



**Office of the Attorney General**  
**Leonardo M. Rapadas**  
 Attorney General of Guam  
 Civil Division  
 287 West O'Brien Drive  
 Hagåtña, Guam 96910 • USA  
 (671) 475-3324 • (671) 472-2493 (Fax)  
 www.guamattorneygeneral.com

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 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS  
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 FILE NO. OPA-PA-12-011

Attorneys for the Government of Guam

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

IN THE APPEAL OF:

PACIFIC DATA SYSTEMS

Appellant.

) DOCKET NO. OPA-PA-12-011  
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**REQUEST FOR DISQUALIFICATION**

Pursuant to the Disclosure and Notice of Status Hearing signed by the Hearing Officer and concurred by the Public Auditor on June 29, 2012 the purchasing agency, Guam Services Agency (GSA) hereby files this written objection and request for disqualification of the Lujan Aguigui & Perez LLP (LAP) firm as the Hearing Officer for this matter.

After making full disclosure of LAP's dealings with GTA the fact remains that LAP represented GTA in matters wherein PDS was the opposing party. In an effort to ensure that there exist no appearance of bias, GSA is of the position that LAP be recused in this matter.

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**Request for Recusal**

In the Appeal of Pacific Data Systems

Office of Public Accountability Docket Nos. OPA-PA-12-002 thru 006 & 009

**COPY**

## A. Case Law Disqualification Standards

The Hearing Officer for OPA procurement appeals function as a judge<sup>1</sup> and therefore the rules that govern recusals of judges apply. The rule that a decision maker shall be disqualified from a case in which that person is interested or prejudiced is to insure a fair and impartial hearing of the issues involved, and to guarantee that no decision maker shall preside in a case in which she is not wholly free, disinterested and independent. Litinsky v. Querard, 683 P.2d 816, 818 (Colo. Ct. App. 1984) (“The purpose of this [disqualification] rule is to ensure a fair and impartial hearing of the issues involved.”) (citing Wood Bros. Homes, Inc. v. Fort Collins, 670 P.2d 9 (Colo. Ct. App. 1983)); Dacey

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### <sup>1</sup> 12109. Authority of the Hearing Officer.

The Public Auditor may appoint a Hearing Officer for Procurement Appeals. If no Hearing Officer is appointed or in the event of the Hearing Officer's recusal, the Public Auditor may appoint and contract with another Guam-licensed attorney, who may be an attorney in full time service of the government of Guam, or an attorney in private practice, to act as Hearing Officer for all further proceedings with respect to that matter. The Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendations to the Public Auditor. No prior determination shall be final or conclusive. The Hearing Officer has the power, among others, to:

- (a) Hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;
- (b) Require parties to state their positions with respect to the various issues in the proceeding;
- (c) Require parties to produce for examination those relevant witnesses and documents under their control;
- (d) Rule on motions, and other procedural items on matters pending before such officer;
- (e) Regulate the course of the hearing and conduct of participants therein;
- (f) Receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (g) Fix time limits for submission of written documents in matters before such officer;
- (h) Impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
  - (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
  - (2) Excluding all testimony of an unresponsive or evasive witness;
  - (3) Expelling any party or person from further participation in the hearing; and
  - (4) Taking official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.
- (i) Compel attendance and testimony of and production of documents by any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission;
- (j) Consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant or appellant

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v. Conn. Bar Ass'n, 441 A.2d 49, 52 (Conn. 1981) (“The objective of the [disqualification] statute is to assure that the person who participates in any judicial proceeding in a judicial capacity is disinterested.”) (citing Groton & Ledyard v. Hurlburt, 22 Conn. 178, 191, 1852 WL 674 (Conn. 1852)).

The statutory grounds for disqualification are founded upon the Canons of Judicial Ethics (Code of Judicial Conduct), but those provisions are not exhaustive. See A.B.A. Model Code of Judicial Conduct, Canon 3 subd. C(1) (“A judge shall diligently discharge the judge’s administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.”); see also 7 G.C.A. § 6103 (“In addition to the requirements of § 6104 and § 6105 of this Chapter, the standards of conduct prescribed by the American Bar Association’s Canon of Judicial Ethics shall apply to and govern the conduct of the Justices of the Supreme Court of Guam and the Judges of the Superior Court of Guam.”).

The situations in which a judicial officer should recuse himself are varied and are not limited arbitrarily to cases of kinship, personal interest in the litigation **or prior representation of a party**; there are areas beyond these where a judge may not sit in judgment. 46 Am. Jur. 2d, Judges § 95; see also Walker v. State, 358 So.2d 800 (Ala. Crim. App. 1978) (“Statutory grounds or rules of court are not exclusive of the common law principles that disqualify a judge.”) (citing Morgan County Comm’n v. Powell, 292 Ala. 300, 293 So.2d 830 (Ala. 1974)). A judicial officer “not only has the right but, moreover, has the obligation to recuse himself on his own motion if he is satisfied that there is good cause for believing that his not doing so might preclude a fair and unbiased

hearing and judgment, or might reasonably lead counsel or the parties to believe so.” State v. Tucker, 625 A.2d 34, 36 (N.J. Super. Ct. App. Div. 1993) (quoting State v. Utsch, 184 N.J. Super. 575, 581, 446 A.2d 1236 (N.J. Super. Ct. App. Div. 1982)) (internal quotations and ellipses omitted), cert. denied, 135 N.J. 468, 640 A.2d 850 (N.J. 1994).

**B. The Facts Here Warrant Disqualification under the Statutory and Case Law Standards**

Judicial disqualification is required if a reasonable person would question the judge’s impartiality, even though no actual bias or prejudice has been shown. Gray v. Univ. of Ark. at Fayetteville, 883 F.2d 1394, 1397-98 (8th Cir. 1989) (“Because the goal of the [disqualification] statute is to ensure the appearance of impartiality, disqualification is required if a reasonable person who knew the circumstances would question the judge’s impartiality, even though no actual bias or prejudice has been shown.”). Because LAP has represented GTA in 4 matters involving telecommunications and of the four matters two were in opposition to PDS, this creates an appearance of partiality which arguably taints the public’s perception of the legitimacy of these proceedings.

In light of the foregoing, GSA respectfully request that Hearing Officer Delia Lujan Wolff recuse herself from this case. The grounds set forth above constitute sufficient reason to believe that LAP’s impartiality might reasonably be questioned by a third party.

Dated this 6<sup>th</sup> day of July, 2012.

OFFICE OF THE ATTORNEY GENERAL  
**Leonardo M. Rapadas, Attorney General**

By:

  
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**FRED NISHIHIRA**  
Assistant Attorney General