

1 BERMAN O'CONNOR & MANN  
Suite 503, Bank of Guam Bldg.  
2 111 Chalan Santo Papa  
Hagåtña, Guam 96910  
3 Telephone No.: (671) 477-2778  
Facsimile No.: (671) 477-4366

4 Attorneys for Appellants:  
5 SHANGHAI ELECTRIC POWER JAPAN CO., LTD. and  
TERRA ENERGY, INC.  
6

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: Nov 13, 2017

TIME: 12:24  AM  PM BY: FDJ

FILE NO OPA-PA: 17-008

7 **BEFORE THE PUBLIC AUDITOR**  
8 **PROCUREMENT APPEALS**  
9 **TERRITORY OF GUAM**

9 IN THE APPEAL OF

10 SHANGHAI ELECTRIC POWER  
11 JAPAN CO., LTD. and TERRA  
ENERGY, INC.,

12 Appellants.

Appeal No. OPA-PA-17-008

**OBJECTION TO HANWHA'S  
PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW FILED  
NOVEMBER 7, 2017**

13  
14 COMES NOW Appellants Shanghai Electric Power Japan Co., Ltd. and Terra  
15 Energy, Inc. (herein "SEPJ") and hereby objects to the Hanwha Energy Corporation and  
16 Pacific Petroleum Trading Corp.'s (herein "Hanwha") Proposed Findings of Fact and  
17 Conclusions of Law filed on November 7, 2017.

18 **BACKGROUND**

19 On October 24, 2017, the Hearing Officer ruled in the evidentiary proceedings to  
20 prohibit any evidence related to compromise and offers to compromise pursuant to  
21 Guam Rule of Evidence 408. See Exhibit "A", GRE 408 (Compromises and Offers of  
22 Compromise), attached hereto for ease of reference. The Hearing Officer repeatedly  
23 affirmed the same ruling as to questions put to witness Mr. Eddie Woo and the Hanwha  
24 witness. No evidence was submitted on this point.

25 On November 7, 2017, Hanwha's Proposed Findings of Fact and Conclusions of  
26 Law were filed and set forth at p. 13, ¶ 28, several sentences of purported evidence  
27 related directly to the prohibited subject of offers to compromise that the Hearing  
28

1 Officer ruled was not admissible in the evidentiary hearing. See Hanwha Proposed  
2 Findings of Fact, p. 13, ¶ 28, attached hereto as Exhibit "B".

### 3 POINTS AND AUTHORITIES

4 SEPJ submits that the Hearing Officer's ruling in the evidentiary proceedings  
5 was entirely correct, justified, clear and made on the record. No excuse exists for  
6 Hanwha to insert into the record the factual subject matter that was expressly  
7 prohibited by the Hearing Officer.

8 Guam Procurement Code at 5 GCA § 5425(b) (Authority to Resolve Protests)  
9 provides as follows:

10 The Chief Procurement Officer, the Director of Public Works,  
11 head of a purchasing agency, or a designee of the one of  
12 these officers shall have the authority, prior to the  
13 commencement of an action in court concerning the  
controversy, to settle and resolve a protest of an aggrieved  
bidder, offeror, or contractor, actual prospective, concerning  
the solicitation or award of a contract. (emphasis added)

14 Based on this authority, little doubt should exist that the discussions of a possible  
15 settlement after the protest was filed by SEPJ are contemplated and not prohibited by  
16 the relevant portion of Guam's procurement code.

17 SEPJ leaves to the discussion of the Hearing Officer the imposition of any  
18 sanction such as attorneys' fees and costs, or other sanction appropriate, for the  
19 violation of the Hearing Officer's Order and ruling in the evidentiary proceedings on  
20 October 24, 2017.

### 21 REQUEST FOR RELIEF

22 SEPJ respectfully requests that the Hearing Officer and Public Auditor strike ¶ 28  
23 from Hanwha's Proposed Findings of Fact and Conclusions of Law, and enter any  
24 sanction that the Hearing Officer and Public Auditor deem appropriate.

25 / / /

26 / / /

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

DATED this 13 day of November, 2017.

Respectfully submitted,

**BERMAN O'CONNOR & MANN**  
Attorneys for Appellants  
*SHANGHAI ELECTRIC POWER JAPAN CO.,  
LTD. and TERRA ENERGY, INC.*

By:   
\_\_\_\_\_  
DANIEL J. BERMAN

# Exhibit “A”

1 SOURCE: Rule 406, FRE.

2 **Rule 407 Subsequent Remedial Measures**

3 When, after an injury or harm allegedly caused by an event, measures are taken that, if taken  
4 previously, would have made the injury or harm less likely to occur, evidence of the subsequent  
5 measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in  
6 the product's design, or a need for a warning or instruction. This rule does not require the exclusion  
of evidence of subsequent measures when offered for another purpose, such as proving ownership,  
control, or feasibility of precautionary measures, if controverted, or impeachment.

7 SOURCE: Rule 407, FRE.

8 **Rule 408 Compromises and Offers to Compromise**

9 Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or  
10 promising to accept, a valuable consideration in compromising or attempting to compromise a claim  
11 which was disputed as to either validity or amount, is not admissible to prove liability for or  
12 invalidity of the claim or its amount. Evidence of conduct or statements made in compromise  
13 negotiations is likewise not admissible. This rule does not require the exclusion of any evidence  
14 otherwise discoverable merely because it is presented in the course of compromise negotiations.  
15 This rule also does not require exclusion when the evidence is offered for another purpose, such as  
16 proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort  
to obstruct a criminal investigation or prosecution.

17 SOURCE: Rule 408, FRE.

18 **Rule 409 Payment of Medical and Similar Expenses**

19 Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses  
occasioned by an injury is not admissible to prove liability for the injury.

20 SOURCE: Rule 409, FRE.

21 **Rule 410 Inadmissibility of Pleas, Plea Discussions, and Related Statements**

22 Except as otherwise provided in this rule, evidence of the following is not, in any civil or  
23 criminal proceeding, admissible against the defendant who made the plea or was a participant in the  
24 plea discussions:

- 25 (1) a plea of guilty which was later withdrawn;  
26 (2) a plea of nolo contendere;  
27 (3) any statement made in the course of any proceedings under Rule 11 of the Federal  
28 Rules of Criminal Procedure or comparable state, territorial, or commonwealth procedure

EXHIBIT

A

# Exhibit “B”

at § 5427. Authority to Resolve Contract and Breach of Contract  
Controversies.

§ 5425. Authority to Resolve Protested Solicitations and Awards.

ic (a) Right to Protest. Any actual or prospective bidder, offeror, or  
od contractor who may be aggrieved in connection with the method of source  
or selection, solicitation or award of a contract, may protest to the Chief  
id Procurement Officer, the Director of Public Works or the head of a  
purchasing agency. The protest shall be submitted in writing within fourteen  
(14) days after such aggrieved person knows or should know of the facts  
giving rise thereto.

(b) Authority to Resolve Protests. The Chief Procurement Officer, the  
Director of Public Works, the head of a purchasing agency, or a designee of  
one of these officers shall have the authority, prior to the commencement of  
an action in court concerning the controversy, to settle and resolve a protest  
of an aggrieved bidder, offeror, or contractor, actual or prospective,  
is concerning the solicitation or award of a contract. This authority shall be  
exercised in accordance with regulations promulgated by the Policy Office.

ll (c) Decision. If the protest is not resolved by mutual agreement, the  
o Chief Procurement Officer, the Director of Public Works, the head of a  
purchasing agency, or a designee of one of these officers shall promptly  
issue a decision in writing. The decision shall:

(1) state the reasons for the action taken; and

(2) inform the protestant of its right to administrative and judicial  
review.

(d) Notice of Decision. A copy of the decision under Subsection (c) of  
this Section shall be mailed or otherwise furnished immediately to the  
protestant and any other party intervening.

(e) Appeal. A decision under Subsection (c) of this Section including  
a decision there under regarding entitlement to costs as provided by  
Subsection (h) of this Section, may be appealed by the protestant, to the  
Public Auditor within fifteen (15) days after receipt by the protestant of the  
notice of decision.

(f) Finality. A decision of the Public Auditor is final unless a person  
adversely affected by the decision commences an action in the Superior  
Court in accordance with Subsection (a) of §5480 of this Chapter.

