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7 OFFICE OF PUBLIC ACCOUNTABILITY
8 PROCUREMENT APPEALS

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10 In the Appeal of

11)
12 MAEDA PACIFIC CORPORATION,

13)
14 Appellant.)
15 -----

DOCKET NO. OPA-PA-15-008

**APPELLANT'S OPPOSITION
TO MOTION TO DISMISS**

16 On September 1, 2015, Purchasing Agency, Guam Solid Waste Authority ("GSWA")
17 filed a Motion to Dismiss the Appellant, Maeda Pacific Corporation's ("MPC") Appeal of
18 the Final Decision of GSWA on the basis that the Office of the Public Auditor ("OPA")
19 lacks jurisdiction to hear this matter and further moves for recusal of the Public Auditor.

20 MPC does not object to the factual statements set forth in the Background portion
21 of GSWA's Motion, however, it also supplements the factual background as set forth
22 herein.

23 **A. THE OPA HAS JURISDICTION OVER THIS DISPUTE.**

24 GSWA characterizes MPC's Appeal as a dispute over money for which the Public
25 Auditor lacks jurisdiction. There is no question that the Public Auditor has no jurisdiction
26 over disputes having to do with money owed to or by the government of Guam. *See* 5
27 Guam Code Annotated ("GCA") § 5703; 2 Guam Administrative Rules ("GAR") § 12103(a)
28 and § 12301(a). GSWA chooses to characterize this as a dispute over money. What it really

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1 is is a dispute over the validity and enforcement of a provisions of the parties' Procurement
2 Contract, specifically, the liquidated damages clause. GSWA, instead of addressing that
3 issue head on, puts its own spin on the Appeal and does not address the issue of the
4 validity or enforceability of the liquidated damages clause.

5 In this case, GSWA assessed liquidated damages against MPC at a rate of Three
6 Thousand Three Hundred Dollars (\$3,300.00) per day for a total of Six Hundred Sixty-
7 Three Thousand Dollars (\$663,000.00) to off-set the claimed final payment of MPC in the
8 amount of Five Hundred Six Thousand Four Hundred Eighty-Three Dollars and Thirty-
9 Nine Cents (\$506,483.39). Accordingly, GSWA asserts that it is owed One Hundred Fifty-
10 Six Thousand Five Hundred Sixteen Dollars and Sixty-One Cents (\$156,516.61).

11 MPC's dispute is over the validity and enforceability of the liquidated damages
12 clause. The Liquidated damages clause is part of the Contract, and under modern
13 procurement theory, it must be a negotiated as part of the agreement. Clearly, if the OPA
14 was to determine that the liquidated damages clause is unenforceable or invalid, then
15 GSWA could not assess Six Hundred Sixty-Three Thousand Dollars (\$663,000.00) as
16 liquidated damages. That being said, the OPA cannot decide what money is owed or that
17 MPC or GSWA should get an Order for monies owed to it. That determination is the
18 purview of the Superior Court of Guam (5 GCA § 5480(f)).

19 The money issue is determined by Superior Court of Guam who has jurisdiction of
20 that issue. The prerequisite to filing a lawsuit over a money dispute against a government
21 agency is a filing of a claim against the government. (5 GCA § 5480(f)). That has been
22 accomplished in this case to preserve that issue. But that issue is not the issue before the
23 OPA. The Government Claims Act found at Title 5, Chapter 6, commencing with § 6101
24 of the Guam Code Annotated, pertains to claims of money owed by the government. The
25 filing of that Claim against the government does not deprive the OPA of jurisdiction to
26 adjudicate procurement contract disputes.

27 GSWA relies on *Pacific Rock Corporation vs. Department of Education*, 2001 Guam
28

1 21 ("*Pacific Rock II*")^{1/} to substantiate its argument that this appeal is a monetary dispute
2 not a procurement contract dispute. It further relies upon 5 GCA § 5427(a)(2)(f) for the
3 principle that contract disputes are to be resolved at the Agency level and precludes an
4 appeal to the Public Auditor (GSWA Motion at p. 4). GSWA misreads *Pacific Rock II*
5 which clearly states that the issues on appeal were the proper statute of limitations period
6 for *Pacific Rock II*'s Superior Court case and when *Pacific Rock*'s claim arose. *Pacific*
7 *Rock II* at ¶ 17. GSWA clearly views MPC's appeal as dealing with a breach of contract
8 claim for money owed to or by the government of Guam for which the OPA has no
9 jurisdiction to resolve. On that point, MPC does not disagree (See 5 GCA § 5703; 2 GAR §
10 12103(a)).

11 This Appeal arises by virtue of a controversy in a procurement contract between the
12 parties. The OPA has the authority to resolve contract and breach of contract controversies
13 (See 5 GCA §5427). The Public Auditor has the power to review and determine *de novo* any
14 matter properly submitted to her or him. 2 GAR § 12103(a).

15 MPC clearly stated in its Statement of Issues that this Appeal is over the validity and
16 enforceability of paragraph IV of the parties' Procurement Contract which was attached
17 thereto. The review of a liquidated damages provision is a question of fact rooted in the
18 principle of just compensation. It is not permissive for a party to reap a windfall well
19 above the actual harm sustained. *B.M. Company v. Avery*, 2001 Guam 27. Furthermore,
20 Paragraph VIII of the Procurement Contract further states that "...all other claims (other
21 than money)...are subject to the Guam Procurement Law...", which is in conformance with
22 Guam Law. Therefore, the Public Auditor has jurisdiction to hear this Appeal.

23 **B. THE PUBLIC AUDITOR NEED NOT RECUSE HERSELF.**

24 GSWA states that the Public Auditor should recuse herself because she penned a
25 letter to the media critical of the GSWA and the Federal Receiver. The Public Auditor is
26 mandated by statute to be objective and impartial and whether she can do so is a question

27
28 ^{1/} Two *Pacific Rock* cases were decided by the Guam Supreme Court, one in 2000 and one in 2001.
GSWA miscites its reference to the second case as 2001 Guam 29, which is actually 2001 Guam 21.

1 that she must answer. The GSWA's of the OPA's comments does not mean that she cannot
2 be objective and impartial. Being analytical, thorough and critical in her assessments is
3 part of her job. As an elected official she is allowed to have a voice and to express herself
4 both professionally and personally as are Senators and other elected officials. She may
5 disagree on whether the people of Guam continue to need a Receiver to do the job of the
6 GSWA board, but what is before her in this Appeal is the validity and enforceability of a
7 Procurement Contract provision, not the continued employment of the Receiver. GSWA's
8 criticism of the OPA's comments does not disqualify her from hearing this Appeal.

9 *Respectfully submitted* this 21st day of September, 2015.

10 **TORRES LAW GROUP**



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12 By

13 **PHILLIP TORRES, ESQ.**
14 *Attorneys for Appellant*

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