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THE OFFICE OF PUBLIC ACCOUNTABILITY – GUAM  
HAGÁTÑA, GUAM

In the Appeal of ) DOCKET NUMBER. OPA-PA-12-007  
)  
)  
)  
DATA MANAGEMENT RESOURCES, LLC, ) APPELLANT'S OPPOSITION TO THE  
) SPECIAL APPEARANCE OF THE OFFICE OF  
Appellant. ) THE ATTORNEY GENERAL OF GUAM AND  
) MOTION TO STRIKE SPECIAL  
) APPEARANCE

COMES NOW Appellant, DATA MANAGEMENT RESOURCES, LLC. ("DMR") by and through undersigned counsel in OPPOSITION to the Office of the Attorney General of Guam's request for entry of Special Appearance in this matter, and Motion to Strike request for Special Appearance. Specifically, the Office of the Attorney General (hereinafter "Attorney General") initially entered appearance in these administrative proceedings on behalf of the General Services Agency (GSA) and the Department of Administration (DOA). To date, the Attorney General has asserted conflicts of interest with GSA by Chief Procurement Officer, Claudia Acfalle, and conflict with DOA. The Attorney General now seeks to enter special appearance on its own behalf without any authority of law seemingly asserting itself as legal counsel to the Government of Guam despite the Government of Guam's insistence on the Entry of Appearance by the Legal Counsel of the Office of the Governor of Guam. Appellant DMR seeks an order striking the

ORIGINAL

1 Attorney General's attempt to remain in these administrative proceedings notwithstanding its known  
2 conflicts with GSA and DOA, which is contrary to its duties and obligations as set forth by the Rules of  
3 Professional Responsibility governing the practice of law in Guam.

#### 4 **FACTUAL BACKGROUND**

5 On November 1, 2012, the Hearings Officer continued these administrative proceedings due to an  
6 assertion of a conflict of interest by GSA, Chief Procurement Officer (CPO), Claudia Acfalle of the  
7 Attorney General's cross-examination, which was clearly adverse to its client. Upon information and belief,  
8 the Attorney General denies an attorney client relationship to the CPO of GSA.  
9

10 On November 24, 2012, the Attorney General asserted a "conflict of positions" with DOA, and  
11 asserted its intention to withdraw as counsel of record for DOA. Notwithstanding its intention to  
12 withdraw as counsel for DOA and GSA, the Attorney General insists on its continued participation in these  
13 procurement proceedings pursuant to "its statutory responsibilities and obligations." Exhibit A to  
14 Memorandum Supporting Special Entry of Appearance by Office of the Attorney General (hereinafter  
15 "Attorney General Memo").

16 On November 26, 2012, the Government of Guam and Appellant DMR entered into a Settlement  
17 Agreement and Mutual Release, a courtesy copy of which has been provided to the Office of Public  
18 Accountability, at the request of the Attorney General.  
19

20 The Office of the Governor by its legal counsel has entered its appearance on behalf of GSA and  
21 DOA in these administrative proceedings, and orally sought substitution of counsel.

22 The Attorney General following the initial hearing on November 26, 2012 filed a Special  
23 Appearance on its own behalf, and a supporting Memorandum at approximately 9:42 a.m. The Attorney  
24 General has no client, but purports to represent itself, and alleges that the Settlement Agreement and Mutual  
25 Release and Order of Dismissal by Stipulation is contrary to law.  
26  
27

LEGAL ARGUMENT

I. NO GUAM LAW SETTING FORTH ANY STATUTORY RESPONSIBILITY OR OBLIGATION OF THE OFFICE OF THE ATTORNEY GENERAL OTHER THAN TO APPROVE CONTRACT AS TO FORM AND LEGALITY IN PROCUREMENT, AND THUS, ITS REQUEST FOR SPECIAL APPEARANCE MUST BE DENIED.

Guam Procurement Code defines the scope of duties of the Office of the Attorney General in procurement to approval of the correctness of form and legality, and does not grant the Attorney General authority to decline approval of a contract based on his disagreement with terms. 5 G.C.A. § 5150. While the Attorney General retains his common law powers as the Chief Legal Officer of Guam, the Legislature by statute may restrict or modify his powers. Guam International Airport Authority v. Moylan, 2005 Guam 5, ¶65. The Supreme Court of Guam has resolved the inherent problem of the Attorney General's disagreement with contracts, and has concluded that the Attorney General has the legal obligation and duty to "approve a contract which is lawful as to form and content." Guam International Airport v. Moylan, 2005 Guam 5, at ¶ 65.

Additionally, 5 G.C.A. § 5150 is clearly a limitation on the Attorney General's authority over procurement matters. It provides:

The Attorney General, the Deputy Attorney General or such Assistant Attorneys General, or such Special Assistant Attorneys General as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to the Policy Office and the General Services Agency. Whenever the Chief Procurement Officer, the Director of Public Works, or the head of any executive branch agency, autonomous agency, instrumentality or public corporation of the government of Guam conducts any solicitation or procurement which is estimated to result in an award of Five Hundred Thousand Dollars (\$500,000) or more, the Attorney General or his designees, including one (1) or more Special Assistant Attorneys General who may be so designated or appointed by the Attorney General and subject to any reasonable requirements or conditions determined by the Attorney General, shall act as legal advisor during all phases of the solicitation or procurement process. The Attorney General, or his designee, including one (1) or more Special Assistant Attorneys General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such a determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the required procedures precedent

1 to executing the contract were carried out. He or his designees *may* prescribe the  
2 forms and format required to be followed by the agencies in aiding him in his  
3 determination of form and legality.

4 While the Attorney General proffers 5 G.C.A. §5230(b) as a basis to recognize its ostensible authority in  
5 procurement actions, as set forth in the Comment, the basis for disclosure of records to the Attorney  
6 General is its relationship as legal counsel. The Comment provides:

7 **COMMENT:** Subsection (b) is modified to make it clear that the Attorney  
8 General, as counsel to the government in general and to the GSA in particular, may  
9 review all data. In the past some have argued that confidential information  
10 protected in a manner of the original MPC (not mentioning the Attorney General)  
11 was not to be revealed to the Attorney General even when the agency was  
12 requesting a legal opinion on that same information.

13 The Attorney General has no independent authority in these procurement proceedings where it does  
14 not represent a Government agency. The right of appeal by the Government is an explicit statute which  
15 clearly does not vest authority in procurement proceedings with the Attorney General, but in the client, in  
16 this case, the Government of Guam agency. 5 G.C.A. § 5707 provides:

17 (b) Authorization of Appeal by the Government. No such appeal shall be made by  
18 the government or an autonomous agency or public corporation unless  
19 recommended by the Chief Procurement Officer, the Director of Public Works, or  
20 the head of the Purchasing Agency involved.

21 If the Attorney General has the ostensible authority argued by it to act independently of any client, the  
22 Attorney General's authority to appeal a decision by the Public Auditor would supersede any determination  
23 by the Government agency to appeal. Clearly, the Legislature in its wisdom restricted the Attorney  
24 General's authority in procurement proceedings to simply act as a legal advisor, and to approve contracts in  
25 "form and legality."

26 In this case, the Attorney General asserts that it does not represent GSA, by its CPO, Claudia  
27 Acfalle, nor DOA, as set forth by Attorney General Leonardo Rapadas, as attached to the Memorandum

1 submitted by the Attorney General. If the Attorney General does not represent any party in this action, the  
2 Attorney General cannot enter special appearance, and its request should be denied.

3 **II. ATTORNEY GENERAL'S CLAIM THAT IT IS NOT IN THE BEST INTEREST**  
4 **OF THE GOVERNMENT OF GUAM TO COMPROMISE ITS CLAIM OF**  
5 **OWNERSHIP DOES NOT MAKE THE CONTRACT ILLEGAL; THUS,**  
6 **ATTORNEY GENERAL HAS NO AUTHORITY OR BASIS TO CONTEST THE**  
7 **FORM OR LEGALITY OF THE EXECUTED SETTLEMENT AGREEMENT.**

8 The Attorney General on its own behalf claims that the interests of the Government of Guam are  
9 not served by the execution of the Settlement Agreement and Mutual Release entered into between the  
10 Government of Guam and Appellant DMR. The crux of the Attorney General's claim of illegality is simply  
11 that the Government of Guam is compromising its claim of ownership in a global settlement with DMR.  
12 Because the Government of Guam is prepared to certify fund availability under the award of the  
13 procurement herein, and as set forth in the Order of Dismissal by Stipulation, there is no illegal expenditure  
14 of funds; thus, no illegal contract, as alleged by the Attorney General, exists.

15 The Attorney General simply insists on infringing upon the power of the Government of Guam to  
16 determine a fair, adequate and reasonable settlement in the best interests of the Government of Guam  
17 taking into account numerous factors, including the likelihood and duration of litigation, the risks of liability  
18 and damages, the ability of the Appellant to prevail on any of its claims, the risks of proceeding with the  
19 claims and defenses in the litigation, and the range of reasonableness of settlement terms, amongst other  
20 factors. Notwithstanding, the Attorney General disagrees with the Government of Guam's decision to  
21 resolve its dispute with DMR.

22 Respectfully, the Attorney General's obligation does not extend beyond the approval of the  
23 agreement as to "form and legality," of the Settlement Agreement and Mutual Release. Because the essence  
24 of every settlement is compromise, it is not unusual that every term set forth in the Settlement Agreement  
25 would address favorably the Government of Guam, or DMR, conversely; hence, a settlement is intended to  
26 compromise and resolve the issues between the parties. The Government of Guam and DMR have  
27

1 compromised the issues between them, and seek the dismissal of this procurement appeal on the terms set  
2 forth in the Order of Dismissal by Stipulation.

3  
4 **III. GOVERNMENT'S MOTION TO DISMISS AND VACATE PROCUREMENT  
5 WAS DENIED, AND ITS ATTEMPT TO RENEW THE MOTION ABSENT  
6 ANY CLIENT DIRECTIVE SHOULD BE DENIED.**

7 The Attorney General incorrectly represents that the Government's Motion to Dismiss is  
8 outstanding and has been held in abeyance by the Public Auditor. As set forth by the Hearings Officer on  
9 Day 3 of the Merits Hearing, the Government's Verified Motion to Dismiss Appeal and to Vacate  
10 Procurement was denied. The audio recording transcription is provided for reference below:

11 Hearings Officer Torres:

12  
13 At my request, I asked to meet with the Public Auditor and  
14 counsels to discuss the ongoing claims and defenses in this matter,  
15 and to see if any of those could be limited; but after discussion, I  
16 note that all claims remain in place, and defenses remain in place. I  
17 would also note at this time, **the Public Auditor denies the  
18 Government's Motion to Dismiss.** If we could move forward.

19 Day 3, Part 2, Minute Entry Source: 1:00 to 1:27.

20 The Attorney General on its own accord alleges that there is "evidence emerging of Appellant's  
21 intentional disruption of critical GovGuam accounting functions" by the termination of point of sale  
22 services; however, this is simply another misstatement by the Attorney General of the evidence. *See*  
23 Attorney General Memo, p. 2-3. As set forth in the testimony of Benigno Camacho, the Government of  
24 Guam by DOA directed the termination of the old point of sale system, which resulted in the suspension of  
25 the interface function between the DOA and Department of Revenue of Taxation systems. *See Oral*  
26 Testimony of Benigno Camacho on Day 2, Part 6, Minute Entry Source 33:00 to 37:00; *see also* Exhibit 1,  
27 Excerpt of Written Testimony of Benigno Camacho by Deposition, p. 13. The testimony is further  
28 supported by the Written Testimony by Deposition of Benita Manglona; excerpt attached as Exhibit 2.

1 Thus, the Attorney General's assertion is not supported by any evidence presented, and its attempts to  
2 renew its motion without direction of any client, should be denied and stricken from these proceedings.

3 **CONCLUSION**

4 **BASED ON THE FOREGOING**, Appellant respectfully requests that the request for Special  
5 Appearance by the Office of the Attorney General, absent representation of any Government of Guam  
6 agency, and in light of the Entry of Appearance by the Legal Counsel of Office of the Governor on behalf  
7 of the Department of Administration and General Services Agency, be denied and its appearance and  
8 memorandum be stricken. Additionally, the disagreement by the Attorney General of Guam in the terms of  
9 the settlement agreement is beyond its statutory obligation to approve the form and legality of the contract  
10 in these procurement proceedings. Thus, Appellant further requests that the Office of Public  
11 Accountability enter an Order consistent with the Order of Dismissal by Stipulation.  
12

13 **RESPECTFULLY SUBMITTED** on this 26<sup>th</sup> day of November, 2012.

14 **LAW OFFICE**  
15 **JACQUELINE TAITANO TERLAJE, P.C.**

16 By:

17   
18 **JACQUELINE TAITANO TERLAJE**  
19 **Attorney for Data Management Resources, LLC.**

1 A: Yes.

2 Q: Okay. So in the Point of Sale that was eventually interfaced into the  
3 Financial Management System of the Government of Guam, at some point there  
4 came an end to that system?

5 A: Yes.

6 Q: Okay. When did that system come to an end?

7 A: It was November 2011. That's it, yeah.

8 Q: Okay. And do you know if--

9 A: Again, I'm very bad on dates -- okay? -- so when I say it--

10 Q: It's not a problem

11 A: --it's gonna be a general.

12 Q: No problem. And that's important. For our record purposes, if you're  
13 not sure about a date or you want to talk about an area of time--

14 A: Yeah.

15 Q: --that's fine to designate the area of time. So in November of 2011, the  
16 old POS system -- the Point of Sale system -- was changed or turned off somehow--  
17 terminated--

18 A: Terminated, yeah.

19 Q: --is a good word. So it was terminated?

20 A: No more services, yeah.

21 Q: Do you remember the circumstances of why that service was  
22 terminated?

23 A: The reason they wanted to do it? Why they terminated?

24 Q: Yeah, the reasons why the Point of Sale was terminated.

25 A: (Indiscernible muttering) I know that a letter was issued out to  
26 terminate the services. Exactly why the reasons was, I don't recall exactly.

27 Q: Okay.

28 A: Yeah.

Exhibit 1

Appellant Opposition to Attorney General  
Special Appearance and Motion to Strike

Deposition of Benigno Camacho  
July 17, 2012  
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1 A: --you know.

2 Q: Okay. I mean, my understanding is it was tied to a Merchant Services  
3 contract. Is that correct based on your knowledge?

4 A: That -- that's -- that's correct that it was tied to the Merchant Services  
5 contract, and because it was tied to that, they -- they said that they'd throw in the  
6 POS for free. That's what my staff had represented to me.

7 Q: Okay. And who in your staff said that the former POS system was  
8 being provided for free?

9 A: That was the Financial Manager.

10 Q: Who would be?

11 A: Kathy Kakigi.

12 Q: (Pause) And because according to the depo 2, it says:

13 Without the credit card payments, the vendor will no longer  
14 collect fees which pay for the hosting, use and maintenance  
15 of the POS application and web payment services.

16 So, would it be fair to say that the credit card payments really was what was  
17 driving the payment of the POS application based on this status report?

18 A: Yes. That's -- that's what it appears that, you know, it's not really--  
19 and what, you know, my comment to them was, you know, nothing's free. You  
20 know, actually, I recall my comment now; I said nothing's free; they're getting the  
21 payment from the credit card.

22 Q: Okay. So, prior to the termination of the services under the old POS  
23 system that you testified that was terminated as of December 1st of 2011--

24 A: That's correct.

25 Q: Okay. What efforts were made in relation to securing the request for  
26 proposal to ensure that the POS system would be in place before that termination  
27 date?

28 A: The P-- the evaluate -- I mean, the RFP was initiated since March; and  
it was out in April of that year.

Exhibit 2

Appellant Opposition to Attorney General  
Special Appearance and Motion to Strike

Deposition of Benita A. Manglona  
July 16, 2012  
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