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PROCUREMENT APPEALS  
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FILE NO OPA-PA: 15-008

9 **BEFORE THE PUBLIC AUDITOR**  
10 **PROCUREMENT APPEALS**  
11 **TERRITORY OF GUAM**

12 IN THE MATTER OF  
13 MAEDA PACIFIC CORPORATION,

14 Appellant,

15 and

16 GUAM SOLID WASTE AUTHORITY

17 Purchasing Agency.

) Docket OPA PA-15-008

**REBUTTAL TO APPELLANT'S  
COMMENTS**

18 **REBUTTAL TO APPELLANT'S COMMENTS**

19 Pursuant to 2 G.A.R. §§ 12104(c)(4) and 12102(g), GSWA hereby submits its Rebuttal  
20 to the Comments on Agency Report filed by appellant Maeda Pacific Corporation ("Maeda") on  
21 September 11, 2015. A Motion to Dismiss for Lack of Jurisdiction and for the Disqualification  
22 or Recusal of the Public Auditor is pending. The controversy on appeal is the validity and  
23 enforceability of the Liquidated Damages clause.

24 "The Public Auditor shall not have jurisdiction over disputes having to do with money  
25 owed to or by the government of Guam." 5 G.C.A. § 5703. Because the validity and  
26 enforceability of a liquidated damages clause has to do with how much money may be owed to  
27 the government of Guam, the Public Auditor must dismiss the appeal for lack of jurisdiction.  
28 *See also* 2 G.A.R. § 12301(a) ("Disputes having to do with money owed to or by the  
government of Guam shall not be submitted.").

1 Liquidated damages clauses are valid and enforceable “when, from the nature of the  
2 case, it would be impracticable or extremely difficult to fix the actual damage.” 18 G.C.A. §  
3 88104. Thus, a determination of whether the liquidated damages clause is valid and enforceable  
4 would require the Public Auditor to attempt to calculate the actual damages. *See First*  
5 *International Corporation v. Maeda Corporation*, Superior Court of Guam Civil Case No.  
6 CV0788-97, Decision and Order p. 23 (Sep. 22, 1999) (The Superior Court of Guam found that  
7 the subject liquidated damages clause valid and enforceable because calculating the amount of  
8 damages arising from the loss of use of a newly constructed facility was impracticable at best).

9 Because the Public Auditor cannot determine the validity of the liquidated damages  
10 clause without attempting to calculate the actual money loss to the government, the Public  
11 Auditor has no jurisdiction over the dispute and this matter must be resolved in accordance with  
12 the Government Claims Act. 5 G.C.A. § 5703; *Pacific Rock Corp. v. Dept. of Education*, 2001  
13 Guam 29 ¶¶ 31-32, 39.

#### 14 CONCLUSION

15 For the foregoing reasons, the appeal must be dismissed for lack of jurisdiction to hear  
16 the appeal under 5 G.C.A. § 5703.

17 Respectfully submitted this 16<sup>th</sup> day of September, 2015.

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22 *Attorney for Guam Solid Waste Authority*  
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