IN THE SUPREME COURT OF GUAM

PACIFIC ROCK CORPORATION
Plaintiff-Appellee

vs.

DEPARTMENT OF EDUCATION,
a department of the Executive Branch
of the Government of Guam, an unincorporated
Territory of the United States of America
Defendant-Appellant

OPINION

Supreme Court Case No.:CVA98-003
Superior Court Case No.:CV0668-94

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Petition for Rehearing
Argued and submitted on Sept. 21, 2001
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice (Acting)[1], JOHN A. MANGLONA, Designated Justice, RICHARD H. BENSON, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] In our previous holding in *Pacific Rock Corp. v. Department of Education*, 2000 Guam 19 (hereinafter "*Pacific Rock I*"), we espoused a bright-line test, wherein we held "that the Procurement Law controls actions against the Government of Guam for contracts procured under the statute . . . ." We maintain our intent in the *Pacific Rock I* opinion to "clarify and interpret the policies intended by the Legislature in promulgating the Procurement Laws," however, in our present holding, we recognize the interplay between the Guam Procurement Law (hereinafter "Procurement Law") and the Government Claims Act (hereinafter "Claims Act") in a breach of contract case praying for monetary damages. Consequently, in our present opinion, we affirm the basic bright-line test in *Pacific Rock I*, but we modify our opinion in breach of contract cases that involve money owed to or by the Government of Guam. Today, we hold that "the Procurement Law controls actions against the Government of Guam for contracts procured under the statute," however, in breach of contract suits where monetary relief is sought, the Procurement Law serves as the final administrative remedy that is a prerequisite to filing a claim pursuant to the Claims Act.

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[1] The Chief Justice recused himself from this case, and as the only full-time justice on the panel, Justice Carbullido was appointed Acting Chief Justice.

I.

[2] This case arises out of a procurement contract between Pacific Rock Corporation (hereinafter "Pacific Rock") and the Department of Education (hereinafter "DOE"). Pacific Rock submitted and DOE accepted a bid for project no. 710-5-1070-L-TER. The project was for the construction of temporary classrooms at J.Q. San Miguel, Agana Heights, Yigo, Wettengel, M.A. Ulloa, Finegayan, and P.C. Lujan elementary schools. Collectively referred to as one project, the construction work was composed of four individually signed contracts. Identical in its form notwithstanding specific project names and locations, each of the four contracts contained a "Disputes Clause" which stated in pertinent part:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits A, B, C, D). In addition, paragraph IX(2)(a) of the general conditions of the contracts provided in relevant part:

> Except as otherwise provided in this contract, any disputes arising under this contract shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive.

Defendant-Appellant's Excerpts of Record, Tab 26 (Exhibit 2).

[3] After the award and upon scrutiny of the project specifications, Pacific Rock discovered non-conformities with applicable building codes and lodged a protest of the award. Nevertheless, in a letter dated June 29, 1990, Pacific Rock's president, Delbert Swegler, informed DOE that despite the discrepancies, the company would commence construction per DOE's plans and specifications.

However, the company would not take liability for building code violations.

[4] In a letter dated July 6, 1990, then Director of DOE and Contracting Officer, Anita Sukola (hereinafter "Sukola"), responded that she took Pacific Rock's indication of intent to commence construction to mean that the company was rescinding its protest of the bid award. Further, Sukola informed Pacific Rock that it was responsible for bringing attention of known code violations to and resolving such violations with the Department of Public Works. Sukola asked Pacific Rock to respond if she mistook Pacific Rock's position, but Pacific Rock gave no such response. Instead, Pacific Rock and DOE executed the four contracts under the project on or about August 20, 1990.

[5] To address concerns over the project, Pacific Rock, its consultant, CIC Consultants, Inc., Department of Public Works, and DOE's construction manager and Contracting Officer's representative, E.V. Baldeviso & Associates (hereinafter "Baldeviso") held a technical coordination meeting. At the meeting, the parties discussed no less than twenty-one separate issues and appeared to have resolved most of the issues.

[6] On August 21, 1990 and August 22, 1990, DOE issued the notices to proceed with the construction. Pacific Rock thereafter commenced construction. However, as Pacific Rock proceeded with the construction, deficient specifications necessitated some eighty-two changes to the project. *See* Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits 41-1 through 41-9). Despite these snags, Pacific Rock completed the project, and final inspection was made on August 16, 1991. The final payment was also due at this time.

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[7] Pacific Rock was unable to obtain final payment for both the remaining amounts under the contract and for the change orders. Shortly thereafter, Baldeviso requested justification from Pacific Rock for the reasons behind the project's delay. In response to Baldeviso's request, on May 26, 1992, Pacific Rock submitted a detailed itemization for their reasons in the delay. On December 28, 1992, Pacific Rock's attorney, Thomas Keeler, sent a letter to DOE demanding payment of $639,607.60, which represented both the remaining amounts under the contract and the change order monies. DOE responded to this letter on February 2, 1993, wherein a new Director, Franklin J.A. Quitugua (hereinafter "Quitugua") informed Pacific Rock that DOE would agree to a total sum of $272,875.05. Quitugua also informed Pacific Rock that the company could submit change orders with invoices under protest then pursue legal remedies. On February 8, 1993, Quitugua wrote another letter informing Pacific Rock that DOE would not process change orders or invoices under protest and that its position was non-negotiable.

[8] On February 10, 1993, Pacific Rock requested that DOE reconsider its position. DOE agreed, and in a letter dated February 24, 1993, Quitugua offered to form a team consisting of the Attorney General's Office, DOE's own attorney, and Baldeviso to investigate the matter and participate in negotiations. 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.

[9] Investigation commenced and on June 12, 1993, Baldeviso, as the Contracting Officer's representative, issued its first report summarizing approvals and disapprovals of the change order claims requested by Pacific Rock. On July 6, 1993, Baldeviso issued its second report summarizing

an assessment of liquidated damages for the four packages. Essentially, Baldeviso recommended that a majority of the eighty-two change order items that Pacific Rock requested be disapproved. Baldeviso also calculated that the Government was entitled to $91,500.00 in liquidated damages. 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.

[10] Unsuccessful in negotiations, on November 4, 1994, Pacific Rock filed a government claim under the Claims Act against DOE. On November 16, 1994, Pacific Rock filed the underlying complaint against DOE in the Superior Court. Pacific Rock supplemented its complaint on September 18, 1995. DOE moved for summary judgment on November 6, 1995, which the trial court denied. A four-week bench trial was held on August 26, 1996 through September 23, 1996, and subsequently, the trial court ruled in favor of Pacific Rock, denying DOE liquidated damages but awarding Pacific Rock a total of $514,258.76 in damages plus prejudgment and post-judgment interest. Record on Appeal, Tab 72, p. 71 (Decision and Order, Feb. 26, 1997).

[11] Although not clear in its decision, the trial court apparently took jurisdiction over the matter pursuant to the Claims Act, Title 5 GCA § 6101 et seq. (1998). The court determined that Pacific Rock substantially complied with the Claims Act procedures and that its claim arose based on a rule that, "in order for a claim to arise, a claim made by the Plaintiff must be first denied, thus creating a disputed claim with the Government." The court applied this rule to conclude that the July 20, 1993 letter from the Attorney General's office was the final decision required under the Procurement Law to start the running of the limitations period under the Claims Act. Since the administrative

claim under the Claims Act would be barred if no claim was filed within eighteen months of the claim arising, Pacific Rock would be barred if it failed to file its government claim by January 20, 1995. Because Pacific Rock filed its complaint on November 4, 1994, the court found the action timely, thus conferring jurisdiction on the trial court and allowing the court to proceed to the merits of the claim.

[12] DOE filed an appeal of the trial court's decision to this court and on June 2, 2000, we reversed the trial court's earlier ruling. We held that Pacific Rock's claim was not filed within the statute of limitations afforded in the Procurement Law and therefore, the trial court had no jurisdiction over the matter. On June 16, 2000, Pacific Rock filed a Petition for Rehearing. Pacific Rock then filed a Petition for Writ of Mandamus at the Ninth Circuit on April 3, 2001. The Ninth Circuit denied Pacific Rock's Petition on June 20, 2001 without prejudice, and gave this court sixty days to issue an order on the Petition for Rehearing. On July 9, 2001, we granted Pacific Rock's Petition for Rehearing on this matter.

II.

[13] We have jurisdiction over the appeal of the final judgment of the court below pursuant to Title 7 GCA §§ 3107, 3108 (1998). We review issues of statutory interpretation and jurisdiction *de novo*. *Taijeron v. Kim*, 1999 Guam 16, ¶ 9 (citation omitted). The point at which a statute of limitations begins to run is a question of fact. *Suzuki* v. *Holthaus*, 375 N.W.2d 126, 128 (Neb. 1985) (quoting *Interholzinger v. Estate of Dent*, 333 N.W.2d 895, 899 (Neb. 1983)). We review a trial court's findings of fact for clear error. *Hemlani* v. *Nelson*, 2000 Guam 9, ¶ 8 (citing *Yang* v. *Hong*,

1998 Guam 9, ¶ 4).

III.

[14] In its original appeal of the trial court's decision, DOE raised the following issue on appeal:

> Whether the trial court erred in finding that Pacific Rock's claims were filed within the 18-month statutory period and thus not precluded by the Claims Act?

[15] To maintain its assertion that Pacific Rock's claims were not filed within the eighteen month statutory period and, therefore, were precluded by the Claims Act, DOE argued three points. First, the eighteen month filing period prescribed by the Claims Act is jurisdictional and cannot be tolled by participation in negotiations or by making offers of settlement. Second, Pacific Rock was aware that it had a claim against the Government on February 8, 1993. Third, Procurement regulation 9-103.04.2 is not a provision of the Claims Act. In *Pacific Rock I*, having considered these arguments, we reversed the trial court's decision and found that Pacific Rock failed to timely file its claim at the Superior Court, leaving the court without jurisdiction to decide the case.

[16] Pursuant to Rule 31 of the Guam Rules of Appellate Procedure[2], Pacific Rock, in support of its Petition for Rehearing, proffers four contentions. First, the court's ruling should not apply to the undisputed amounts under the contract that the Government neglected to pay. Second, the Government failed to properly notify Pacific Rock of its right to administrative review; and

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[2] Rule 31, entitled Petition for Rehearing, of the Guam Rules of Appellate Procedure states in pertinent part:

> The petition shall state with particularity the points of law or fact which in the opinion of the petitioner, the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. An issue not previously briefed by the parties can not be raised for the first time in a petition for rehearing in the Supreme Court of Guam.

Guam R. App. P. 31(a).

therefore, Pacific Rock is not bound by the limitations period set forth in the Procurement Law. Third, the Government waived its right to rely on the limitation provisions of the Procurement Law by failing to plead the statute in its answer or otherwise raise the statute at any time in the proceedings below. Fourth, the limitations provisions of the Procurement Law do not apply to contract claims for the payment of money.

[17] We address both DOE's points of argument in the original appeal as well Pacific Rock's four contentions in its Petition for Rehearing in our resolution of the fundamental issue of this case, which is, whether Pacific Rock's breach of contract claim seeking monetary damages against DOE was barred by the statute of limitations. The resolution of that issue is contingent on this court's determination of two separate, but interrelated queries: (1) what is the proper statute of limitations applicable to the instant case, and (2) when did Pacific Rock's claim arise.

A. Statute of Limitations

[18] Pacific Rock, in its Petition for Rehearing, argues that this court incorrectly raised *sua sponte* the issue of lack of jurisdiction based on the statute of limitations in *Pacific Rock I*. We disagree. The "waiver of sovereign immunity is jurisdictional in nature so that if the action is barred, the Court lacks subject matter jurisdiction over plaintiff's claim." *Johnson v. United States*, 2000 WL 968795, at *2 (D. Kan. June 27, 2000) (citing to *Bradley v. United States*, 951 F.2d 268, 270 (10th Cir. 1991). Furthermore, in claims against the government, "statute of limitations [are] 'jurisdictional in nature and, as an express limitation on the waiver of sovereign immunity, may not be waived.'" *Cooper v. United States*, 47 Fed. Cl. 115, 117 (2000) (quoting *Hart v. United States*, 910 F.2d 815, 818-19 (Fed.Cir. 1990)) (internal citations omitted); *see also Superior Court v.*

Topasna, 1996 Guam 5, ¶ 6 (stating jurisdictional defects cannot be waived); *see also Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1571 (Fed.Cir. 1994); *see also Kirby v. United States*, 201 Ct.Cl. 527, 539 (1973). The resulting import of this principle is that jurisdictional issues may be raised at any time. *See Lujan* v. *Lujan*, 2000 Guam 21, ¶ 15. Therefore, this court in *Pacific Rock I*, did not err in raising the issue regarding the statute of limitations *sua sponte.*

[19] In our resolution of the first issue regarding the proper statute of limitations to apply in this case, we reiterate the basic starting point of discussion in our *Pacific Rock I* opinion, the waiver of sovereign immunity. "[T]he doctrine of sovereign immunity applies to Guam." *Guam Econ. Dev. Auth. and Guam Visitors Bureau v. Island Equip. Co.*, 1998 Guam 7, ¶ 6 (citing *Marx v. Gov't. of Guam*, 866 F.2d 294, 298 (9th Cir. 1989)). The Organic Act of Guam clearly states that the Government of Guam "with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to . . . the exercise by the government of Guam of any of its lawful powers." 48 U.S.C. § 1421a (1987); see also *Island Equip.*, 1998 Guam 7 at ¶ 6.

[20] In order for a suit to be maintained, therefore, against the Government of Guam and any of its instrumentality such as DOE, there must be an express waiver of sovereign immunity by the Guam Legislature. *See* 48 U.S.C. § 1421a; *see also Wood v. Guam Power Auth.*, 2000 Guam 18, ¶ 10. In the case at bar, two statutes, the Procurement Law and the Claims Act, have been proposed as the statute conferred by the Guam Legislature as the express waiver of sovereign immunity by the government in a breach of contract suit praying for monetary relief. As reflected in our previous holding, the trial court's holding, as well as both the parties' appellate briefs, there has been much confusion as to the proper statute to apply. The determination of which statute of limitations

provision applies to the instant action is dispositive in our analysis to both the issues of whether Pacific Rock met the statute of limitations and when Pacific Rock's claim arose.

1. Procurement Law

[21] We first turn our focus to the statute our court previously determined and applied as the controlling statute in the case between Pacific Rock and DOE, the Procurement Law. In *Pacific Rock I*, we held that the trial court did not have jurisdiction to hear the case. The rationale for our opinion was based on three premises. First, a party who seeks judicial relief from administrative action taken under the Procurement Law is not required to comply with the Claims Act. Second, the contract and cause of action arose pursuant to the Procurement Law. Third, the legislature intended that the Procurement Law controls when a cause of action arises under a contract procured through the Procurement Law. In our opinion today, we embrace the overarching rule set forth in *Pacific Rock I* that the Procurement Law applies to contracts procured under the Procurement Law; however, we hold that in breach of contract claims praying for monetary damages, the Procurement Law does not contain the requisite waiver of sovereign immunity to bring the case into court.

a. Legislative History of the Guam Procurement Law

[22] The crux of the misunderstanding of which statute to apply stems from the Procurement Law's rich, but perplexing legislative history. In order to guide us in our understanding and interpretation of the Procurement Law, we therefore, examine the legislative history behind the Law.

[23] The provisions of the Guam Procurement Law, codified in the Guam Government Code §§ 6950-82 (1982), were originally adopted from the Model Procurement Code by the 16th Guam Legislature in 1982. Guam Pub. L. 16-124 (Dec. 30, 1982). The following three sections under the

original Law would have been applicable to the case at bar, which involves a breach of contract claim praying for monetary relief.

[24] First, GGC §§ 6975.2 (a) through (f) addressed the Procurement Law's applicability and the Chief Procurement Officer's authority in resolving contracts and breach of contracts controversies. Because of the significance of this section, we outline relevant portions of the section in this opinion. Section 6975.2 provides:

> (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 commences an action in court in accordance with § 6978(c) of this Chapter.
>
> (f) Failure to Render Timely Decision. If the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers does not issue the written decision required under Subsection (c) of this Section within sixty (60) days after written request for a final decision, *or* within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

GGC § 6975.2(a)-(f) (1982) (emphasis added).

[25] Second, GGC § 6978(c) provided the waiver of sovereign immunity for breach of contract cases. Under the original Procurement Law provisions, the Superior Court was conferred jurisdiction for breach of contract suits seeking monetary damages. Guam Government Code § 6978 (c) and (f) state in relevant part:

> (c) Actions Under Contracts or for Breach of Contract. The Superior Court shall have jurisdiction over an action between the Territory and a contractor, for any cause of action which arises under, or by virtue of, the contract, *whether the action is at law or in equity, whether the action is on the contract or for a breach of the contract, and whether the action is for monetary damages or declaratory, or other equitable relief*, but shall be subject to § 526 of the Code of Civil Procedure, and as it may be amended or re-codified from time to time.
>
> (f) All actions permitted by this Article shall be conducted as provided in the Government Claims Act.

GGC § 6978 (c), (f) (1982) (emphasis added).

[26] Third, GGC § 6878.1(c) defined the time limitations for when a suit for breach of contract damages must be brought. Section 6878.1(c) provides:

> Actions Under Contracts or for Breach of Contract. Any action commenced under Section 6978(c) of this Chapter shall be commenced within *six months* of the date the claim arose, or within *six months* of the date claimant knew, or should have known, that a claim existed against the other party.

GGC § 6878.1(c) (1982).

[27] In 1986, the 18th Guam Legislature amended the Procurement Law and added a Procurement Appeals Board, which was again a modified version from a similar provision found in the Model Procurement Code. Guam Pub. L. 18-44 (Nov. 14, 1986). The provisions regarding the Procurement Appeals Board were originally codified in GGC §§ 6983-6983.9 and are presently codified in Title 5 GCA §§ 5701-10 (1996). In addition, the 1986 amendments changed several

provisions of the Procurement Law to allow the Procurement Appeals Board to function within the procurement process and significantly modified several of the provisions outlined above.[3]

[28] The first pertinent change is found in Title 5 GCA § 5480(c) (1996) (modified from GGC § 6878 (c)), which no longer confers jurisdiction to the Superior Court for breach of contract cases seeking monetary relief as it originally did in the 16th Guam Legislature version. Section 5480(c) instead provides the following:

> In addition to other relief and remedies, the Superior Court shall have jurisdiction to grant injunctive relief in any action brought under Subsections (a), (b), or (c) of this Section.

Title 5 GCA § 5480(c) (1996).

[29] The second significant change is found in Title 5 GCA § 5481(c) (1996) (modified from GGC § 6878.1 (c)), which changes the time limitations on when an action for a breach of contract suit can be brought. Section 5481(c) states in relevant part:

> Any action commenced under 5480(c) of this Chapter shall be commenced within twelve (12) months after the date of the Procurement Appeals Board decision.

Title 5 GCA § 5481(c) (1996).

[30] The third major addition to the current Procurement Law is the existence of the Procurement Appeals Board, which added two important dimensions to contract or breach of contract claims. First, it added another review mechanism at the administrative level before a case could be brought to court. Second, it extended the claimant's time frame to bring a Title 5 GCA § 5427 (1996) case into court from six months starting from the time the Chief Procurement Officer renders a decision

[3] In *Pacific Rock I*, we failed to recognize the magnitude of those changes made by the 18th Legislature. In this regard, our court is not alone as reflected in the latest version of the Guam Administrative Rules and Regulations, which do not comply with the current Procurement Law in all respects.

(under the original Procurement Law) to twelve months from the time the Procurement Appeals Board renders a decision.

[31] The creation of the Procurement Appeals Board, however, does not aid claimants such as Pacific Rock who are seeking monetary damages under a breach of contract theory. Title 5 GCA § 5705, which outlines the jurisdiction of the Procurement Appeals Board provides in pertinent part:

> The Board shall have the power to review and determine de novo any matter properly submitted to it. *The Board shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam.*

Title 5 GCA § 5705 (1996) (emphasis added).

[32] As reflected above, the Procurement Appeals Board has no jurisdiction over disputes such as the present, which involve money owed to or by the Government of Guam. The Procurement Appeals Board's lack of jurisdiction in this area is consistent with the 18th Guam Legislature's modification of GGC § 6878(c) (presently codified as Title 5 GCA § 5480(c)) which originally conferred jurisdiction to the Superior Court in breach of contract cases seeking monetary relief. The Procurement Appeals Board's lack of jurisdiction and the legislature's latest modification do not render the Procurement Law wholly inapplicable to the present case however, in view of the legislature's retention of Title 5 GCA §§ 5427(a)-(f) (originally codified as GGC §§ 6975.2(a)-(f)).[4] As aforementioned above, this specific section of the Procurement Law outlines the Procurement Law's applicability and the Chief Procurement Officer's authority in resolving contract and breach

[4] Notwithstanding some minor modifications from its original enactment, 5 GCA §§ 5427(a)-(f) is essentially identical to GGC §§ 6975.2(a)-(f) as outlined above.

of contract controversies at the administrative level.[5]

[33] In sum, when viewed in totality, the current disposition of the Procurement Law is that it no longer confers a waiver of sovereign immunity for breach of contract cases for monetary relief. The Procurement Law remains applicable to such cases, however, through 5 GCA §§ 5427(a)-(f), which in effect, provide the last administrative remedy that a claimant must exhaust before pursuing legal recourse.

2. Claims Act

[34] Because we find that the Procurement Law, though applicable at the administrative level pursuant to 5 GCA §§ 5427(a)-(f), does not confer jurisdiction to courts for breach of contract suits seeking monetary relief, we hold that the statute of limitations under the Procurement Law was not the proper statute to apply in this case. This does not end our analysis, however, we next examine the other proposed statute, the Claims Act. Although the trial court applied the Claims Act in the instant case, the focus of the trial court's opinion was determining whether or not Pacific Rock

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[5] The requirement of resolving the dispute at the administrative level provided for in the Procurement Act comport with the contracts signed by the parties in this case. Each of the four contracts contained a "Disputes Clause" which stated in pertinent part:

> Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the Contracting Officer whose decision shall be final and conclusive upon the parties thereto. In the meantime the Contractor shall diligently proceed with the work as directed.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibits A, B, C, D). In addition, paragraph IX(2)(a) of the general conditions of the contracts provided in relevant part:

> Except as otherwise provided in this contract, any disputes arising under this contract shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive.

Defendant-Appellant's Excerpts of Record, Tab 26 (Exhibit 2).

complied with the procedures under the Claims Act and not necessarily discussing the basis for their choice of the Claims Act as the applicable statute. Ultimately, the trial court found that Pacific Rock "substantially complied with" the Claims Act's procedures. Record on Appeal, Tab 72, p. 65 (Decision and Order Feb. 26, 1997). We hold that the trial court was correct in applying the Claims Act as the proper statute in its determination of whether Pacific Rock filed its suit within the statute of limitations, however, we also point out below, the specific provision that confers jurisdiction to the courts in breach of contract cases praying for monetary damages.

[35] The waiver of sovereign immunity for breach of contract suits against the Government of Guam and its instrumentalities is found in Title 5 GCA § 6105 (1993), which provides in pertinent part:

> Pursuant to Section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided:
>
> (a) for *all expenses incurred in reliance upon a contract to which the Government of Guam is a party*, but if the contract has been substantially completed, expectation damages may be awarded;

Title 5 GCA § 6105(a) (1993) (emphasis added). Unlike the current Procurement Law provisions, 5 GCA § 6105 provides the proper waiver of sovereign immunity for breach of contract suits praying for monetary relief. Moreover, the statute provides for both reliance and expectation damages awards.

[36] In *Pacific Rock I*, we departed from the *Ciesiolka v. San Nicolas* line of cases that made strict compliance with the Claims Act a jurisdictional prerequisite to maintaining suit against the government. *Ciesiolka v. San Nicolas*, Civ. No. CV-90-00076A, 1991 WL 336902, at * 3 (D. Guam App. Div. June 11, 1991). In accord with our current holding that the statute of limitations found

in the Claims Act is the proper time limitations to apply in the present case, we return to the policy adopted by the 9th Circuit. The pragmatical effect of this holding is that claimants, such as Pacific Rock, whose claims are not conferred a waiver of sovereign immunity under the Procurement Law, are required to file a government claim with the Attorney General before filing suit in court as mandated by 5 GCA §§ 6106, 6201-13.[6]

[37] We acknowledge Pacific Rock's concern and our previous apprehension in *Pacific Rock I,* where exhaustion of remedies under the Procurement Law and the filing of a claim with the Attorney General's Office may result in dual administrative review, at the Chief Procurement Officer level and at the Attorney General level. The rationale for our current disposition in this matter is two-fold. First, as previously outlined in the Procurement Law discussion, the 18th Guam Legislature not only removed the waiver of sovereign immunity under the Procurement Law for breach of contract cases seeking monetary damages, but also, specifically did not allow the Procurement Appeals Board to hear cases that involve money owed to and by the Government of Guam. Consequently, notwithstanding the current non-existence of the Procurement Appeals Board, had the Board existed, cases within the Procurement Appeals Board's jurisdiction would have received dual administrative review as well, at the Chief Procurement Officer level and the Procurement Appeals Board level before the case is moved to court. Second, the possibility of additional review (which increases the chances of settlement before the case enters the court system) is consistent with the overarching policy of sovereign immunity and that is to protect the

[6] To eliminate any discrepancies, we confine our opinion to suits such as the present, wherein the Procurement Law does not confer a waiver of sovereign immunity. In suits that the Procurement Law provides for a comprehensive remedial scheme both administratively and legally, then the Procurement Law controls and to that extent *Pacific Rock I* remains good law.

government from unnecessary suits. *See Rustin v. Dist. of Columbia*, 491 A.2d 496, 501 n. 8 (D.C. 1985) (citations omitted) ("The very purpose of the doctrine of sovereign immunity is to protect the government from having to spend significant amounts of time litigating the merits of its policy decisions."). The commentary found in Title 5 GCA § 6206 (1993) entitled Settlement of Claim Before Action supports this proposition and states in relevant part:

> Former law, with a short exception, provided that the Attorney General could approve settlements only if they were under $3,000. This section retains the limit of $3,000 for the Attorney General or Claims Officer acting alone, but permits greater settlements with the approval of the Governor, in the case of line agencies, and the Board or chief officer, Attorney General and Governor in the case of autonomous agencies. This should encourage settlements before court suits, but keep the policy makers aware of the settlement and permit them to bring other policy considerations into the larger settlements. *We should not encourage suits where settlement is possible.*

Title 5 GCA § 6206 cmt. (1993) (emphasis added).

B. When did Pacific Rock's Claim Arise?[7]

[38] The next issue that our court must resolve is when Pacific Rock's claim against DOE arose. At first glean, the issue appears straightforward, however, the analytical scheme for resolving it begins with the recognition of the interplay between both the Procurement Law and the Claims Act outlined above. Moreover, the resolution of this issue ultimately controls whether or not Pacific

[7] We disagree with the dissent's intimation that the issue of when the claim arose was not properly raised in the Petition for Rehearing. *See infra* (concurring and dissenting opinion of BENSON, J.). Notwithstanding the issue's significance in the original appeal, in this rehearing, both parties extensively discussed the issue in their briefs and during oral arguments.

Alternatively, even if the issue was not properly raised, if in review of our prior opinion, we discover an error, the court can *sua sponte* grant rehearing on the issue. In this regard, we follow the procedural framework of *Clark Pipe & Supply Co., Inc. v. Associates Commercial Corp.*, 893 F.2d 693 (5th Cir. 1990). In *Clark Pipe*, an issue was not raised by the Petitioner, however, the court, *sua sponte*, granted rehearing on that issue in conjunction with the issues that were properly raised reasoning: "Our review of our prior opinion . . . convinces us that our holding with respect to valuation of the collateral is erroneous and should be corrected in order to avoid any precedential effect it may have on this point." *Id.* at 595 n. 1.

Rock met the statute of limitations for their present suit. For reasons set forth below, we affirm the trial court's finding that Pacific Rock's claim arose on July 20, 1993, which represents the date of the final decision under 5 GCA § 5427.

1. Pacific Rock's Claim Arose When it Exhausted its Administrative Remedies Afforded to it by the Procurement Law.

[39] In the instant case, Pacific Rock brought a breach of contract suit against DOE for monetary damages.[8] As illustrated above, breach 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, in that there is no waiver of sovereign immunity, however, that does not mean that this case is wholly removed from the Procurement Law. The 18th Guam Legislature's retention of 5 GCA §§ 5427(a)-(f) in view of all the major changes that occurred in the Procurement Law during that period, reflects the Guam Legislature's desire that breach of contract disputes, regardless of the remedy sought, be first resolved at the Chief Procurement Officer's level. Because 5 GCA § 5427 sets forth the final administrative measure that a contractor such as Pacific Rock must undertake under the Procurement Law before seeking further remedy, we find 5 GCA § 5427(f) entitled Failure to Render Timely Decision germane in the court's analysis of when a claim arises. Title 5 GCA § 5427(f) provides:

> If the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or the designee of one of these officers does not issue the written

[8] Pacific Rock contends that the disputed and undisputed portions of its breach of contract suit are distinct and that even if the court rules that the suit was brought beyond the statute of limitations, the undisputed portion should nonetheless be awarded to them. We find Pacific Rock's contention unwarranted. In a breach of contract claim, the Plaintiff cannot separate the undisputed portion from the disputed portion for they are part of the whole case.

> decision required under Subsection (c) of this Section within sixty (60) days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

5 GCA § 5427(f).

[40] Title 5 GCA § 5427(f) establishes a scheme as to when a final decision should be rendered. In our reading of the statute, we see three possible scenarios that claimants may face during their dispute resolution with the Chief Procurement Officer. The first scenario is that a claimant submits a written request for a final decision, which should be rendered within sixty days by the Chief Procurement Officer. The second instance is that the parties agree to prolong the final decision beyond the sixty days which is allowable under the "within such longer period as may be agreed upon by the parties" clause of the provision. Title 5 GCA § 5427(f) (1996). The third situation is that there is neither a written request for a final decision within sixty days submitted nor an agreement between the parties (through words or conduct) to prolong the final decision beyond the sixty days and therefore, a final decision should still be rendered within the sixty days. Under scenarios one and three, the matter becomes a direct application of the sixty days formula mandated by the statute, however, under the second instance, the determination of when the Chief Procurement Officer or his representative renders a final decision as a result of all the negotiations becomes a factual issue that a court is compelled to examine. We find that the case between Pacific Rock and DOE falls under this second scenario.

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2. The Issue of When a Final Decision was Given is a Question of Fact.

[41] In *Pacific Rock I*, we failed to identify the proper standard of review in our examination of this specific factual issue regarding the date of the final decision under 5 GCA § 5427(f). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous . . . ." *Yang* v. *Hong*, 1998 Guam 9, ¶ 4 (citing to Guam R. Civ. P. 52(a) and *Coffey* v. *Gov't of Guam*, 1997 Guam 14, ¶ 6). "Factual determinations are reviewed for clear error." *Yang*, 1998 Guam 9 at ¶ 4 (citing to *Guam* v. *Chargualaf*, Crim. No. 88-00068A, 1989 WL 265040, at *2 (D. Guam App. Div. Sept. 26, 1989)).

[42] Here, the trial court concluded that Pacific Rock's claim against DOE arose on July 20, 1993. Record on Appeal, Tab 72, p. 68 (Decision and Order Feb. 26, 1997). The trial court based its finding on the offer and counter-offer activities that occurred between the parties after the substantial completion of the project on August 16, 1991. *See id.* at 66. It further found that notwithstanding DOE's unfavorable treatment of Pacific Rock's demand, "it [was] clear that no official denial of [Pacific Rock's] claims had been made" until July 20, 1993. *Id*. at 66, 68.

[43] From our examination of the record, especially focusing on the documented correspondences between the parties after the substantial completion of the project, we hold that the trial court's finding of fact regarding when Pacific Rock's claim arose was not clearly erroneous and therefore, affirm it. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake." *Yang*, 1998 Guam 9, at ¶ 7.

[44] The project was substantially completed on August 16, 1991; this day also represented the day of final inspection and when the final payment was due. Throughout the duration of the project, several disputes surfaced regarding the various modifications from the original plan. When the project formally ended on August 16, 1991, further negotiations regarding those modifications and payment of those modifications not only continued, but discussions about the final payment remaining on the contract commenced.

[45] Although Pacific Rock demanded payment of $639,607.60 to DOE on December 28, 1992, the negotiations did not cease. On February 2, 1993 and supplemented by another letter on February 8, 1993, Quitugua made Pacific Rock an offer of $272,875.05. Quitugua's February 8, 1993 letter contained the following excerpt:

> The offer of $272,875.05 is firm and non-negotiable. If this is not acceptable, Mr. Swegler is free to pursue any available remedies.

Defendant-Appellant's Excerpts of Record, tab 19 (trial exhibit Y).

[46] The trial court did not construe the above as a final rejection of Pacific Rock's demand because it did not contain the required language that Pacific Rock is free to seek judicial review in Superior Court. Record on Appeal, Tab 72, p. 67 (Decision and Order, Feb. 26, 1997). Additionally, in response to Pacific Rock's request for further negotiations on February 10, 1993, Quitugua welcomed the opportunity for further negotiations as reflected in the following excerpts of his February 24, 1993 response:

> In response to your request to further negotiate the matter of the amounts due to Pacific Rock we are prepared to meet with you and Mr. Swegler to completely and finally resolve this matter.

I look forward to working with you toward resolving this matter once and for all.

Plaintiff-Appellee's Supplemental Record on Appeal (Exhibit D-55).

[47] In addition to the above, another letter sent by Baldeviso, the Contracting Officer's representative, demonstrate the parties ongoing resolution of the dispute. In that June 16, 1993 nine page letter, Baldeviso addressed each of the various packages under the project, gave a brief description of the claims that Pacific Rock had, and noted whether or not the claims were approved or disapproved. At the end of the letter, Baldeviso stated:

> We look forward that the above information will help settle disputes and eventually close these project in due time.

Plaintiff-Appellee's Supplemental Excerpts of Record (Trial Exhibit 41-9).

[48] It was not until the July 20, 1993 letter from the Attorney General's office had Pacific Rock been notified that its claims have been rejected and that the Government's final offer was $277,506.19. This letter, which the trial court construed to be the final denial of Plaintiff's request, is significant because it attached Baldeviso's final assessment of the project. Moreover, this letter contained a larger amount than the one previously offered by Quitugua and established Pacific Rock's claim against DOE. *See Franconia Assocs.* v. *United States*, 240 F.3d 1358, 1364 (Fed. Cir. 2001) ("A claim against the United States first accrues when the government's liability is determined."); *see also Kinsey* v. *United States*, 852 F.2d 556, 557 (Fed. Cir. 1988); *see also Wrona* v. *United States*, 40 Fed. Cl. 784, 787-88 (1998); *see also Brighton Village Assocs.* v. *United States*, 52 F.3d 1056, 1060 (Fed. Cir. 1995).

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[49] In addition to 5 GCA § 5427, which authorizes the Contracting Officer to resolve matters that arise in procurement contracts, the general conditions of the contracts contained a disputes provision that stated, "any disputes arising under this contract shall be decided by the Contracting Officer." Defendant-Appellant's Excerpts of Record, Tab 26 (Exhibit 2). Furthermore, even during the construction period, the contract mandated that not only are disputes to be decided by the Contracting Officer, but also, "[i]n the meantime the Contractor shall diligently proceed with the work as directed." Plaintiff-Appellee's Supplemental Excerpts of Record (Exhibits A, B, C, D). It was therefore fair and reasonable for the parties to continually negotiate in the manner that they did and for as long as they did. Had Pacific Rock chosen to immediately file suit in court before resolving this matter in accordance to 5 GCA § 5427 and their contract per the disputes provisions in the general conditions of the contracts, they would have failed to exhaust their administrative remedies and would not have been able to maintain their suit. *See Cannon* v. *United States*, 146 F. Supp. 827, 829 (Ct. Cl. 1956). ("A cause of action of whatever nature can accrue only at the time that a suit may be maintained thereon, and from that date forward the applicable statute of limitations begins to run."). We therefore affirm the trial court's finding of July 20, 1993 as the date when Pacific Rock's claim against DOE arose as it effectively represented the date when Pacific Rock was rendered a final decision under 5 GCA § 5427(f).

C. Did Pacific Rock's Claim against DOE fall within the Statute of Limitations?

[50] At the heart of this case is the determination of "Whether Pacific Rock's breach of contract claim seeking monetary damages was filed within the statute of limitations?" We hold that Pacific Rock's claim was filed within the statute of limitations. Our holding here is grounded from our

previous resolution of the two preliminary queries. First, the proper statute of limitations applicable in a breach of contract suit involving money owed to or by the Government of Guam is found in the Claims Act. Second, Pacific Rock's claim arose when it exhausted its administrative remedies afforded to it by the Procurement Law pursuant to 5 GCA § 5427.

[51] The statute of limitations under the Claims Act is found on Title 5 GCA § 6106 (1993) and provides:

> Limitations on Actions and Filing.
>
> (a) All claims under this Act must be filed within 18 months from the date the claim arose, but any claims timely filed under the predecessor of this Act shall be considered to have been timely filed under this Chapter.
>
> (b) Every action filed under this Chapter shall be barred unless commenced within 18 months from the time the notice that the claim was rejected was served as provided in Article 2 of this Chapter, or within 24 months after the claim was filed in cases where the government does not reject the claim.

Title 5 GCA § 6106(a)-(b) (1993). Pursuant to 5 GCA § 6106(a), a claimant must file a claim "within 18 months from the date the claim arose." 5 GCA § 6106(a). As 5 GCA § 6106(a)-(b) provide and the comment to this specific provision explains, the government has six months to render a decision on this claim. A claimant can only file a suit in court within eighteen months after the government rejects its claim during those six months or within twenty-four months after the original filing of that claim if the claim is not rejected during those six months, whichever comes first.

[52] As we determined above, Pacific Rock's claim arose on July 20, 1993. Pacific Rock had eighteen months from that time to file a claim. It filed a government claim with the Guam Attorney General's Office for both the final payment and compensation for the additional work against DOE

on November 4, 1994. This was sixteen months from the time the claim arose and therefore within the eighteen-month limit of 5 GCA § 6106(c). Two weeks later on November 16, 1994, Pacific Rock filed its suit in the Superior Court. An examination of the record does not reveal that the Attorney General responded to Pacific Rock's November 4, 1994 government claim. Consequently, Pacific Rock should have waited six months from the time they filed their claim on November 4, 1994 before filing suit in Superior Court. On September 18, 1995, however, Pacific Rock filed a Supplemental Complaint in Superior Court, which, in effect, served as a cure to their premature filing on November 16, 1994. We, therefore, hold that Pacific Rock's claim was filed within the statute of limitations. Accordingly, the trial court had jurisdiction to hear Pacific Rock's case against DOE.

IV.

[53] Our opinion is restricted to breach of contract cases for contracts procured under the Procurement Law, which involve money owed to or by the Government of Guam. For other types of contracts procured under the Procurement Law and whose claimants have been afforded a comprehensive remedial scheme both administratively and legally under the provisions, we affirm our holding in *Pacific Rock I*, which states that the Procurement Law controls those types of actions against the Government of Guam as intended in the Procurement Law. In the present case, however, the Procurement Law served as the final administrative remedy that Pacific Rock had to pursue before going to the Claims Act; and whose exhaustion of such administrative remedy effectively commenced the running of the statute of limitations under the Claims Act. We hold that Pacific

Rock's claim was filed within the statute of limitations provided for in the Claims Act and that the trial court had jurisdiction to decide the merits of the case. The trial court's decision is **AFFIRMED**. Our holding in *Pacific Rock I* is modified to the extent that it is inconsistent with our holding today.

JOHN A. MANGLONA
Designated Justice

F. PHILIP CARBULLIDO
Chief Justice (Acting)

BENSON, J.: CONCURRING and DISSENTING

[54] I concur with the court in its reasoning and in its holding that in breach of contract cases seeking monetary damages against the Government of Guam, the Procurement Law serves as the final administrative remedy that is a prerequisite to filing a claim pursuant to the Claims Act.

[55] I dissent from the holding that Pacific Rock's claim arose on July 20, 1993, the trial court's finding of fact, not on December 28, 1992 as held in *Pacific Rock I*. The court states that the issue was raised in the Petition for Rehearing. I do not agree.

[56] In its Petition for Rehearing, Pacific Rock failed to meet the requirements of Rule 31 of this Court's Rules of Appellate Procedure to "state with particularity the points of law or fact . . . the Court has overlooked or misapprehended." Guam R. App. P. 31(a). The court's opinion sets out the four issues presented by Pacific Rock. That *Pacific Rock I* erred in holding the date it did is not raised. Nor does the Petition for Rehearing raise the issue of the standard of review for factual findings (which would have gotten to the problem). The memorandum supporting the Petition for Rehearing does not discuss either the date found by the trial court, the date held in *Pacific Rock I*, or the standard of review.

[57] The Department of Education's response to the Petition for Rehearing mentions December 28, 1992 only to point out that even if the eighteen months in the Government Claims Act were the proper statute of limitations to use, Pacific Rock is still out of time. In its reply brief, Pacific Rock discusses at length what it sees as the proper date (July 20, 1993), and quotes from its brief on appeal. These two circumstances do not correct that failure of Pacific Rock to "state with particularity" the issue.

[58] The court also states that it is entitled to address "DOE's points of argument in the original appeal." No authority is cited, and I know of none.

[59] I believe, therefore, that the issue of the date on which the claim arose is not before us.

[60] On its own motion, the court could have granted a rehearing on the issue of whether *Pacific Rock I* properly overruled the trial court's finding of fact. *Clark Pipe and Supply Co., Inc. v. Associates Commercial Corporation*, 893 F.2d 693, 695 n. 1 (5th Cir. 1990) (granting a rehearing on the issue requested and on a second issue *sua sponte*. "Our review of our prior opinion, however, convinces us that our holding with respect to valuation of the collateral is erroneous and should be corrected in order to avoid any precedential effect it may have on this point. We therefore, sua sponte, grant REHEARING on that issue as well." *Id*.).

RICHARD H. BENSON
Justice *Pro Tempore*