

IN THE  
SUPREME COURT  
OF THE  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

---

**TRIPLE J SAIPAN, INC.,**  
*Plaintiff-Appellee,*

v.

**GLENN MUNA, ACTING COMMISSIONER, COMMONWEALTH OF THE  
NORTHERN MARIANA ISLANDS STATE BOARD OF EDUCATION,  
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS PUBLIC  
SCHOOL SYSTEM,**  
*Defendants-Appellants.*

---

**SUPREME COURT NO. 2017-SCC-0033-CIV**  
SUPERIOR COURT NO. 17-0245-CV

**OPINION**

**Cite as: 2019 MP 8**

Decided October 28, 2019

---

Tiberius Mocanu, Saipan, MP, for Defendants-Appellants.  
James Stump, Saipan, MP, for Plaintiff-Appellee.

---

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLOÑA, Associate Justice; KATHERINE A. MARAMAN, Justice Pro Tempore.

MANGLOÑA, J.:

¶ 1 Defendants-Appellants Glenn Muna, Acting Commissioner of the CNMI Public School System (“Commissioner”),<sup>1</sup> the CNMI Board of Education (“Board”), and the CNMI Public School System (collectively “PSS”) appeal two orders issued by the trial court: (1) Order Regarding Timeliness of Petitioner’s Procurement Protest and Denying Petitioner’s Motion for a Stay (“Order Regarding Timeliness”), and (2) Order Denying Respondents’ Motion for Reconsideration (“Order Denying Reconsideration”). PSS maintains the trial court improperly reached the merits of the dispute and remanded the case to the agency. PSS contends the court (1) deprived PSS of procedural due process; (2) abused its discretion in remanding the case to the agency; and (3) abused its discretion in denying the motion for reconsideration. For the following reasons, we AFFIRM the Order Regarding Timeliness and the Order Denying Reconsideration.

#### I. FACTS AND PROCEDURAL HISTORY

¶ 2 The proceedings began as part of a competitive sealed bidding process for the procurement of five school buses. Plaintiff-Appellee Triple J and third party, Morrico Equipment, LLC, submitted bids of \$799,375 and \$709,995, respectively. PSS evaluated the bids and eventually awarded the contract to the third party on May 2, 2017. On May 26, 2017, immediately after learning of the contract award to the third party, Triple J filed a procurement protest, contending that PSS violated its procurement regulations by awarding the contract to the third party, whose unresponsive bid failed to include the “requisite warranty information, amongst other defects.” *Triple J Saipan, Inc. v. Cynthia I. Deleon Guerrero, Commissioner, The Commonwealth of the Northern Mariana Islands Public School System, The Commonwealth of the Northern Mariana Islands State Board of Education*, Civ. No. 17-0225 (NMI Super. Ct. Oct. 26, 2017) (Order Reg. Timeliness Pet’r’s Procurement Protest and Order Den. Pet’r’s Mot. for a Stay at 2) (“Order Reg. Timeliness”).

¶ 3 The Commissioner found the protest to be time-barred pursuant to the PSS Procurement Regulations, found in Northern Mariana Islands Administrative Code (“NMIAC”) §§ 60-40-401(a)(1) and (a)(2). He found the agency lacked jurisdiction to hear the procurement protest because NMIAC § 60-40-401(a)(1) sets a time limit on when a procurement protest must be submitted to PSS, stating in relevant part: “[t]he protest shall be received by the Commissioner of Education in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.” The Commissioner also found the agency lacked jurisdiction because NMIAC § 60-40-401(a)(2) requires a party protesting an award to provide the other party

---

<sup>1</sup> Glenn Muna has since become the Commissioner of Education during pendency of this appeal.

notice of its protest within three days of filing the protest. Triple J appealed the Commissioner's decision to the Board's Appeals Committee, which denied the protest on the same grounds of lack of subject matter jurisdiction and timeliness.

¶ 4 Triple J sought judicial review under the Commonwealth Administrative Procedures Act ("CAPA"). 1 CMC § 9112(b).<sup>2</sup> It filed (1) a complaint against PSS asserting a variety of administrative claims pertaining to the procurement protest and subsequent proceedings and (2) a request for a temporary restraining order, preliminary injunction, and permanent injunction. Triple J later filed an Amended Petition for Review of Final Agency Action and Request for Stay. It requested the stay to enjoin PSS "from any further actions of any nature in implementation, payment, processing, receiving, accepting, negotiating or contact associated with IFB 17-025 (Contract 137769-OC) until all matters of dispute are resolved." Appellee's App. 1 at 34. PSS filed an opposition to the motion for a stay. The court heard arguments on the parties' filings. Though labeled a hearing on the motion to stay, the parties argued the jurisdictional and timeliness issues, the merits of the procurement protest, and the remedy sought. Invoking NMIAC § 60-40-410(b), Triple J sought annulment of PSS's contract with the third party rather than lost profits damages, as the court suggested.

¶ 5 The court issued its Order Regarding Timeliness, denying the stay and resolving the issue of whether PSS had subject matter jurisdiction to consider the procurement protest. The court found the procurement protest and proof of notice to be timely filed and remanded the case to PSS to decide the merits of the claim regarding the third party's bid. At no time during the hearing did the court indicate that it was invoking Rule 7 of the Commonwealth's Rules of Procedure for Administrative Appeals ("Rules of Procedure").<sup>3</sup> PSS filed a motion to reconsider the Order Regarding Timeliness, contending "the [c]ourt improperly ruled on the merits of the dispute even though there had not been a filing of record and Respondents had not had a chance to brief the matter" in violation of Rules 4(a) and 5(a) of the Rules of Procedure. *Triple J Saipan, Inc.*

---

<sup>2</sup> 1 CMC § 9112(b) states:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action within 30 days thereafter in the Commonwealth Superior Court.

<sup>3</sup> Rule 7 provides that "[o]n its own for good cause or by a party's motion, and in the interests of fairness or judicial economy, the trial court may suspend or modify any provision of these rules in a particular case and order proceedings as it directs." NMI R. ADMIN. APPEALS P. 7. Without a ruling modifying the proceedings, the Rules of Administrative Appeals Procedure provide that "[t]he respondent shall file any brief in opposition within twenty days after receipt of the petitioner's brief" and "the petitioner may file a reply brief within ten days after receipt of the respondent's brief." NMI R. ADMIN. APPEALS P. 5(b)-(c).

*v. Guerrero, et al.*, No. 17-0245 (NMI Sup. Ct. Nov. 15, 2017) (Order Den. Resp'ts' Mot. For Recons. at 1–2) (“Order Denying Reconsideration”). The court subsequently denied PSS’s motion for reconsideration, concluding “the [c]ourt is satisfied that its original ruling was proper and that the parties were fully heard on the jurisdictional question . . . .” *Id.* at 3.

¶ 6 PSS appeals the trial court’s Order Regarding Timeliness and Order Denying Reconsideration.

## II. JURISDICTION

¶ 7 We have appellate jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3; *see also* 1 CMC § 9113 (governing appeals from judicial review under the CAPA).<sup>4</sup>

¶ 8 Triple J argues that we do not have jurisdiction because the remand to the agency in the Order Regarding Timeliness was not a final judgment. PSS acknowledges that only final orders are appealable unless an exception applies. It nonetheless argues, without any supporting authority, that jurisdiction is proper because the remand order was a “de-facto final judgment.” Reply Br. 2.<sup>5</sup> At oral argument, PSS clarified its position, stating that absent an appeal to this Court, the timeliness issue would have been forever foreclosed. We review this jurisdictional issue de novo. *Commonwealth v. Taitano*, 2017 MP 19 ¶ 13.

¶ 9 Our appellate jurisdiction is limited to *final* orders of the Superior Court. 1 CMC § 3102(a); *Friends of Marpi v. Commonwealth*, 2012 MP 9 ¶ 1. A remand to an administrative agency is generally an interlocutory order and not a final judgment. *See e.g., Finkelstein v. Bowen*, 869 F.2d 215, 217 (3d Cir. 1989). Courts have nonetheless held that the final judgment rule does not apply to a remand to an agency when a trial court “finally resolves an important legal issue in reviewing an administrative agency action and denial of appellate review before remand to the agency would foreclose appellate review as a practical matter.” *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 118 (3d Cir. 1999). The Ninth Circuit applies a three-factor test for instances such as this, in which a remand to an agency functions as a de facto final judgment. A remand order may be considered final and appealable where “(1) the [trial] court conclusively resolves a separable legal issue, (2) the remand order forces the agency to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable.” *United States v. United States Bd. of*

---

<sup>4</sup> 1 CMC § 9113 states: “An aggrieved party may obtain a review of any final judgment of the Commonwealth Superior Court under this chapter by appeal to the Commonwealth Supreme Court. The appeal shall be taken as in other civil cases.”

<sup>5</sup> Ordinarily we do not address an issue raised for the first time in a reply brief. *J.G. Sablan Rock Quarry v. Dep’t of Pub. Lands*, 2012 MP 2 ¶ 43. Since this affects our subject matter jurisdiction, we address the issue. *Sullivan v. Tarope*, 2006 MP 11 ¶ 39; RESTATEMENT (SECOND) OF JUDGMENTS § 11, cmt. c-d (1982).

*Water Commissioners*, 890 F.3d 1134, 1149 (9th Cir. 2018). We review each factor in turn.

¶ 10 First, the court must have “conclusively resolve[d] a separable legal issue.” *Id.* Although the issues of timeliness and subject matter jurisdiction were the primary issues subject to judicial review before the court, they were separable from the ultimate merits of the procurement protest (i.e., whether the contract was wrongly awarded to the third party rather than to Triple J). Second, it is precisely PSS’s contention that the court’s reading of the regulations was erroneous. Finally, review of the court’s resolution of the subject matter jurisdiction and timeliness questions “would, as a practical matter, be foreclosed” if immediate appellate review were not permitted. *Id.* On remand to the agency, PSS will be unable to appeal its own decision, while Triple J will not appeal the determinations in its favor on the jurisdictional questions.

¶ 11 Our finding under the last prong does not contravene our holding in *Commonwealth v. Office of the Civil Service Commission*, 2005 MP 6. There, an employee was terminated by the Commonwealth Department of Public Safety (“DPS”). He subsequently appealed his termination to the Commonwealth Office of the Civil Service Commission, which reinstated him. *Id.* ¶ 1. DPS sought judicial review of the reinstatement and the trial court set it aside. The employee appealed to this Court on the ground that DPS could not seek judicial review because the CAPA, 1 CMC § 9112, only permits a “person suffering a legal wrong”<sup>6</sup> to seek judicial review of an adverse administrative decision. *Office of the Civ. Serv. Comm’n*, 2005 MP 6 ¶ 11. We construed the CAPA to bar a non-party agency from seeking judicial review of a decision that adversely affects its interest. We did not interpret the CAPA to bar an agency that is a party to a determination adjudicated by another agency from seeking judicial review of an adverse decision. *Id.* ¶ 17. DPS, as a party to the adjudication, could seek judicial review of an adverse ruling by the Office of the Civil Service Commission, but, crucially, we did not hold in that decision that an agency could seek judicial review of *its own* determination as the adjudicating body.

¶ 12 When the agency seeking to appeal is itself the adjudicating agency, then the very terms of the CAPA—consistent with general principles of standing—preclude an agency from appealing its own determination. *See Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) (“Should the Secretary lose on remand, there would be no appeal, for the Secretary cannot appeal his own agency’s determination.”). This is because an agency is not usually “aggrieved” from its own action. “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action . . . .” 1 CMC § 9112(b). “The phrase ‘person adversely

---

<sup>6</sup> 1 CMC § 9101(j) defines “person” as “an individual . . . or . . . organization of any character *other than an agency*.” (emphasis added).

affected or aggrieved’ is a term of art used in many statutes to designate those who have standing to challenge or appeal an agency decision . . . .” *Dir., Office of Workers’ Comp. Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995). And a litigant must show an “injur[y] in fact by agency action.” *Id.* at 127 (emphasis added).

¶ 13 *Office of the Civil Service Commission* is no bar to the general rule that an agency cannot seek review of its own determination. The third factor of the Ninth Circuit’s test, that a separable legal question would be effectively unreviewable if appeal of the remand order were denied, still applies. Consequently, we find the court’s remand order was a de facto final judgment under *United States v. United States Board of Water Commissioners*. We therefore have jurisdiction to hear PSS’s appeal.

### III. STANDARDS OF REVIEW

¶ 14 There is one core issue on appeal, advanced through three separate arguments. We are asked to address whether the court erred in considering the appeal’s merits during the Motion for a Stay hearing. First, we review PSS’s procedural due process claims de novo. *Castro v. Castro*, 2009 MP 8 ¶ 15. Second, we review a trial court’s remand to an administrative agency for abuse of discretion. *E.g., Taiwan Semiconductor Indus. Ass’n v. Int’l Trade Comm’n*, 266 F.3d 1339, 1344 (Fed. Cir. 2001).<sup>7</sup> Finally, we review the Order Denying Reconsideration for abuse of discretion. *Angello v. Louis Vuitton Saipan*, 2000 MP 17 ¶ 3; *see also Rishor v. Ferguson*, 822 F.3d 482, 495 (9th Cir. 2016).

### IV. DISCUSSION

¶ 15 PSS raises exclusively procedural objections to the trial court’s actions below. It does this without sufficiently briefing its objections, relying on conclusory assertions that the trial court abused its discretion; nevertheless, we take this opportunity to provide guidance on judicial review of agency action. PSS advances its argument through three different avenues: (1) purported deprivation of procedural due process; (2) abuse of discretion in remanding to the agency; and (3) abuse of discretion in denying reconsideration. Triple J’s response is that the court was within its discretion to modify procedures to expedite the litigation.

¶ 16 At the outset, we determine the trial court neither deprived PSS of procedural due process nor did it abuse its discretion. First, there is no absolute protected interest in process itself. Second, the court’s remand was not an abuse of discretion because (1) the Rules of Procedure afford the court discretion to modify and expedite proceedings; and (2) it was not required to defer to the

---

<sup>7</sup> In *Songao v. Commonwealth*, 4 NMI 186 (1994), we reviewed the trial court’s remand of a Land Commission determination of ownership to the Commission de novo. This did not stand for the proposition that we generally review remands to administrative agencies de novo; it was a question of statutory interpretation construing the unique judicial review of land determinations under the Land Commission Act of 1983, 2 CMC § 4249, rather than under the CAPA.

agency's unreasonable interpretation of its procurement regulations. Finally, we decline to reach the merits of PSS's third claim regarding reconsideration and deem it waived for failure to adequately brief their arguments.

A. *Procedural Due Process*

¶ 17 PSS's first argument is that the court deprived it of procedural due process in determining the appeal's merits at the Motion for a Stay hearing. Applying the three-prong test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976),<sup>8</sup> PSS first claims a private interest in the "opportunity to plead, respond to a pleading, develop the record, and [its] expectation that a judicial arbiter will confide with the rules of due process . . ." Opening Br. 15. Under the second prong, PSS argues it was erroneously deprived of this private interest because the court improperly reached the appeal's merits during the Motion for a Stay hearing. In so doing, PSS lost the benefit of typical procedural safeguards such as fully briefing the merits of the issues and application of the correct legal standard. Finally, under the third prong, PSS maintains there is a governmental interest in ensuring the court abides by due process requirements. Triple J counters that PSS's interest is balanced by Triple J's interest in having the merits of its protests heard after months of enduring the protest and appellate processes. Triple J also looks to the *Eldridge* test, claiming process has been provided, by way of written briefs, oral arguments, and written determinations at each stage of the protest and appellate processes, in accordance with the Rules of Procedure. Enduring additional procedures would burden an already costly and time-consuming administrative appeals process.

¶ 18 Both the Commonwealth and United States Constitutions guarantee due process of law. *See* NMI CONST. art. I, § 5; U.S. CONST. amend. XIV; *see also* *Castro*, 2009 MP 8 ¶ 16 ("[F]ederal due process guarantees are applicable in the Commonwealth pursuant to Section 501 of the Covenant."). The Due Process Clause of the Fourteenth Amendment and the Commonwealth Constitution's due process protections in Article I, Section 5 are "coextensive," so they may be analyzed together. *Castro*, 2009 MP 8 ¶ 16.

¶ 19 We have analyzed procedural due process on only a few occasions. The threshold question is whether a due process interest in life, liberty, or property is implicated, after which we "determine what procedures protect that interest

---

<sup>8</sup> The *Mathews v. Eldridge* three-prong test states:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

sufficiently to satisfy due process.” See *J.G. Sablan*, 2012 MP 2 ¶ 18; *Premier Ins. Co. v. Commonwealth Dep’t of Labor*, 2012 MP 16 ¶ 8 n.5; *In re Hafadai Beach Hotel Extension*, 4 NMI 37, 44–45 (1993). While we have discussed methods of service constituting reasonable notice for due process and recognized implications of due process, we have never considered what constitutes a property or liberty interest. See *Premier Ins. Co.*, 2012 MP ¶¶ 8–12; *In re Hafadai*, 4 NMI at 44–5; see also *J.G. Sablan*, 2012 MP 2 ¶ 18. Thus, we look to federal law for guidance.

¶ 20 The United States Supreme Court has interpreted due process interests broadly, holding property interests “extend well beyond actual ownership of real estate, chattels, or money” and liberty interests encompass more than formal criminal process constraints. *Bd. of Regents v. Roth*, 408 U.S. 564, 571–2 (1972). Property interests must be “interests that a person has already acquired in specific benefits.” *Id.* at 576. Recognized liberty interests include freedom from bodily restraint and the rights to contract, engage in common occupations of life, worship God according to personal preferences, engage in free speech under the First Amendment, and bear arms under the Second Amendment. *Old Dominion Dairy Prods., Inc. v. Sec’y of Def.*, 631 F.2d 953, 962 (D.C. Cir. 1980); *Wilhoite v. Melvin Simon & Assocs.*, 640 N.E.2d 382, 385–86 (Ind. Ct. App. 1994). Certain organizations or entities may also claim some of these liberty interests, such as the right to preserve its reputation and to pursue an occupation. See *Old Dominion*, 631 F.2d at 963; *Wedges/Ledges of California v. City of Phoenix*, 24 F.3d 56, 65 n.4 (9th Cir. 1994).

¶ 21 Due process jurisprudence has repeatedly recognized that process itself is not always a liberty interest protected by due process:

Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

*Olim v. Wakinekona*, 461 U.S. 238, 250–51 (1983) (citing *Hewitt v. Helms*, 459 U.S. 460, 471 (1983)); see also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 279 n.2 (1998) (“[A] protected interest in process itself . . . is not a cognizable claim.”). In order to be protected by due process, state statutes or rules must create the liberty or property interest. *Roth*, 408 U.S. at 570–71, 577. To do so, states typically explicitly grant these interests or create them “by placing substantive limitations on official discretion.” *Olim*, 461 U.S. at 249. Should a state wish procedure found in regulations to be protected by due process, it must act to distinctly alter or extinguish a right or status previously recognized in state law or regulation. See *Paul v. Davis*, 424 U.S. 693, 711 (1976). In *Bell v. Burson*, for example, the United States Supreme Court held that state licenses, deemed essential to the pursuit of livelihood, could not be taken away without due process. 402 U.S. 535, 539 (1971). This is an exception



to the rule, however, because “procedural rules created by state administrative bodies cannot, of themselves, serve as a bases for a separate protected liberty interest.” *Naegele Outdoor Adver. Co., Div. of Naegele, Inc. v. Moulton*, 773 F.2d 692, 702-03 (6th Cir. 1985) (quoting *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980)).

¶ 22 PSS claims neither a property nor a liberty interest, but rather a right to proceed according to the rules governing administrative appeals in the CAPA<sup>9</sup> and the Rules of Procedure. Opening Br. 15. Both sets of rules merely lay out how the parties should proceed in their appeal and the powers the court possesses in reviewing the matter. *See, e.g.*, 1 CMC § 9112; NMI R. ADMIN. APPEALS P. 1–7. They do not reference, let alone alter or extinguish, a property or liberty interest previously recognized in PSS’s procurement regulations. PSS’s claim amounts to no more than one to process itself, which procedural due process does not protect. Because no substantive due process interest is implicated, we need not apply the *Eldridge* test to determine what process was required under the circumstances.<sup>10</sup>

#### *B. Remand*

¶ 23 PSS argues that the court abused its discretion in remanding the case because the court did not provide PSS an opportunity to directly and fully brief the merits of the appeal. Generally, a court will remand to the agency to supplement the record. The case at bar is unusual in that the court irregularly determined the primary issues on appeal in its Order Regarding Timeliness (i.e., the Commissioner’s subject matter jurisdiction to hear the protest and the timeliness of that protest). At oral argument before this Court, PSS asserted that it would have briefed the timeliness and jurisdiction issues more fully in a hearing on the merits than it did in the context of opposing a motion for a stay. Pressed as to what those additional arguments would have been, PSS proffered that the court should have deferred to the agency’s interpretation of its own regulations regarding timeliness and jurisdiction rather than reviewing them *de novo*. Triple J counters that the Rules of Procedure grant the trial court

---

<sup>9</sup> The relevant section of the CAPA, Section 9112(f), states:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action....In making the forgoing determination, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule or prejudicial error.

<sup>10</sup> PSS could have claimed an underlying substantive due process interest in the right to contract. That claim, however, ignores the purpose of the CAPA and the Rules of Procedure: to present an avenue for the court to review agency action and directions for parties who wish to avail themselves of the process. Again, the CAPA and the Rules of Procedure in no way mention, let alone alter or extinguish, a right to contract.

considerable leeway to remand to the agency and make interlocutory orders as appropriate. Resp. Br. 12–14.

¶ 24 We must determine whether the court abused its discretion in effectively deciding the merits of the appeal and remanding the case to the agency. A trial court’s remand to an administrative agency is reviewed for an abuse of discretion. *Taiwan Semiconductor Indus. Ass’n v. Int’l Trade Comm’n*, 266 F.3d 1339, 1344 (Fed. Cir. 2001). “An abuse of discretion exists if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Commonwealth v. Taitano*, 2017 MP 19 ¶ 35. We will uphold the Order Regarding Timeliness unless the court clearly erred either in exceeding the scope of its power to remand under the Rules of Procedure or in failing to properly defer to the agency’s interpretation of the procurement regulations.

¶ 25 We first look at the broad authority the court has in remanding an action back to the agency, and then turn to whether the court’s refusal to defer to the agency’s interpretation was proper.

*i. Rules of Procedure*

¶ 26 PSS contends that the trial court abused its discretion by invoking Rule 7 of the Rules of Procedure to suspend normal procedures and expedite the hearing on the motion for a stay. Opening Br. 10. The Rules of Procedure govern procedures for review of an agency’s final action pursuant to the CAPA. See 1 CMC §§ 9101–15. Rule 7 permits the court to modify procedures on its own initiative in the interest of judicial economy. See *supra* ¶ 5 n.3. While the court did not state at the hearing that it was invoking Rule 7, it did so in its Order Denying Reconsideration to justify the irregularity of deciding the jurisdictional questions on appeal at the motion for a stay stage. Order Denying Reconsideration at 3.

¶ 27 Even under the normal operation of the rules, without invoking a Rule 7 modification, the court has broad discretion to remand to the agency as it deems appropriate. It may

order any . . . remedy appropriate to the facts and circumstances of a particular appeal, including but not limited to remanding the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure and the error cannot be corrected in the trial court proceedings.

NMI R. ADMIN. APPEALS P. 6(e)(2). If the court does remand the action to the agency, “it may make such interlocutory order as it finds necessary to preserve the interests of any party . . . pending further proceedings or agency action.” *Id.* at 6(f). The court therefore had wide latitude under the Rules to order remand or other interlocutory orders as it deemed appropriate, while Rule 7 permitted it to expedite proceedings and decide the jurisdictional questions. We now turn to

PSS's contention at oral argument that the court should have deferred to the agency's interpretation of the procurement regulations.

*ii. Deference*

¶ 28 The United States Supreme Court articulated the principle that courts accord deference to federal agencies' interpretations of their own regulations in the landmark decision of *Auer v. Robbins*, 519 U.S. 452 (1997). In *Auer*, the Court revived the doctrine articulated in its earlier decision of *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), that an administrative agency's interpretation of its own regulations will control unless "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461.

¶ 29 *Auer* was recently limited in *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). There, the United States Supreme Court addressed whether it should overturn its holdings in *Auer* and its earlier *Seminole Rock* decision regarding deference to agencies' interpretations of their regulations. It declined to do so, emphasizing that trial courts reviewing agency action are empowered to overturn unreasonable interpretations. "*Auer* deference is sometimes appropriate and sometimes not. Whether to apply it depends on a range of considerations . . . . The deference doctrine . . . is potent in its place, but cabined in its scope." *Id.* at 2408. If the plain meaning of the regulation does not support the agency's interpretation, no deference is afforded. Even if the regulation is genuinely ambiguous, the agency's interpretation must still be reasonable. In particular, deference is not afforded to an agency interpretation that is merely a "convenient litigating position" or "post hoc rationalization." *Id.* at 2417. In short, *Kisor* advises courts that they need not defer to agency interpretations that are plainly unreasonable.

¶ 30 Here, the trial court declined to defer to the Commissioner's determination that the procurement protest was untimely under NMIAC § 60-40-401(a)(1). The court held that the Commissioner's findings "were not supported by the regulations [sic] plain meaning." Order Reg. Timeliness at 7. The regulation reads as follows, in pertinent part (prior to 2019 amendment):

Any actual or prospective bidder, offeror, or contractor who asserts a claim or asserts that it has been aggrieved in connection with the solicitation or award of a contract may protest to the Commissioner of Education. The protest shall be received by the Commissioner of Education in writing within ten days after such aggrieved person knows or should have known of the facts giving rise thereto.

The plain meaning of "aggrieved person" in NMIAC § 60-40-401(a)(1) implied that a bidder who loses to a defective bid has suffered a legal wrong at the hands of PSS, and that the ten-day window in which to file a protest should begin when the losing bidder had actual or constructive knowledge of having lost the bid. On May 26, 2017, PSS informed Triple J that it had awarded the contract to a third party on May 2, 2017. PSS maintained that the ten-day

window began as soon as Triple J became aware that the third party's bid was allegedly defective per the regulations (i.e., on April 13, 2017, when both parties submitted their bids). On the court's reading, Triple J was not yet an "aggrieved person" on April 13, 2017 when it had not yet been denied the contract, so the agency's reading to the contrary contradicted the plain language of the regulation. The court's interpretation is consistent with conventional principles of standing, requiring that an aggrieved party have suffered a legal wrong, and with due process principles of notice. We need not determine the correct reading of the regulation; we find only that the court did not err in overruling the agency's reading.

¶ 31 The court also reversed the agency's determination that it lacked subject matter jurisdiction to hear the protest under NMIAC § 60-40-401(a)(2), which requires that the protestor give timely notice to other bidders:

Other persons, including bidders, involved in or affected by the protests shall be given notice of the protest and its basis in appropriate cases. The protesting party shall provide such notice and a copy of its protest to all other bidders involved in or affected by the protest and shall file a declaration or proof of service with the Commissioner of Education. Proof of notice is required by the protesting party to other bidders or proposers within three calendar days of filing its protest.

Triple J filed its protest on May 26, 2017 and submitted its proof of notice to the third-party bidder, on May 31, 2017. PSS held this to fall outside the window of three calendar days to file. Order Reg. Timeliness at 10. "Calendar days" generally means all consecutive days on the calendar, including holidays and weekends. The court maintained that NMIAC § 60-40-401(a)(2) is properly read in conjunction with NMIAC § 60-40-401(d)(1)–(2), under which "in computing any period of time prescribed or allowed by these procedures, the day of the act or event from which the designated period of time begins to run shall not be included" and "[e]xcept as otherwise specified, all 'days' referred to in this subpart are deemed to be working days of the Public School System." The window would begin to toll on May 30, 2017, since May 26 would be excluded, May 27–28 were weekend days, and May 29 was Memorial Day. May 31, 2017 would fall within the window. Again, the court's reading better accords with the plain language and with principles of proper notice than does PSS's interpretation.

¶ 32 The proper interpretation of the regulations is not before us; our inquiry is merely whether the court abused its discretion by refusing to accord the agency *Auer* deference and instead imposing what it took to be the plain meaning of the regulations. We hold that the court's remand was within its discretion under the Rules of Procedure. We further hold that it was not an abuse of discretion to find that the agency's interpretation of the regulations contradicted their plain meaning.

*C. Reconsideration*

¶ 33 We decline to reach the merits of PSS’s third claim (i.e., that the court abused its discretion in denying PSS’s motion for reconsideration). *See Angello*, 2000 MP 17 ¶ 3 (reviewing denial of reconsideration for abuse of discretion). Justifiable grounds for reconsideration include “an intervening change in the controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Id.* ¶ 23. PSS provides no argument that any of these grounds justifying reconsideration is applicable. Put differently, PSS failed to “provide any legal analysis to support [its] claim, or develop this as a separate issue. We consider only those arguments sufficiently developed to be cognizable.” *Manglona v. Baza*, 2012 MP 4 ¶ 13 n.9; *see also Kim v. Baik*, 2016 MP 5 ¶ 30. Therefore, we deem this argument waived.

**V. CONCLUSION**

¶ 34 For the foregoing reasons, we AFFIRM the trial court’s Order Regarding Timeliness and Order Denying Reconsideration, with specific instructions to PSS as the agency to apply the court’s determinations regarding timeliness and subject matter jurisdiction.

SO ORDERED this 28th day of October, 2019.

/s/  
ALEXANDRO C. CASTRO  
Chief Justice

/s/  
JOHN A. MANGLOÑA  
Associate Justice

/s/  
KATHERINE A. MARAMAN  
Justice Pro Tempore