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3 **Office of the Attorney General**  
4 **Leonardo M. Rapadas**  
5 Attorney General of Guam  
6 **Civil Litigation Division**  
7 287 West O'Brien Drive  
8 Hagåtña, Guam 96910 • USA  
9 Tel. (671) 475-3324 • Fax (671) 472-2493  
10 www.guamag.org

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
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FILE NO OPA-PA: 12-007

Office of the Attorney General, *pro se*

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

10 IN THE APPEAL OF ) DOCKET NO. OPA-PA-12-007  
11 )  
12 DATA MANAGEMENT RESOURCES, LLC.) **SUPPLEMENTAL MEMORANDUM RE**  
13 ) **ATTORNEY GENERAL AS A**  
14 ) **REQUIRED PARTY; OPPOSITION TO**  
15 ) **SETTLEMENT & ORDER OF**  
16 ) **DISMISSAL BY STIPULATION**  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )  
Appellant.

I. Attorney General as Required Party.

Both Appellant and the Agency take the view that there is but a single basis for the Attorney General to justify his appearance in a procurement appeal, and that is, as counsel for an Agency. In other words, they are encouraging the Public Auditor to adopt the narrow (and risky precedent-wise) view, that anytime an Agency declares a conflict, the Attorney General will be excluded from a procurement appeal. This truncated, self-serving rationale of allowing the Attorney General to participate in a procurement appeal only if the Agency agrees, would give every agency a tool to exclude the Attorney General from all future procurements by the

**ORIGINAL**

1 simple expedient of declaring conflicting views about how an appeal is to be handled or  
2 resolved. Having made their objection to the Attorney General remaining in this procurement  
3 appeal as a Party, the burden of proof is upon the Agency and Appellant, and they have not  
4 cited any authority showing that their exclusory argument has merit. In other words, the  
5 burden of showing that the continued participation in this Appeal by the Attorney General  
6 violates Guam's Procurement Law and Regulations belongs to the Agency and Appellant.  
7 Otherwise, their objection is of no consequence. In another procurement appeal where an  
8 appellant questioned the authority of the Attorney General, decided this year, the Public  
9 Auditor ruled:

11 Generally, in the absence of an operative presumption, the  
12 petitioning party has the burden of going forward as well as  
13 the burden of persuasion in an administrative hearing.  
14 (citation omitted). This means that [appellant] has the  
burden to produce evidence and persuade the Public  
Auditor that it is entitled to the relief it seeks.

15 In the Appeal of Peter Alecxis,dba APM: Guam Medical Referral Services, Appeal No: OPA-  
16 PA-11-016, p.8 (6 January 2012).

17 For the Public Auditor to endorse this novel theory would be revolutionary and bode ill  
18 for future procurement appeals. Many provisions of the Guam procurement law would be  
19 undermined and of lessened effectiveness, with resultant procurement obligations of the  
20 Attorney General, compromised. The following provisions of Guam Procurement Law and  
21 Regulations demonstrate that procurement obligations of the Attorney General necessarily  
22 appertain to standing in procurement appeals:

1                   **5 GCA §5150. Duties of the Attorney General.**

2                   The Attorney General, the Deputy Attorney General or such  
3                   Assistant Attorneys General as the Attorney General may  
4                   designate, shall serve as legal counsel and provide necessary  
5                   legal services to the Policy Officer and the General Services  
6                   Agency. The Attorney General shall, in addition, when he  
7                   approves contracts, determine not only the correctness of their  
8                   form, but their legality. In making such a determination of  
9                   legality, he may require any or all agencies involved in the  
10                  contract to supply him with evidence that the required  
11                  procedures precedent to executing the contract were carried  
12                  out. He may prescribe the forms and format required to be  
13                  followed by the agencies in aiding him in his determination of  
14                  legality. (emphasis added)

15                  Appellant submitted on 26 November 2012 two contracts involving an expenditure of  
16                  more than \$500,000.00. They are the undated, but partially executed Settlement Agreement and  
17                  Mutual Release (attached hereto as Exhibit “A”) and its Exhibit, the unsigned, undated Contract  
18                  For Services Request for Proposal DOA/RFP-014-11 (attached hereto as Exhibit “B”).

19                  Whenever GSA’s CPO conducts any solicitation or  
20                  procurement which is estimated to result in an award of five-  
21                  hundred-thousand-dollars (\$500,000) or more, the Attorney  
22                  General of Guam shall act as legal advisor during all phases of  
23                  the solicitation or procurement process. 5 GCA §5150.  
24                  (emphasis added)

25                  In the Appeal of Peter Alexsis, dba APM: Guam Medical Referral Services, Appeal No: OPA-  
                    PA-11-016, p.11 (6 January 2012).

                    In that same appeal, “the issue of whether the Attorney General of Guam served as  
GSA’s legal advisor for this solicitation is moot”. Id. This was because of the mandatory  
language (“shall”) in §5150, which cannot be waived or obviated by the agency jettisoning the  
Attorney General over a conflict. In the words of the PA: “However, the Attorney General must

1 provide only the necessary legal services for this solicitation.” Id.

2 The Attorney General suggests that the best way forward in the this Appeal is for the  
3 Attorney General to remain a party to the proceedings in its own right, and to require the Agency  
4 to provide evidence, extrinsic to the contract, that the legal criteria for entering the Exhibit “A”  
5 and Exhibit “B” contracts have been met. If eliminated from this procurement appeal  
6 proceeding, for the Attorney General to otherwise perform its function under 5 GCA §5150  
7 would be needlessly time-consuming and inefficient. Hence if for no other reason, the interests  
8 of judicial economy would provide a valid basis for the Attorney General to remain as a party to  
9 fulfill its function under §5150. Put differently, the implicit connection to this appeal by  
10 statutory obligation, apart from representation of the Agency, warrants the continued inclusion of  
11 the Attorney General in this matter, whose absence would require protracted proceedings, which  
12 is in no one’s interests.

14 In this appeal proceeding, issues of anti-competitiveness and suspected collusion have  
15 arisen. In such instances, the Attorney General must be involved by statute:

16 When for any reason collusion or other anticompetitive  
17 practices are suspected among any bidders or offerors, a  
18 notice of the relevant facts shall be transmitted to the  
19 Attorney General. 5 GCA §5246.

20 Repeatedly in this proceeding, the Attorney General has stated the objective of  
21 exposing suspected collusion and anticompetitive practices in this matter. Should the settlement  
22 fail owing to illegalities, the Attorney General would then have the opportunity to present  
23 evidence of these matters so that the Public Auditor may include such proof in arriving at its

1 decision on the merits of this appeal. Thus it is reasonable and necessary to allow the Attorney  
2 General to remain a party to this procurement appeal it its own right.

3 II. Dismissal of Appeal; Stay Remains in Effect: Settlement Illegal. The automatic stay  
4 on the procurement resulting from the protest remains in effect because the matter before the  
5 public auditor:

6 In the event of a timely protest ... the Territory shall not  
7 proceed further with the solicitation or the award of a  
8 contract prior to final resolution of such protest, and any  
9 such further action is void, unless The Chief Procurement  
10 Officer or the Director of Public Works after consultation  
11 with and written concurrence of the head of the using or  
12 purchasing agency and the Attorney General or designated  
13 Deputy Attorney General, makes a written determination  
14 that the award of the contract without delay is necessary to  
15 protect substantial interests of the Territory;. 5 GCA §5425  
16 (g)(1).

13 III. Illegalities of the Proposed Settlement (Exhibit "A").

14 (a) Payment of Award Contravenes Procurement Law requirement of a "fair and  
15 reasonable" determination. Perhaps the most glaring illegality of what the Agency and  
16 Appellant have "bargained for between" themselves (p.4) as a settlement, is where it refers to  
17 "determining the amount of consideration to be given in the making of this settlement" (p.4),  
18 and also where it recites that "this Settlement Agreement is entered into ... for sufficient  
19 consideration, and that it is fair, just and reasonable to all Parties" ¶(2),p.1. Also where the  
20 Agreement states that "[i]t is in the substantial interests of the Government of Guam", without  
21 giving us any idea of what those interests are. ¶II, (i), p.2.

22 With respect, it is submitted that nothing could be further from the truth. Here is a non-

23  
24 page 5 of 9 pages

1 inclusive list of the one-sided benefits for DMR conferred by the Settlement Agreement:

2 1. GovGuam's transfer of ownership to DMR of the DOA Application  
3 Program Interface (and code) that it owns,

4 2. Bought and paid-for under the clear language of the 2004 Agreement  
5 with Merchant Billing Services (Exhibit "C" hereto). ¶I.F., p.2 <sup>1/</sup>

6 3. GovGuam's relinquishment of any claim against DMR for the  
7 intentional disruption or disablement of the Application Program Interface by DMR during the  
8 first part of this year, costing GovGuam millions of dollars arising from the lack of that  
9 interface connection between DOA and DRT.

10 4. GovGuam's relinquishment of any claim against DMR directly or  
11 indirectly and relinquishment of any support or participation in any such claim, known or  
12 unknown, arising from DMR's use of its fiber optic cable access to GovGuam's Central Data  
13 Center and DMR's system access to GovGuam Agencies, known or unknown since "the  
14 beginning of time". ¶III, p.3

15  
16 Within 90 days, whether DMR delivers or not, the fixed, lumpsum "fair and  
17 reasonable" payment by GovGuam to DMR, (including an interface) for DOA, which will  
18 never be owned by GovGuam. ¶III, A. & B., p.2 of Exhibit "B" hereto. To put this price in  
19 perspective, GovGuam has recently developed its own Point of Sale System which works fine.  
20

21 \_\_\_\_\_  
22 The Office of the Attorney General is currently investigating whether other software programs identified in the  
23 definition of 'Claim to Ownership', p. 2 of 7, Settlement Agreement, ownership of which is permanently and  
24 irrevocably granted to DMR in Section III, Mutual Releases, page 3 of 7, Settlement Agreement, are actually owned  
25 by the Government of Guam.

1 What keeps it from supplying DRT with DOA data is the interface GovGuam purchased in  
2 2004 (Exhibit "C") and was intentionally disabled by DMR over the DOA Director's repeated  
3 objections earlier this year. An equivalent interface is available to GovGuam for less than  
4 \$15,000; delivered in less than a month. See Exhibit "D" hereto. This deal was never  
5 subjected to a "fair and reasonable" determination despite a request to counsel for the Agency  
6 to have this done.

7  
8 5. Three more years of 24/7 unrestricted fiber optic cable access to  
9 GovGuam's Central Data Center. ¶I,p.2 & ¶II, p.2, Exhibit "B".

10 6. Free defense "without any cost to DMR" and enforcement of the  
11 Settlement Agreement by GovGuam. ¶II(vi), p.3

12 In contrast to the foregoing considerable benefits to DMR, the Settlement Agreement only  
13 gives GovGuam a dismissal of the Freedom of Information Act suit languishing in Superior  
14 Court, a waiver of other claims and little else. The Guam Procurement law requires a  
15 determination that an award, such as the one made pursuant to ¶II(i), p.2 of the Settlement  
16 Agreement, be "fair and reasonable". 5 GCA § 5216(e). Since no such determination has been  
17 made of the "award" in the Settlement Agreement, both it and the Contract (Exhibit "A"  
18 thereto) are unlawful.

19 (b) The Settlement Agreement is overbroad in scope and exceeds the subject matter  
20 jurisdiction of the Public Auditor.

21 The Settlement Agreement purports to preclude GovGuam from filing any and all  
22 claims "of any nature related to the Procurement Appeal, Writ Proceedings, and Claim to  
23

1 Ownership” etc., etc. See ¶I. A.-E.,pp. 1&2, ¶II(i)&(ii), p.2, and ¶III, p.3. It is the Public  
2 Auditor who decides procurement appeals, including a decision to resolve an appeal by  
3 stipulated settlement. See 5 GCA §§12201 (Public Auditor’s decision must adhere to the  
4 terms and conditions of the solicitation), 5425(f), and also §5703 as to Jurisdiction of the  
5 Public Auditor. But to adopt the sweeping multi-forum, multi-case and multi-jurisdictional  
6 scope of the Settlement Agreement is clearly in excess of the Public Auditor’s subject matter  
7 jurisdiction to hear and decide this procurement appeal only. That jurisdiction cannot extend to  
8 other lawsuits in other forums, other jurisdictions, federal courts and claims under federal  
9 statutes and those of foreign countries, since “the beginning of time”. ¶III, p.3 These  
10 provisions are clearly illegal as they are extraneous to the OPA’s subject matter jurisdiction. 5  
11 GCA §5425(e) confers upon the Public Auditor limited jurisdiction to hear appeals from an  
12 Agency protest denial. Nothing more. The OPA has ruled that the Public Auditor can only  
13 hear appeals which involve matters raised earlier and decided in an agency protest, not other  
14 matters such as assertion of other claims by the Parties in other forums and other jurisdictions  
15 which were never raised at the agency level. See: Decision, In the Appeal of, Peter Alexxis  
16 ADA, dba APM: Guam Medical Referral Services, Appeal No. OPA-PA-11-016, 6 January  
17 2012. Consequently the Settlement Agreement calls upon the Public Auditor to decide matters  
18 in excess of her jurisdiction.  
19

20 (c) Contravention of Government Claims Act.  
21  
22  
23



1 The Settlement Agreement provides that the prevailing party in any proceeding to enforce  
2 this Settlement Agreement shall be entitled to, without limitation, reasonable attorney fees and  
3 costs which is contrary to the Government Claims Act (5 GCA 6101, et seq.). ¶IV, p.4.

4 (d) Fiber Optic Cable. Page 2 of the Contract For Services Request for Proposals  
5 DOA/RFP-014-11 states that GovGuam hereby ratifies, confirms, authorizes and consents to the  
6 continued operation and connection of the fiber optic cable by Contractor for another three years.  
7 This provision is totally irrelevant to the settlement and is beyond the scope of the Public  
8 Auditor's jurisdiction to make this a part of the Decision to approve the Settlement Agreement  
9 providing therefore especially without regard to the privacy, security and confidentiality issues  
10 by such unfettered access by a private company to government agency, employees', and citizen'  
11 data. It is in excess of the Public Auditor's jurisdiction and void. The authority cited in ¶(b)  
12 hereinabove is adopted.  
13

14 Dated this 13<sup>th</sup> day of December 2012.

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

17  
18 By:



**BENJAMIN M. ABRAMS**  
Assistant Attorney General