power).

As noted by one court:

The purpose of the writ of mandamus is not to rubber-Stamp every administrative decision that is rendered. If that were the case, there would be no point in reviewing administrative decisions at all.

Hankla v. Long Beach Civil Service Comm'n, 34 Cal.App.4th 1216, 1222, 40 Cal.Rptr.2d 583 (1995) (Commission abused its discretion; trial

court erred in denying petition).

TRC submits that the OPA has abused its discretion, to its substantial prejudice, as discussed below.

Section 5425 of 5 G.C.A. mandates that an appeal from a denial of a procurement protest shall be filed with the public auditor “ . . . within fifteen (15) days after receipt of by protestant of the notice of the decision.”

In this matter, ETI lodged its first protest on January 30, 2007, after GPA had informed ETI that it had selected a petitioner as the best offeror for the RFP. The basis of ETI's first protest was GPA's alleged bias in favor of petitioner. GPA served notice of its denial of the first protest on March 28, 2007. From receipt of that denial, ETI had fifteen (15) calendar days to file its appeal with OPA. Thus the period to appeal expired on April 11, 2007.

Instead of timely appealing GPA's denial, ETI submitted a second protest on April 6, 2007 containing the same essential allegations as those contained in its first protest: either bias in favor of petitioner or bias against ETI. GPA served notice of its denial of the second protest on April 13, 2007, indicating it was without jurisdiction to entertain it. Finally, on April 30, 2007, ETI appealed from the denial of the second protest. It is beyond dispute that ETI failed to timely appeal from the denial of the first protest. Where an application to re-open is based not on new data but only on alleged “material error”, an agency denial is not subject to review ICC v. Brotherhood of Locomotive Engineers. 482 U.S. 270, 96 L. Ed 2d 222, 107 Supreme Court 2360, 2366 (1987) (An Order denying review of a prior order on the same record that was before the agency when it rendered its original decision is not itself reviewable). Where discussion of merits is followed by specific conclusion that a claim is denied on res judicata

conduct administrative review, indicating it was without jurisdiction to entertain ETI's request. An application to reopen based not on the same data is not subject to review. ICC Brotherhood of Locomotive Enginneers, supra. GPA served notice of its denial on April 13, 2007. ETI's period in which to appeal that denial expired on April 28, 2007. See 5 G.C.A., section 5425 (e). Consequently, ETI's May 1, 2007 Amended Notice of Appeal was untimely and the new allegation raised therein were not properly before OPA and thus OPA should not have considered it.

### III. PETITIONER IS ENTITLED TO A WRIT OF MANDATE

A. Petitioner is a beneficially interested party Petitioner, as an offeror selected for an award of the RFP, has a beneficial interest in obtaining the award and is practically and legally affected by the OPA's Finding and Recommendations and is directly prejudiced. Ex. Rel. Young v. County of El Dorado, 5 C3d 480, 491, 96 CR 553 (1971). An aggrieved party may petition for writ even though aggrieved party was not party to the challenged action. Monterey Club v. Superior Court, 48 CA2d.131, 119 P2d 349 (1941).

B. Petitioner is without a plain, speedy and adequate remedy at law

The harm to petitioner, occasioned by OPA's Findings and Recommendations, is irreparable in that petitioner is deprived of consideration for any award of the RFP. Petitioner cannot compel OPA to comply with the Guam Procurement laws. As such, petitioner right to due process protection afforded under the law is effectively frustrated. Respondents ignored compliance with the law and explicitly rejected it as reflected in Respondent's Finding and Recommendations and the matters-of-record.

grounds, the decision should not be interpreted as re-opened. Krumpelman v. Heckler 76752 586, 589 (1985). In addition to the absence of jurisdiction to entertain ETI's request, GPA's denial of the second protest, in essence, is based on fact that ETI's allegation of bias had been previously addressed and denied in the first protest.

It is beyond dispute that GPA informed ETI, in denying the first protest, that it had right to seek "...judicial review...". See petitioner's Exhibit "2". Language that a claimant "... is free to seek judicial review..." is construed as a final rejection. Pacific Rock v. Department of Education, 2001 Guam 21 at 46. (Affirming bright-line test respecting procurement laws held in Pacific Rock v. Department of Education, 2000 Guam 19). It is further beyond dispute that the allegations raised in its second protest are essentially the same as those raised in its first protest. Hence the second protest did not restart the appeal period and therefore the appeal expiration date of April 11, 2007 applies.

C. ASSUMING ETI'S SECOND PROTEST IS DEEMED  
TIMELY, ITS MAY 1, 2007 AMENDED NOTICE OF APPEAL  
IS UNTIMELY.

1. OPA Was Without Subject Matter Jurisdiction to entertain ETI's Amended Notice of Appeal And The Issue(s) fairly subsumed therein.

Assuming arguendo that the second protest restarted the appeal period clock, that period (on the second protest) expired on April 28, 2007. Thus, even if one deems ETI's appeal from the denial of the second protest as timely, it is beyond dispute that ETI's May 1, 2007 Amended Notice of Appeal is untimely. Generally, a court will not address arguments raised for the first time on appeal. Dumaliang et al. v. Silan, 2000 Guam 24, at 12.

As noted above, GPA denied the second protest and refused to re-open to

C. Proceedings are without or in excess of the Respondent's jurisdiction

Respondent assumed subject matter jurisdiction over a protest and issue that were neither timely appealed nor timely raised. Notwithstanding the absence of jurisdiction over the protest and the issue raised therein, respondent improperly and knowingly chose to ignore the law and to proceed in derogation of it and in so doing, acted in excess and without jurisdiction.

CONCLUSION

Respondent violated the Procurement Law in adjudicating the untimely appeal and the issued raised therein and did so knowingly. There is/was no valid justification for Respondent to act in derogation of the Law. As such, Respondent improperly deprived TRC of consideration for the award of RFP.

Petitioner respectfully requests that this Court issue a writ commanding Respondent to reinstate TRC for consideration of the RFP and to set aside its Findings and Recommendations of July 17, 2007. Furthermore, Petitioner respectfully requests that Respondent be prohibited and restrained from ignoring the Law and based on the foregoing, the Court should issue an alternative writ of mandate commanding the Respondent to set aside its Findings and Recommendations, or show cause, if any it has, before this Court, at a time and place then or thereafter specified by court order, why it has not done so, and why a peremptory writ should not issue.

The Court should further stay the Award of GPA-RFP-07-002 pending entry of judgment in these proceedings.

Dated this 22<sup>nd</sup> day of August, 2007.

MAHER & THOMPSON, P.C.  
Attorneys for Petitioner

By:

  
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JAMES M. MAHER