# 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

## AMENDED OPINION

(The title page of this opinion was amended pursuant to a "Notice of Amendment to the Title Page of The Opinion Issued on June 2, 2000)

Supreme Court Case No. CVA98-0003
Superior Court Case No. CV1668-94

**Filed: June 2, 2000**

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Appeal from the Superior Court of Guam
Argued and submitted on August 11, 1999
Hagåtña, Guam


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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice; EDWARD S. TERLAJE and HOWARD TRAPP,[1] Justices *Pro Tempore*.

**CRUZ, C.J.:**

**[1]** Appellant Department of Education ("DOE") appeals the trial court's judgment in favor of Appellee Pacific Rock Corporation ("PRC"). Pacific Rock Corporation filed suit under the Government Claims Act, 5 GCA § 6101 *et seq.*, praying for final payment of, and an equitable adjustment to, the contract sum of a contract procured pursuant to the Procurement Law, 5 GCA § 5001 *et seq*. The trial court invoked jurisdiction under the Government Claims Act and awarded PRC $219,682.34 for cost overruns and $284,363.00 owing under the original contract, as well as prejudgment interest and post-judgment interest. We hold that the Procurement Law controls actions against the Government of Guam for contracts procured under the statute and find that PRC failed to timely file its claim at the Superior Court, leaving the court without jurisdiction to decide the case. Accordingly, the judgment in favor of PRC is vacated.

## I. FACTUAL AND PROCEDURAL BACKGROUND

**[2]** In 1990, PRC 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, and Finegayan elementary schools.

**[3]** After the award and upon scrutiny of the project specifications, PRC discovered nonconformities with applicable building codes and lodged a protest of the award. Thus, in a letter

[1] Justice *Pro Tempore* Trapp heard oral arguments in this case but disqualified himself from deciding the matter prior to issuance of this opinion and did not join in it.

dated June 29, 1990, PRC'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, the Director of DOE responded that she took PRC's indication of intent to commence construction to mean that the company was rescinding its protest of the bid award. Further, the Director informed PRC that the company would be liable for noncompliance with building codes and that it was responsible for resolving violations with the Department of Public Works ("DPW"). The Director asked PRC to respond if she mistook PRC's position, but PRC gave no such response. Instead, PRC and the government signed a contract on or about August 20, 1990.

**[5]** To address concerns over the project, PRC, its consultant, CIC Consultants, Inc., DPW, and DOE's construction manager, E.V. Baldeviso & Associates ("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]** Pacific Rock Corporation thereafter commenced construction. However, to say that the project did not proceed without great difficulty is an understatement as deficient specifications necessitated some eighty-two changes to the project. *See* Appellee's Supplemental Excerpts of Record Trial Exhibit 41-1 through 41-9. Despite these snags, PRC completed the project, and final inspection was made on August 16, 1991.

**[7]** For reasons never fully explained, PRC could neither obtain payment for remaining amounts under contract nor for change orders. For other unknown reasons, PRC took no formal action until

December 28, 1992, when its attorney sent a letter to DOE demanding payment of $639,607.60, which included both remaining amounts under contract and change order monies. The Department of Education responded to this letter on February 2, 1993, wherein a new Director informed PRC that DOE would agree to a total sum of $272, 875.05. The new Director also informed PRC that the company could submit change orders with invoices under protest then pursue legal remedies. Shortly thereafter, on February 8, 1993, the Director wrote another letter informing PRC that DOE would not process change orders or invoices under protest and that its position was non-negotiable.

**[8]** Instead of pursuing legal action, PRC requested that DOE reconsider its position. The Department agreed, and in a letter dated February 24, 1993, the Director 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, PRC responded that it would be amenable to negotiation and cooperative with investigation of the matter.

**[9]** Investigation commenced, and Baldeviso formalized its findings in a letter dated June 16, 1993, wherein it recommended that seventy-one of eighty-two change order items be disapproved. Baldeviso also calculated that the Government was entitled to $91,500.00 in liquidated damages. On July 20, 1993, the Attorney General's office informed PRC 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 PRC filed an administrative claim under the Government Claims Act against DOE. On November 16, 1994, PRC filed a complaint against DOE at the Superior Court. A four-week bench trial was held, and subsequently, the trial court decided in favor of PRC, denying DOE liquidated damages but awarding PRC a total of $514,258.76

in damages[2] plus prejudgment and post-judgment interest. *Pacific Rock Corp. v. Department of Educ.*, CV1668-94 (Super. Ct. Guam Feb. 26 1990).

**[11]** Although not clear in its decision, the court apparently took jurisdiction over the matter pursuant to Guam's claims statute, 5 GCA § 6101 *et seq*. The court determined that PRC 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 first be denied, thus creating a disputed claim with the Government." The court used 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, PRC would be barred if it failed to file its administrative claim by January 20, 1995. However, as PRC filed its claim 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.

## II. ANALYSIS

**[12]** We have jurisdiction over the appeal of the final judgment of the court below pursuant to 7 GCA §§ 3107 and 3108 (1994).

**[13]** Although the contract at issue was made pursuant to authority granted DOE under the Procurement Law, the parties allege that jurisdiction over this action is properly found under the

[2] In its February 26, 1997 Decision and Order, the trial court originally awarded $514,258.76 in damages. The trial court subsequently reduced Item 1 of PRC's claim by $4,597.50 and Item 23 by $5615.92 in an Amended Decision and Order entered on the docket on December 1, 1997. However, on January 7, 1998, the Clerk of the Superior Court entered a Stipulation and Amended Judgment filed on December 1, 1997 indicating a total damages award of $526,602.04 on the docket.

Government Claims Act. We are called upon to review the statutory scheme and jurisdiction and our review is *de novo. Taijeron v. Kim*, 1999 Guam 16, ¶ 9.

**A. Waiver of sovereign immunity**

**[14]** Guam's waiver of sovereign immunity for actions in contract is found at 48 U.S.C. §1421a, which provides in relevant part:

> **Unincorporated Territory--Government.** Guam is hereby declared to be an unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam. The government of Guam shall have the powers set forth in this Act, shall have power to sue by such name, and, *with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to,* or any tort committed incident to, *the exercise by the government of Guam of any of its lawful powers*.

48 U.S.C. §1421a (1987) (emphasis added). The Legislature saw fit to waive sovereign immunity as to contract actions for reliance and expectation damages under the Government Claims Act at 5 GCA § 6105:

> **Waiver of Immunity.** 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. . . .

5 GCA § 6105 (1993).

**[15]** Litigants have used the Government Claims Act to plead jurisdiction and the defense of lack of jurisdiction for all contract and tort actions against the government. *See Guam Econ. Dev. Auth. v. Island Equip. Co., Inc.*, 1998 Guam 7; *Agustin v. Government of Guam*, Civ. No. CV96-00039A, 1996 WL 875740 (D. Guam App. Div. Nov. 6 1996); *Lampley v. Government of Guam*, 882 F.Supp.

957 (D. Guam App. Div. 1995); *Ciesiolka v. San Nicolas*, Civ. No. CV-90-00076A, 1991 WL 336902 (D. Guam App. Div. June 11 1991); *Maquera v. RCA Global Communication*, Civ. No. 87-00074A, 1988 WL 242616 (D. Guam App. Div. Nov. 7 1988); *Intercontinental Trading Corp. v. Guam Housing & Urban Renewal Auth.*, DCA Civ. No. 87-00001A, 1987 WL 109897 (D. Guam App. Div. Nov. 27 1987); *Pacific Drilling, Inc. v. Marianas Drilling, Inc.*, DCA Civ. No. 85-0016A, 1985 WL 56585 (D. Guam App. Div. Sept. 27 1985); *Quenga v. Government of Guam*, D.C. Civ. No. 83-00015A, S.C. Civ. No. 136-80, 1984 WL 48865 (D. Guam App. Div. May 22 1984); *Desoto v. Guam*, D.C. Civ. No. 82-0002A, S.C. Civ. No. 484-81, 1983 WL 30218 (D. Guam App. Div. Sep. 9 1983); *Carltom Enters., Inc. v. Government of Guam*, Civ. No. 81-0060A, 1983 WL 30210 (D. Guam App. Div. Aug. 25 1983); *Mariano v. Guam Civil Serv. Comm'n Bd.*, D.C. Civ. Appeal No. 810052A, 1983 WL 30227 (D. Guam App. Div. June 20 1983); *Santos v. Calvo*, D.C. Civ. No. 80-0223A, S.C. Civ. No. 663-80, 1982 WL 30790 (D. Guam App. Div. Aug. 11 1982); *Munoz v. Government of Guam*, Civ. No. 76-16A, 1978 WL 13511 (D. Guam App. Div. Mar. 13 1978).

**B. A party who seeks judicial relief from administrative action taken under the Procurement Law is not required to comply with the Government Claims Act**

**[16]** In *Ciesiolka v. San Nicolas*, *supra*, the District Court of Guam's Appellate Division followed the Ninth Circuit's rich tradition of strictly construing claims statutes. Civ. No. CV-90-00076A, WL 336902 *3 (D. Guam App. Div. June 11 1991). The *Ciesiolka* court held fast that such strict compliance is a jurisdictional prerequisite to maintaining suit against the government. *Id.* We do not agree.

**[17]** When a contractor has been aggrieved with respect to a bid award, it must lodge a protest with the contracting officer. 5 GCA § 5425 (1996). If a Procurement Law controversy arises with regard to breach, mistake, misrepresentation, or other cause for contract modification or rescission, recourse is to seek resolution with the Chief Procurement Officer ("CPO"), Title 5 GCA § 5427, (1996), because it is the government's policy to attempt settlement of disputes before resorting to litigation. GSA Procurement Reg. § 9.03.01.1, (1984). The CPO or her designee has authority to investigate disputes, issue a final and conclusive decision on the matter, and inform the contractor of its right to judicial or administrative review of the action taken. 5 GCA § 5427(c), (e). If the controversy concerns a dispute over money owed by or to the government, there is no administrative review available. 5 GCA § 5705 (1996). The Superior Court has jurisdiction over actions between the government and a contractor, whether at law or in equity. 5 GCA § 5480 (1996).

**[18]** By comparison, the formal procedure for filing an administrative claim is also prescribed by statute. 5 GCA § 6201 (1993). In addition to submitting a claim form under the procedure outlined at section 6201, the Claims Act requires that the claims officer investigate the claim. 5 GCA § 6203 (1993). The administrative claim must be filed with the Attorney General within eighteen months of the claim arising. 5 GCA § 6106(a) (1993). Upon rejection of the claim or six month's lapse without a decision, a claimant may institute an action at the Superior Court. 5 GCA § 6208 (1994).

**[19]** Strict compliance with the Claims Act would mean that party must twice seek administrative relief when litigating a cause of action under a procurement contract. First a party would be required to exhaust the administrative remedies prescribed by the Procurement Law, seeking settlement with the CPO and obtaining a final decision, then it would have to follow Claims Act procedures,

including undergoing another investigation, before judicial relief would be available. This result produces policy violations which the Procurement Law expressly proscribes:

> **(b) Purposes and Policies.** The underlying purposes and policies of this Chapter are: (1) to simplify, clarify, and modernize the law governing procurement by this Territory; (2) to permit the continued development of procurement policies and practices; (3) to provide for increased public confidence in the procedures followed in public procurement; (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory; (5) to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory; (6) to foster effective broad-based competition within the free enterprise system; (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; (8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.

5 GCA § 5001(b) (1996). Thus we hold that a party who seeks judicial relief from an administrative action taken pursuant to the Procurement Law should not seek relief under the Government Claims Act.

### C. The contract and cause of action arose pursuant to the Procurement Law

**[20]** The contract between PRC and DOE arose pursuant to the Procurement Law. The bid was awarded under the procurement process. *See* 5 GCA §§ 5210 (Methods of Source Selection), 5211 (Competitive Sealed Bidding), 5235 (Types of Contracts), 5300-5307 (Procurement of Construction). Likewise, the contract contained language required by Procurement Law, such as the power of the CPO to settle disputes and the conclusiveness of her decision.

**[21]** Protest over the specifications was resolved under the Procurement Law. Pacific Rock Corporation protested that specifications violated applicable building code provisions. The company sent a letter to the director, a person authorized to settle award disputes, electing to continue

construction, but attempting to shift liability for noncompliance with building codes. The CPO stated the government's position and asked PRC to respond, which it never did.

**[22]** During performance, controversies concerning the contract arose. Then, after completion, settlement was attempted within Procurement Law prescripts. Pacific Rock Corporation made a demand for final payment and change order monies. Shortly thereafter, the Director made a final decision and informed PRC of its right to seek judicial relief. The parties subsequently attempted negotiation of a settlement but reached an impasse with regard to the total final payment.

### D. The Legislature intended that the Procurement Law control when a cause of action arises under a contract procured through the Procurement Law

**[23]** It is clear that in the Procurement Law the Legislature wisely envisioned a comprehensive, detailed scheme for settlement of contract controversies before proceeding to court. Moreover, as the statute contains provisions dealing with judicial and administrative relief and language providing for limitations on actions[3] which differ from the Government Claims Act, it is abundantly clear that the Legislature intended that the Procurement Law waive sovereign immunity here *vis a vis* the Claims Act.

**[24]** In *Turnbull v. Fink*, 668 A.2d 1370 (Del. 1995), Delaware had two statutes which provided for waiver of sovereign immunity in tort actions involving its mass transportation system. One statute, Del. Code Ann. Tit. 2, §1329 (1989), waived immunity for tort liability to a maximum of $300,000 for each occurrence if the state purchased liability insurance. 668 A.2d at 1373. The other statute, Del. Code Ann. Tit. 18, §6511 (1970), waived immunity to an amount covered by purchased

[3] *See* GSA Procurement Reg. § 9-402 (1984).

policy limits. *Id.* The claimant argued that it was potentially entitled to $5,000,000 in relief in accordance with the second statute. *Id.* at 1374.

**[25]** The *Turnbull* court disagreed. The court stated that the two waiver of immunity statutes must be read together and harmonized, if possible. *Id.* at 1377 (citations omitted). If the statutes cannot be reconciled, the specific statute must prevail over the general. *Id.* (citations omitted). The court found that it could not harmoniously read the two statutes together. *Id.* As section 1329 provided a comprehensive, mandatory scheme for relief, the court held that section 1329, being comprehensive and specific, must prevail over section 6511. *Id.* at 1377. Thus, in *Turnbull*, Delaware waived sovereign immunity under the statute with comprehensiveness and specificity, Del. Code Ann. Tit. 2, §1329.

**[26]** Likewise, the Procurement Law at 5 GCA § 5001 *et seq.* is a comprehensive statute providing a mandatory scheme of administrative remedies including judicial relief. Moreover, its provisions clearly apply to actions arising out of contracts entered into under the Procurement Law. Since the Legislature saw fit to waive immunity from suit for actions in contract where the contract was entered into pursuant to Procurement Law, it is the statute which, upon compliance with procedure, satisfies the jurisdictional prerequisite to commencing an action against the Government of Guam at the Superior Court.

**[27]** Thus, we hold that a contractor commencing an action in contract for relief from adverse decisions reached under the Procurement Law's legal and contractual remedy provisions need not proceed under the Claims Act. Our holding today overrules prior case law to the extent that such case law made compliance with Claims Act strictures the jurisdictional prerequisite to commencing

an action against the Government of Guam when a Procurement Law contract is the subject matter of the complaint.[4]

**E. The trial court had no jurisdiction over PRC's claim**

**[28]** Since PRC was required to bring its action under the Procurement Law, the applicable statute of limitations controls:

> **Actions Under Contract or for Breach of Contract.** Any Action commenced under Section 6978 (c) of this Chapter shall be commenced within (6) six months of the date the claim arose or *within six months of the date the claimant knew or should have known, that a claim existed* against the parties.

GSA Procurement Reg. § 9-402(3) (1984). Section 6978(c) is now codified at Title 5 GCA § 5481, (1996), the statutory provision which confers jurisdiction over actions at law or in equity to the Superior Court when the cause of action arises under a procurement contract. Thus, PRC was required under the Procurement Law to file its claim within six months of the date it knew or should have known that it had a claim.

**[29]** In *Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1583 (Fed. Cir. 1995), it was held that that a request for equitable adjustment ("REA") to contract sum was a claim within the meaning of the federal procurement statute. An REA is a remedy payable only when unforeseen or unintended circumstances, such as government modification of the contract, differing site conditions, defective

[4] In *People v. Quenga*, 1997 Guam 6, we stated that this court does not recognize the decisions of the Appellate Division as controlling our construction of law. In addition, while we consider Appellate Division opinions as precedent that is binding upon the trial courts of Guam, they are only considered as persuasive authority when we consider an issue. Moreover, precedent that was extant when this court became operational continues unless and until we address the issues discussed there, and we will not divert from such precedents unless reason supports such deviation. *Quenga*, 1997 Guam 6 at n.4. Thus, prior case law not overruled by our holding today remains in effect unless and until such time that we chose to review such prior case law.

or late-delivered government property or issuance of a stop work order, cause an increase in contract performance costs. *Id.* at 1577 (citations omitted). The definition of claim arrived at in *Reflectone* was derived from its dictionary meaning, which is a demand as a matter of right for something due or believed due, and was found to constitute the essential characteristic of a "claim." *Id.* at 1576. *See also Essex Electro Eng'rs, Inc. v. United States*, 960 F.2d 1576, 1580-81 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 953, 113 S.Ct. 408 (1992). We believe that a request for change order or other, similar demand as a matter of right for payment due or believed due likewise captures the essential characteristic of a Procurement Law claim.

**[30]** It appears that PRC has never submitted a change order request *per se* for the work it performed so that building code discrepancies could be corrected. *See* Appellee's S.E.R. Trial Exhibit D-55. However, at some time during the period of December 26, 1991, when the Director transmitted a form change order to Mr. Swegler, to December 1992, when PRC submitted a fairly detailed cost breakdown of change order work, PRC should have been aware that it had a claim for change order monies. At the very latest, PRC knew it had a claim when its attorney on December 28, 1992 sent a letter demanding final, undisputed payment and payment for change order work. However, no suit was filed until November 4, 1994, approximately twenty-three months later. By then its action was some seventeen months stale.

**[31]** Since PRC did not timely file its action at the Superior Court, its claim was time-barred. Thus, PRC failed to satisfy the jurisdictional prerequisite to maintaining its procurement contract suit against DOE. Consequently, the trial court was without jurisdiction over PRC's claim. The trial court erred by not dismissing PRC's suit.

## III. CONCLUSION

**[32]** For claimants, unaware of the brevity of the period within which to bring actions arising from procurement contracts, and for agencies, facing the possibility of profuse litigation, our holding today may entail grave consequences. However, through this opinion, we clarify and interpret the policies intended by the Legislature in promulgating the Procurement Laws. Further, while the result today brings about an unfortunate consequence to PRC, the company waited an inordinate length of time to bring its action. The laws assist those who are vigilant, not those who sleep over their rights.

**[33]** Because Pacific Rock Corporation failed to timely bring its action in this case, the trial court was without jurisdiction to pass on the merits. Accordingly, the judgment of the trial court is **VACATED** and the matter is **REMANDED** to the trial court for proceedings consistent with this opinion.

BENJAMIN J.F. CRUZ
Chief Justice

EDWARD S. TERLAJE
Justice Pro Tempore