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Jacqueline Taitano Terlaje, Esq.

LAW OFFICE OF JACQUELINE TAITANO TERLAJE, P.C.

284 W Chalan Santo Papa

Hagåtña, Guam 96910

Telephone 671.648.9001

Facsimile 671.648.9002

Email: info@terlajelaw.com

Attorney for Appellant

Purestone, LLC

BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM

IN THE MATTER OF THE APPEAL)

PROCUREMENT APPEAL NO. OPA-PA-16-009

of)

PURESTONE, LLC)

APPELLANT'S MOTION FOR
DISQUALIFICATION AND
REQUEST FOR DISMISSAL

Appellant.)

I. INTRODUCTION

COMES NOW, Appellant PURESTONE, LLC (hereinafter "Appellant"), through undersigned counsel, the Law Office of Jacqueline Taitano Terlaje, P.C., and hereby moves the Public Auditor for her voluntary recusal and disqualification from this matter pursuant to § 12601 of Title 2 Guam Administrative Rules and Regulations (hereinafter "GAR")(2006). Disqualification in this procurement proceeding is necessary to abide by the statutory mandate to ensure expeditious resolution of this procurement protest, and to ensure the integrity of the appellate process once the Public Auditor is disqualified from making any decision on the appeal. Thus, Appellant requests that this matter be dismissed to permit Appellant to proceed in the Superior Court of Guam. 2 GAR § 12601 (2006).

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I. INTRODUCTION

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ORIGINAL

II. FACTUAL BACKGROUND

On November 21, 2013, the Guam Economic Development Authority (hereinafter “GEDA”) issued RFP-14-002 soliciting the proposals for a Development Agreement for Lajuna Point for the Chamorro Land Trust Commission (hereinafter “CLTC”).

On March 21, 2014, Appellant was notified that it was ranked Most Qualified Offeror. Negotiations between GEDA and Appellant commenced and were suspended pending the resolution of the Rules and Regulations for the CLTC by the Guam Legislature. Decl. S. Stern.

On or about November 9, 2015, Public Law 33-95 was signed into law, modifying specific provisions of law related to the regulation of CLTC commercial activity.

On July 13, 2016, following a cancellation and protest with GEDA, Appellant appealed GEDA’s determination on the protest.

On August 5, 2016, Appellant lodged its Conflicts Statement with the Public Auditor. Subsequently, on August 9, 2016, Appellant amended its disclosure to identify Attorney Terrence Brooks, as the attorney responsible for drafting and negotiating the Development Agreement referenced in RFP-14-002 on behalf of the procuring agency, Guam Economic Development Authority for the Guam Chamorro Land Trust Commission. Decl. S. Stern. Attorney Terrence Brooks was also responsible for communicating directly with Appellant on the status of the progress of the CLTC Rules and Regulations before the Guam Legislature. Decl. S. Stern.

Attorney Terrence Brooks is the son of the Public Auditor, Doris Brooks’ spouse. Decl. S. Stern.

On August 12, 2016, a Pre-Hearing Conference was held in this matter.

Appellant now lodges its motion for disqualification, objection and request to dismiss pursuant to 2 GAR § 12601.

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III. LEGAL BACKGROUND

A. PUBLIC POLICY REQUIRING IMPARTIALITY AND FAIRNESS IN THE APPELLATE PROCESS FOR PROCUREMENT REQUIRES THE PUBLIC AUDITOR TO VOLUNTARILY RECUSE HERSELF DUE TO HER FAMILIAL RELATIONSHIP.

Generally, disqualification of the Public Auditor in procurement appeals requires a showing of actual bias. In Re Appeal of Teleguam Holdings, OPA-PA-10-002, p. 2 *citing* Sule v. Guam Board of Dental Examiners, 2008 Guam 20, p. 19. 2 GAR § 12601 provides:

Disqualification of Public Auditor. The Public Auditor may recuse herself or himself at any time and notify all parties, or any party may raise the issue of disqualification and state the relevant facts prior to the hearing. The Public Auditor shall make a determination and notify all parties. In the event of disqualification or recusal of the Public Auditor, a procurement Appeal must be taken to the Superior Court of Guam in accordance with 5 GCA §5480.

While 2 GAR § 12601 does not set forth any minimum standard for disqualification in instances involving the familial relationship of the Public Auditor to a person, party, entity or material witness involved in a procurement, Appellant submits that public policy requires that the Public Auditor must recuse herself where there is a familial relationship within three degrees of consanguinity. This is the same standard applied for judges in the Superior Court of Guam.

Guam law presumes actual bias where there is a relationship between the adjudicator and/or the judicial officer within three (3) degrees of consanguinity. *See* 7 GCA § 6105(b)(5) (as applicable to judges, judicial officers and justices). Guam law provides that judicial officers are required to recuse themselves from presiding over matters in which their impartiality may be reasonably questioned, and specifically, where there is a familial relationship. 7 GCA § 6105(b)(5) provides, in part:

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1 Where he or she or his or her spouse, or a person within the third degree of relationship to
2 either of them, or the spouse of such person: (A) is a party to the proceeding, or an officer,
3 director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) is known by the
4 Judge to have an interest that could be substantially affected by the outcome of the
5 proceeding; (D) is to the Judge's knowledge likely to be a material witness in the proceeding.

6 While the Public Auditor is not a judicial officer within the scope of Title 7 of the Guam Code
7 Annotated which regulates the disqualification within the Judiciary of Guam, Appellant submits that the
8 application of the same minimum standard guarantees the public policy advanced in procurement. First,
9 § 1909(K) of Title 1 Guam Code Annotated (GCA) entrusts the Public Auditor with the "power and duty
10 to hear and decide all appeals of decisions that arise under Title 5, Guam Code Annotated § 5425(c)".
11 Second, the Public Auditor in the execution of these duties must exercise impartiality "to assure fair
12 competitive process". 5 GCA § 5625. Additionally, in the execution of her duties, the Public Auditor must
13 conform her conduct to "foster public confidence" in the integrity of the procurement process.

14 In this case, Attorney Brooks was involved in the negotiation and drafting of the Development
15 Agreement in RFP14-002. Attorney Brooks further was responsible for communicating with the Appellant
16 on behalf of the CLTC in reference to the progress of the adoption of rules and regulations then pending
17 before the Guam Legislature. Attorney Brooks is a material witness to these proceedings because GEDA
18 on behalf of CLTC has taken the position that the Development Agreement under RFP-14-002 required a
19 "commercial lease," and therefore, was nullified by P.L. 33-95. Additionally, but for the request of GEDA
20 on behalf of the CLTC to await the adoption of the rules and regulations, the Development Agreement
21 would have been finalized and not subject to § 75122(b)(6). Because Attorney Brooks was directly
22 involved in the communications with Appellant on this issue, he is a material witness to the issues on
23 review before the Public Auditor. Therefore, the Appellant respectfully requests that the Public Auditor
24 voluntarily recuse herself due to the involvement in this procurement appeal due to her familial relationship
25 to Attorney Terrence Brooks, who is within three (3) degrees of consanguinity
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1 B. APPELLANT OBJECTS TO THE APPOINTMENT OF A STAFF MEMBER OR
2 HEARINGS OFFICER HEREIN.

3 On August 12, 2016, the Public Auditor advised the parties that the Public Auditor had amended §
4 12601 of the Rules of Procedure in 2009, and provided a copy of the transmittal to the Guam Legislature
5 dated August 20, 2009. The amendment specifically provided the following:

6 . . . The Public Auditor shall make a determination and notify all parties. In the event of
7 disqualification or recusal of the Public Auditor, ~~a procurement appeal must be taken to the~~
8 ~~Superior Court of Guam in accordance with 5 G.C.A. §5480~~ the Public Auditor shall designate
9 a member of his or her staff or the appointed Hearing Officer for procurement appeals to
10 preside over the matter. If no member of the Public Auditor's staff or the appointed Hearing
11 Officer is able to preside over the matter due to disqualification, then such matter may be taken
12 to the Superior Court of Guam in accordance with 5 G.C.A. §5480

13 (hereinafter "2009 Amendment").

14 Appellant objects to the application of the amendment to 2 GAR § 12601 on the following basis:

- 15 (i) Prior to the filing of the Notice of Appeal herein, there was no publication of the
16 modification anywhere on the OPA website, the Compiler of Laws, or in printed form, and
17 therefore, no means in which any party was made aware of this substantive change to the
18 Rules of Procedure; and
- 19 (ii) The appointment of a Staff Member or Hearing Officer by a disqualified Public Auditor
20 negatively impacts the integrity of the procurement appeal process.

21 Notice to the public is an essential requirement of due process, guaranteed by the Fourteenth Amendment
22 of the United States Constitution, and by the Organic Act of Guam. "Nor shall any state deprive any
23 person of life, liberty, or property, without due process of law; nor deny to any person within its
24 jurisdiction the equal protection of the laws." U.S. Constitution, Art. XIV, § 1; 48 U.S.C. § 1421b(u). In
25 this instance, there was no public transmission of the 2009 Amendment. While Appellant acknowledges
26 that the Public Auditor may have taken the appropriate steps under the Administrative Adjudication Law
27 to amend § 12601, the only party aware of this amendment was the Public Auditor. The 2009 amendment
28 has not been updated on the Office of Public Accountability website, the Compiler of Laws website, the

1 Guam Administrative Rules and Regulations, or published in any printed pamphlet to advise parties
2 appearing before the Public Auditor of this critical change in § 12601.

3 More importantly, the 2009 Amendment abrogates the statutory right of appeal to an impartial
4 party, and negatively effects the integrity of the procurement process. 5 GCA § 5425(e) grants Appellant
5 the right to appeal its procurement protest to an impartial Public Auditor for determination; the
6 appointment of a hearing officer or staff member as set forth in the 2009 Amendment does not eliminate
7 the involvement of a disqualified Public Auditor, and thus compromises the integrity of the appellate
8 process.

9
10 Further, the 2009 Amendment, without due process of law, substitutes a disqualified Public Auditor
11 for an unknown staff member, who may not be qualified to occupy the position of Public Auditor. A
12 Public Auditor, as defined by 1 GCA § 1906, requires the minimum qualification of one of the following:
13 (a) certified public accountant; (b) attorney; or (c) five (5) years experience in establishment or enactment
14 of government budgets. Appellant concedes that the Public Auditor has the authority to enact rules to
15 carry out the duties of her office (1 GCA § 1909(g); 5 GCA § 5701), and to appoint a hearings officer (5
16 GCA § 5701). However, in the event of disqualification, as in this particular case, the Public Auditor
17 should have no involvement in the determination of a procurement appeal in order to comply with the
18 statutory mandate to maintain the integrity of the procurement process.

19
20 Appellant objects to the application of this amendment to this appeal because the issues of due
21 process and the statutory right to an impartial Public Auditor, which was effectively revoked by the 2009
22 Amendment, will result in a protracted process before the Public Auditor which deprives the Appellant and
23 GEDA of an expeditious resolution to a procurement which has been open since November 21, 2013.

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IV. CONCLUSION

BASED ON THE FOREGOING, the Appellant respectfully requests for the voluntary recusal of the Public Auditor due to her familial relationship to attorney Terrance Brooks, and that this matter be dismissed in accordance with 2 GAR § 12601 to permit Appellant to pursue its appeal to the Superior Court of Guam.

RESPECTFULLY SUBMITTED on this 30th day of August, 2016.

LAW OFFICE OF
JACQUELINE TAITANO TERLAJE, P.C.

By: 

JACQUELINE TAITANO TERLAJE
Attorney for Appellant