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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

9 IN THE PROCUREMENT APPEAL OF

10 MORRICO EQUIPMENT, LLC,

11 Appellant.

) Docket No. OPA PA-15-014
) Docket No. OPA PA-15-017
) Docket No. OPA PA-16-001

**REPLY MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS
FOR LACK OF JURISDICTION
AND FOR RECUSAL**

REPLY MEMORANDUM

12 The law requires dismissal. The OPA simply does not have any statutorily conferred
13 jurisdiction over an untimely appeal, as instructed under Superior Court of Guam case law
14 overturning a prior exercise of the OPA’s jurisdiction. Neither does the OPA have any
15 statutorily conferred jurisdiction to interpret or overrule a federal district court order. Finally,
16 Guam law requires recusal where a hearing officer or agency member cannot be impartial.
17 Morricco’s Opposition to dismissal and recusal fails to address the law, because it cannot do so
18 without conceding. GSWA redirects the OPA to the relevant law.

19 **I. Morricco’s Untimely Protest and Appeal**

20 Morricco does nothing to address or distinguish its untimely appeal from that in *TRC*
21 *Environment Corporation v. Office of the Public Auditor*, Superior Court of Guam Case No.
22 SP160-07, Decision and Order p.1, Nov. 24, 2008. There, the Superior Court found the OPA
23 lacked jurisdiction over ETI’s untimely appeal. The Court reasoned that ETI’s second protest
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1 did not toll the time to appeal as it was merely protesting the same issues in its First Protest and
2 its Second Protest was not a request for reconsideration. *Id.* at pp. 6-7. The issues here have
3 always remained the same. Morrico was “aggrieved” within the meaning of 5 G.C.A. § 5425 as
4 of its First Protest. It has always challenged the same specification. Morrico cannot repeatedly
5 attack the same specification by finding different ways to fail to meet it.

6 **II. Jurisdiction over a Federal Receiver**

7 Morrico makes bold assumptions for the Public Auditor’s jurisdiction with no legal
8 authority whatsoever to support it. While having the authority to review de novo all matters
9 properly before her, the Public Auditor’s review is limited to procurement protests dealing with
10 a violation of Guam law, whether statutory or regulatory, directly related to the “source
11 selection, solicitation or award of contract.” 5 GCA § 5425. *Data Management Resources,*
12 *LLC, v. OPA, Guam Department of Education*, March 29, 2012, Findings of Facts and
13 Conclusions of Law, p. 3. Morrico fails to establish how determining whether the Receiver is in
14 compliance with federal law or a federal court order comes within the limited jurisdiction
15 conferred to the Public Auditor by 5 G.C.A. § 5425.

16 Morrico’s only legal proffer is misleading; *MDI v. CDCR*, 585 F.3d 1211 (9th Cir.
17 2009) is inapposite. There the Ninth Circuit was noting a contractor’s ability to sue a receiver
18 in federal court to recover payment for services. It did not speak to a territorial administrative
19 agency’s ability to overrule an Order of a District Court. However, to the extent Morrico
20 attempts to challenge the Order of the District Court and the Receiver’s compliance with it,
21 *MDI v. CDCR* is instructive. The Ninth Circuit noted the *Barton* rule, in which “the Supreme
22 Court held that when a plaintiff sues a receiver outside of and without the permission of the
23 appointing court, the non-appointing court is *without jurisdiction to entertain the suit.*” *Barton*
24 *v. Barbour*, 104 U.S. 126, 131 (1881)(Emphasis added). Here, Morrico is requesting relief that
25 would only come from suit against the Receiver with the permission of the appointing court,
26 under the guise of a procurement appeal. Looking beyond the labels of Morrico’s appeal and
27 the holes in its arguments, it is clear that the law requires dismissal.

1 Without any legal support, Morrico repeatedly relies on the “obviousness” of its
2 arguments. The only thing obvious about Morrico’s arguments is that they completely ignore
3 the plain language of the District Court’s Order. The Receiver, as management over GSWA,
4 has taken its procurement actions pursuant to this Order. The Public Auditor cannot exercise
5 jurisdiction over the matter without substituting her judgment over that of the Receiver’s in
6 contradiction to the District Court’s Order. There is no legal authority for the Public Auditor to
7 do this. Therefore, the matter must be dismissed.

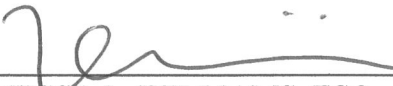
8 **III. Recusal**

9 Morrico’s arguments against recusal are disingenuous. Morrico concedes that the Public
10 Auditor has shown bias for Morrico, but that expressing concern over the costs of litigation is
11 consistent with the mandates of 5 GCA § 5001(b). This logic cannot be followed. Otherwise,
12 the Public Auditor would be encouraged to express an opinion on the economy of every appeal.
13 Morrico then correctly notes that the Public Auditor routinely makes herself available to the
14 media regarding findings “made within the auditor’s work.” However, Morrico misses the point
15 that this particular press release was unprecedented in that it was not a finding made within her
16 work. Finally, Morrico acknowledges that the Public Auditor has opined on the judiciousness
17 of the Receivership as management over GSWA, but seems to argue this is acceptable because
18 other public officials express an opinion on the matter. Sharing the same beliefs as the other
19 officials on the matter only further supports recusal. These officials have been openly adverse,
20 if not hostile, to the existence and decision making of the Receiver. Further, unlike these other
21 public officials, the Public Auditor’s role is to serve as a neutral, administrative adjudicator. A
22 decision cannot possibly be rendered without a cloud of uncertainty hanging over it.
23 Accordingly, recusal is required.

24 **CONCLUSION**

25 For the foregoing reasons, the appeal should be summarily dismissed for the OPA’s
26 lack of jurisdiction to hear the appeal under 5 G.C.A. § 5703. The appeal should also be
27 dismissed due to the disqualification or recusal of the Public Auditor in accordance with 2
28 G.A.R. § 12601.

1 Respectfully submitted this 2nd day of February, 2016.

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