

1 **GUAM DEPARTMENT OF EDUCATION**  
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5 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**  
6 **PROCUREMENT APPEAL**

7 IN THE APPEAL OF

8  
9 **TELEGUAM HOLDINGS, LLC AND**  
10 **ITS WHOLLY OWNED**  
11 **SUBSIDIARIES, GTA TELEGUAM,**  
12 **LLC; GTA SERVICES, LLC; AND**  
13 **PULSE MOBILE LLC,**

14 Appellant.

APPEAL NO. OPA-PA-13-016

**REPLY TO OPPOSITION TO MOTION TO**  
**DISMISS FOR LACK OF JURISDICTION**

**RECEIVED**

OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 12/19/13

TIME: 11:35  AM  PM BY: Z h

FILE NO OPA-PA: 13-016

15 Comes now the Guam Department of Education (“GDOE”) and makes its reply to the  
16 Opposition to Motion to Dismiss filed by Appellant Teleguam Holdings, LLC and its wholly  
17 owned subsidiaries, GTA Teleguam, LLC; GTA Services, LLC; and Pulse Mobile LLC (hereafter  
18 “GTA”).

19 **I. Estoppel does not apply to GDOE’s Motion that the Office of Public**  
20 **Accountability lacks jurisdiction to hear GTA’s appeal.**

21 In its motion for dismissal, GDOE asserts that the Office of Public Accountability (“OPA”)  
22 lacks jurisdiction to hear GTA’s appeal. In opposition, GTA asserts that under the doctrine of  
23 equitable estoppel GDOE should be prevented from making this argument “after GDOE advised  
24 GTA that it has the right to appeal ... pursuant to §5425(e)” (GTA Opposition to Motion to  
25 Dismiss, p. 2). Guam’s procurement law at 5 GCA §5425(c) requires that a protest decision  
26 issued by a purchasing agency advise the protestor of the right to an administrative appeal.  
GDOE’s statement that GTA had the right to appeal was made pursuant to applicable law and

27 Page 1 of 3

28 *In the Appeal of TeleGuam Holdings, LLC and its Wholly Owned Subsidiaries, GTA TeleGuam, LLC; GTA Services,*  
*LLC; and Pulse Mobile LLC, Appellant*

OPA-PA-13-016

**Reply to Opposition to Motion to Dismiss for Lack of Jurisdiction**

**ORIGINAL**

1 does not act as bar to subsequent arguments that an appeal may not properly be heard by the  
2 OPA. Additionally, GDOE has asserted that the bases of GTA's appeal fall outside the  
3 jurisdiction granted to the OPA by statute. GTA's appeal in and of itself is not the issue; as with  
4 lawsuits, a party may commence an action at any time by filing a complaint. However, a court,  
5 and in this instance, the OPA, must determine whether it has authority to resolve a matter. In this  
6 case, GTA has complained that the administration of a contract after award, not the procurement  
7 process itself, is flawed. As stated in GDOE's Motion to Dismiss, the OPA has jurisdiction over  
8 specific matters as described in Guam's law, and that jurisdiction does not include the matters  
9 addressed in GTA's appeal. It is not GTA's right to file an appeal but rather the OPA's  
10 jurisdiction over the appeal that is the central issue in the motion to dismiss. Finally, GDOE did  
11 not induce GTA to believe it could not file an appeal; the opposite is true. GDOE, pursuant to  
12 statute, advised GTA of its right to appeal. For these reasons, estoppel does not apply and GDOE  
13 is not barred from making arguments regarding the OPA's jurisdiction over this matter.

13 **II. GTA's appeal does not assert a violation in the solicitation or award of the**  
14 **underlying IFB. The OPA's jurisdiction to address such violations therefore does**  
15 **not apply.**

16 In its Opposition, GTA also asserts that the OPA is empowered to impose remedies where  
17 there is a determination that a solicitation or award has violated the law. The OPA does in fact  
18 have such authority. But GTA has not asserted that there has been a violation of law in the  
19 solicitation or award of a contract. Instead, all of GTA's allegations address concerns with  
20 *performance after the award*. The OPA's jurisdiction to redress flawed solicitations or awards  
21 does not apply.

22 **III. GTA's interpretation regarding OPA's authority over debarment matters is**  
23 **incorrect, and unsupported by current law.**

24 In its opposition, GTA cites 5 GCA §5426 as allowing a member of the public to request the  
25 debarment or suspension of a contractor. Again, GTA is correct, to a point. §5426(f) does allow  
26 any member of the public to petition a purchasing agency for the debarment of an entity.  
27 However, under current procurement law, the public does not enjoy an equivalent right to have

1 their petition heard in an appeal before the OPA when no debarment or suspension has occurred.  
2 As discussed in the Motion to Dismiss, under 5 GCA §5426 and §5705, the OPA's jurisdiction  
3 over an appeal involving debarment is limited to situations where a debarment has actually  
4 occurred. The current law does not allow the OPA to hear an appeal where, as here, there was no  
5 debarment. The limitations in the current law are amplified in light of legislation pending before  
6 the Guam Legislature which, if passed into law, would expand the authority of the OPA to hear  
7 appeals such as the one GTA has made (Bill 224-32, at Sections 3 and 12, proposes to expand the  
8 OPA's appellate jurisdiction to matters wherein a petition to debar or suspend a party has been  
9 rejected or unanswered. A copy of those sections is attached here as Exhibit 1.). But until such  
10 time as the law is changed to allow for appeals when a petition to debar is rejected, the OPA does  
11 not have jurisdiction to hear an appeal when no debarment has occurred.

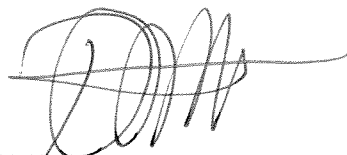
### 12 CONCLUSION

13 For the reasons above, GTA's opposition to the motion to dismiss filed herein is without  
14 merit, and GDOE again respectfully moves that this matter be dismissed for lack of jurisdiction.

15 Dated this 19<sup>th</sup> day of December, 2013.

16 Respectfully submitted,

17 **GUAM DEPARTMENT OF EDUCATION**

18 



19 By: \_\_\_\_\_  
20 **REBECCA M. PEREZ, ESQ.**  
21 *Legal Counsel*

# EXHIBIT 1

*I MINA'TRENTAI DOS NA LIHESLATURAN GUÅHAN*  
2013 (FIRST) Regular Session

Bill No. 224-32(COR)

Introduced by:

T. C. Ada   
R.J. Respicio 

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AN ACT TO AMEND §5425, §5426, §5427, §5450, §5452, §5480, §5481 AND §§5485 (a) and (b) OF ARTICLE 9, AND §5703, §5705, §5706(b), §5707(a), §5708 OF ARTICLE 12, CHAPTER 5, TITLE 5 OF THE GUAM CODE ANNOTATED RELATIVE TO CLARIFYING LEGAL AND CONTRACTUAL REMEDIES IN GUAM PROCUREMENT LAW.

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Findings and Intent.**

3 *I Liheslaturan Guåhan* finds that the procurement system is  
4 intentionally created to “outsource” the real time policing of the  
5 procurement process to the private sector by way of protests, and that  
6 the only way procurement will remain effective is if the review process  
7 is as expedited as the original procurement process.

8 *I Liheslaturan Guåhan* finds that there is a need for the prompt  
9 issuance of decisions on protests related to solicitations or awards as  
10 mandated by 5 GCA §5425(c) of the procurement law, and further  
11 finds that the lack of a timely decision or other resolution of such  
12 protests is a significant factor in prolonged procurement disputes,

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1 the willful or reckless violation of any applicable procurement law  
2 or regulation.

3  
4 (3) The Public Auditor shall have the power to assess  
5 reasonable costs including reasonable attorney fees incurred by the  
6 government, including its autonomous agencies and public  
7 corporations, or any protestor or interested party against a  
8 protestant upon its finding that the any party, including the  
9 government, making a the protest, motion or taking any position  
10 bringing any action was made fraudulently, frivolously or solely  
11 with predominant intent to delay or disrupt the procurement  
12 process.

13  
14 (i) Finality. A decision of the Public Auditor is final unless a  
15 person adversely affected by the decision commences an appeal in  
16 the Superior Court as provided by §5707(a) of this Chapter and in  
17 accordance with the waiver of sovereign immunity conferred by  
18 Subsection (a) of §5480 of this Chapter.

19  
20 **Section 3. §5426 Authority to Debar or Suspend of 5GCA Chapter**  
21 **5 Article 9 is amended as follows:**

22  
23 **§ 5426. Authority to Debar or Suspend.**

24 (a) Authority. After reasonable notice to the person involved and  
25 reasonable opportunity for that person to be heard, the Chief  
26 Procurement Officer, the Director of Public Works or the head of a  
27 purchasing agency, after consultation with the using agency and the

1 Attorney General, shall have authority to debar a person for cause, or  
2 to suspend a person for probable cause, from consideration for award  
3 of contracts. The debarment shall not be for a period of more than  
4 two (2) years. ~~The same officer, after consultation with the using~~  
5 ~~agency and the Attorney General, shall have authority to suspend a~~  
6 ~~person from consideration for award of contracts if there is probable~~  
7 ~~cause for debarment.~~ The suspension shall not be for a period  
8 exceeding three (3) months. The authority to debar or suspend shall  
9 be exercised in accordance with regulations promulgated by the  
10 Policy Office.

11

12 (b) Causes for Debarment or Suspension. The causes for  
13 debarment or suspension include the following:

14

15 (1) conviction for commission of a criminal offense as an  
16 incident to obtaining or attempting to obtain a private contract or  
17 subcontract, or in the performance of such contract or subcontract;  
18

19 (2) conviction under territorial or federal statutes of  
20 embezzlement, theft, forgery, bribery, falsification or destruction of  
21 records, receiving stolen property, or any other offense indicating a  
22 lack of business integrity or business honesty which currently,  
23 seriously and directly affects responsibility as a territorial  
24 contractor;

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26 (3) conviction under federal antitrust statutes arising out of the  
27 submission of bids or proposals;

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(4) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency to be so serious as to justify debarment action:

~~(A)~~i. deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract; or

~~(B)~~ii. a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more procurement contracts, provided, that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor shall not be considered to be a basis for debarment; or

iii. upon a petition of the Department of Labor, failure to pay employees engaged on the contract in violation of Wage Determination law or contract conditions.

(5) any other cause the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a territorial contractor, including debarment by another governmental entity for any cause listed in regulations of the Policy Office;



1  
2 (6) for violation of the ethical standards set forth in Article 11  
3 of this Chapter.

4  
5 (7) filing a frivolous or fraudulent petition, protest or appeal  
6 under § 5425(e), § 5426(~~f~~)(e) or of § 5427(e) of this Chapter.

7  
8 (c) Decision. The Chief Procurement Officer, the Director of  
9 Public Works or the head of a purchasing agency shall issue a written  
10 decision to debar or suspend or to reject any petition to do so brought  
11 under Subsection (f) of this Section. The decision shall:

12  
13 (1) state the reasons for the ~~action taken~~ decision made; and

14  
15 (2) inform the debarred or suspended person involved, or any  
16 person whose petition is rejected, of its rights to judicial or  
17 administrative review as provided in this Chapter.

18  
19 (d) Notice of Decision. A copy of the decision under Subsection  
20 (c) of this Section shall be mailed or otherwise furnished immediately  
21 to the debarred or suspended person and any other party intervening  
22 or petitioning, and the head of all governmental bodies or purchasing  
23 agencies.

24  
25 (e) Finality of Decision. A decision under Subsections (c) or (f)  
26 of this Section shall be final and conclusive, unless fraudulent, or an  
27 appeal is taken to the Public Auditor in accordance with § 5706 of

1     this Chapter. Such a decision shall be automatically stayed during  
2     the pendency of any appeal, but any such appeal does not preclude  
3     nor require a determination of non-responsibility in any solicitation  
4     in which the person charged may participate. The officer issuing  
5     such decision shall immediately notify all persons, governmental  
6     bodies and purchasing agencies of the fact and effect of such appeal.  
7

8           (f) Any member of the public, including bidder, offeror or  
9     contractor as well as any elected official or employee of the  
10    government, may petition the Chief Procurement Officer, the  
11    Director of Public Works or the head of a purchasing agency to take  
12    action to debar or suspend pursuant to Subsection (a) of this Section.  
13    Immediately upon the receipt of such a petition, the person petitioned  
14    shall cause ~~An~~ an investigation of each petition shall to be conducted  
15    and hold a hearing as authorized in Subsection (a) promptly and a  
16    writ ten report should be made of findings of fact and action taken  
17    and issue a decision as required in Subsection (c). If the petitioned  
18    officer does not issue the written decision required under Subsection  
19    (c) of this Section within sixty (60) days after written request by the  
20    petitioner for a final decision, then the petitioner may proceed with  
21    an appeal to the Public Auditor as if a the petition had been rejected.  
22

23    **Section 4. §5427 of 5GCA Chapter 5 Article 9 Legal and**  
24    **Contractual Remedies is amended as follows:**

25        **§ 5427. Authority to Resolve Contract and Breach of Contract**  
26    **Controversies.**

27

1 **Section 12.** §5705 of Article 12, Chapter 5 of Title 5 Guam Code  
2 Annotated is amended to read as follows:

3 **§ 5705. Suspension or Debarment Proceedings.**

4 (a) Scope. This § 5705 applies to a review by the Public Auditor  
5 of a decision under § 5426(c) or (f) of this Chapter.

6 (b) Time Limitation on Filing an Appeal. ~~The aggrieved person~~  
7 receiving an adverse decision under Subsection (c) or (f) of § 5426 of  
8 this Chapter, including a person suspended or debarred or a rejected  
9 petitioner, shall file his/her an appeal with the Public Auditor within  
10 sixty (60) thirty (30) days from the date of the receipt of a decision or  
11 the date a petition is deemed rejected under Subsection (c) of § 5426  
12 of this Chapter.

13  
14 (c) Decision. The Public Auditor shall decide whether, or the  
15 extent to which, the decision to debar or suspend, or reject a petition  
16 to do so, debarment or suspension was in accordance with the statutes,  
17 regulations and the best interest of the government or any autonomous  
18 agency or public corporation, and was fair. The Public Auditor shall  
19 issue her or his decision within thirty (30) days of the completion of  
20 the hearing on the issue.

21 (d) Appeal. Any person receiving an adverse decision, including  
22 the Chief Procurement Officer, the Director of Public Works or the  
23 head of a purchasing agency, a person suspended or debarred, or a  
24 rejected petitioner, may appeal from a decision by the Public Auditor  
25 to the Superior Court of Guam under the waiver of sovereign  
26 immunity provided in § 5480(b) of this Chapter, way of writ of  
27 review.