



RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

DATE: 8/17/15
TIME: 3:40 AM PM BY: Yuka
FILE NO OPA-PA: 15-008

PART I- To be completed by OPA

In the Appeal of)
)
MAEDA PACIFIC CORPORATION)
(Name of Company), APPELLANT)
)
)
)

NOTICE OF APPEAL

Docket No. OPA-PA 15-008

PART II- Appellant Information

Name: MAEDA PACIFIC CORPORATION
Mailing Address: Post Office Box 8110
Tamuning, Guam 96931
Business Address: 150 Harmon Sink Road
Tamuning, Guam 96913
Email Address: tnielsenmpc@teleguam.net
Daytime Contact No: (671) 646-6050
Fax No.: (671) 646-6666

PART III- Appeal Information

- A) Purchasing Agency: Guam Solid Waste Authority
- B) Identification/Number of Procurement, Solicitation, or Contract: Harmon Residential Transfer Station;
Contract No. GSWA-12-02.

C) Decision being appealed was made on July 19, 2015 (date) by:
 Chief Procurement Officer ~~Director~~ **David L. Manning** of Public Works Head of Purchasing Agency
Receiver Representative

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

D) Appeal is made from:

(Please select one and attach a copy of the Decision to this form)

- Decision on Protest of Method, Solicitation or Award
 Decision on Debarment or Suspension
 Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

ORIGINAL

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 17th day of August, 2015.

By: 
 APPELLANT

or

By: **PHILLIP TORRES, ESQ.**
 Appellant's Duly Authorized Representative
 (Address) **TORRES LAW GROUP**
 (Phone No.) 130 Aspinall Avenue, Suite 2A
 Hagatna, Guam 96910
 (671) 477-9891

APPENDIX A

APPELLANT'S
STATEMENT
OF ISSUES

TORRES LAW GROUP
A PROFESSIONAL LAW CORPORATION
130 ASPINALL AVENUE, SUITE 2A, HAGÁTÑA, GUAM 96910-5018

August 17, 2015

STATEMENT OF ISSUES

Re: *Guam Solid Waste Authority*
Harmon Residential Transfer Station; Contract No. GSWA-12-02

Maeda Pacific Corporation (“Appellant”) appeals from the Final Decision issued by Gershman, Brickner & Bratton, Inc. (“GBB”) as representatives and Receiver for the Guam Solid Waste Authority (“GSWA”) regarding the Harmon Residential Transfer Station, Contract No. GSWA-12-02. Appellant asserts that it is owed Five Hundred Six Thousand Four Hundred Eighty-Three Dollars and Thirty-Nine Cents (\$506,483.39). GSWA has assessed Six Hundred Sixty-Three Thousand Dollars (\$663,000.00) as liquidated damages and asserts that it is owed One Hundred Fifty-Six Thousand Five Hundred Sixteen Dollars and Sixty-One Cents (\$156,516.61), the difference between the amount owed to Appellant and the assessment of liquidated damages by GSWA.

Appellant’s Appeal is over the validity and enforceability of paragraph IV of the Contract, the liquidated damages provision, executed between the parties on November 1, 2012. The liquidated damages provision provides for liquidated damages in the sum of Three Thousand Three Hundred Dollars (\$3,300.00) per day for breach of the Contract for failing, neglecting and refusing to complete the work in the time specified under the Contract. Under that provision, liquidated damages are assessed for each calendar day that the Contract is in default.

In accordance with modern law and precedent concerning public contracts, Appellant seeks a determination that the liquidated damages clause is void or unenforceable. Such a decision does not prevent the enforceability of the rest of the Contract, pursuant to paragraph 15 entitled Severable Provisions.

PHILLIP TORRES

Of Counsel: Lawrence J. Teker (inactive), Samuel S. Teker,
Nagatomo Yamaoka and Benjamin F. Hueber

Email: ptorres@tttguamlawyers.com
Telephone: (671) 477-9891/4 | Facsimile: (671) 472-2601

FORMAL
CONTRACT
dated 11/1/2012

HARMON RESIDENTIAL TRANSFER STATION
Contract No. GSWA-12-02

FORMAL CONTRACT

FORMAL CONTRACT

THIS AGREEMENT AND FORMAL CONTRACT ("Contract"), made and entered into this _____ day of _____, 2012, by and between the Guam Solid Waste Authority, an autonomous agency of the Government of Guam, as represented by Gershman, Brickner & Bratton, Inc. in its capacity as Receiver for the Authority executing this Contract, party of the first part, and Maeda Pacific Corporation, a corporation, partnership, limited liability company, liability company or sole proprietorship, hereinafter called the "Contractor", party of the second part, licensed to conduct business on Guam and having Guam Business License No. 98-0033016.

WITNESSETH, Whereas the Government intends to construct the **HARMON RESIDENTIAL TRANSFER STATION, GSWA-12-02**, hereinafter called the "Project", in accordance with the drawings, specifications and other Contract Documents prepared by the Guam Solid Waste Authority.

NOW THEREFORE, the Government and Contractor for the considerations herein set forth and in other Contract Documents associated with the performance hereunder, agree as follows:

I. THE CONTRACTOR AGREES to furnish all the necessary labor, materials, equipment, tools and services necessary to perform and complete in a workmanlike manner all the work required for the construction of the Project, in strict compliance with the Contract Documents herein mentioned, which are hereby made a part of the Contract, including the following addenda:

<u>Addendum No.</u>	<u>Dated</u>
1.	August 09, 2012
2.	August 24, 2012
3.	August 29, 2012
4.	September 06, 2012

(a) Contract Time: The Contractor agrees to commence work under this Contract upon written notice to proceed, and **to complete the Project ready for use and operation within Three Hundred Eight (308) calendar days** of the commencement of the Contract time as

stated in Section 2.0, Time of Completion, Instructions to Bidders of the Contract.

- (b) Subcontractors: The Contractor agrees to bind every subcontractor by the terms of the Contract Documents. The Contract Documents shall not be construed as creating any contractual relation between any subcontractor and the Government.

II. THE GOVERNMENT AGREES to pay, and the Contractor agrees to accept, in full payment for the performance of this Contract, the **Contract amount of two-million-four-hundred-ten thousand Dollars (\$2,410,000.00)** plus any and all sums to be added and/or deducted resulting from all extra and/or omitted work in connection therewith, as authorized under the terms as stated in the General Conditions of the Contract, all in accordance with the terms as stated in the Contract Documents.

Progress payments will be made as specified in the General Conditions.

III. CONTRACT DOCUMENTS: It is hereby mutually agreed that the following list of instruments, plans, specifications and documents which are attached hereto, bound herewith or incorporated herein by reference shall constitute the Contract Documents, all of which are made a part hereof, and collectively evidence and constitute the Contract between the parties hereto, and they are as fully a part of this Contract as if they were set out verbatim and in full herein, and are designated as follows:

- a) Invitation for Bid
- b) Instructions to Bidders
- c) Bid Form
- d) Bid Bond
- e) Bid Schedule of Values
- f) Affidavit Disclosing Ownership and Commissions
- g) Affidavit re Non-Collusion
- h) Affidavit re No Gratuities or Kickbacks
- i) Affidavit re Ethical Standards
- j) Declaration re Compliance with U. S. DOL Wage Determination
- k) Affidavit re Contingent Fees
- l) Certification of Non-Segregated Facilities
- m) Bidder's Statement on Previous Contracts Subject to EEO Clause
- n) Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion
- o) Formal Contract
- p) Performance and Payment Bond
- q) Special Provisions
- r) General Conditions
- s) General Scope of Work
- t) Prevailing Wage Rates

FORMAL CONTRACT
Harmon Residential Transfer Station
Project No. GSWA-12-02

- u) Technical Specifications
- v) Addenda
- w) Plans
- x) Environmental Protection with Erosion Control Plan
- y) Stormwater Pollution Prevention Plan

IV. LIQUIDATED DAMAGES: The Contractor further agrees to pay to the Government the **sum of Three Thousand Three Hundred Dollars (\$3,300.00)**, not as a penalty, but as a reasonable liquidated damages for breach of this Contract by the Contractor by his failing, neglecting or refusing to complete the work within the time herein specified and said sums shall be paid for each consecutive calendar day thereafter that the Contractor shall be in default after the time stipulated in the Contract for completing the work ready for use and/or operation.

V. COVENANT AGAINST CONTINGENT FEES. The Contractor warrants that he has not employed any person to solicit or secure this Contract upon any agreement for a commission, percentage, brokerage or contingent fee. Breach of this warranty shall give the Government the right to terminate the Contract, or in its discretion, to deduct from the Contract price or consideration the amount of such commission, percentage, brokerage or contingent fee. The warranty shall not apply to commissions payable by Contractors upon contracts or sales secured or made through bonafide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

VI. OTHER CONTRACTS. The Government may award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

VII. MANDATORY DISPUTES RESOLUTION CLAUSE (2 GAR DIV. 4 § 9103(G)).

(1) The Government and the Contractor agree to attempt resolution of all controversies which arise under, or are by virtue of, this Agreement through mutual agreement. If the controversy is not resolved by mutual agreement, then the Contractor shall request the Government in writing to issue a final decision within sixty days after receipt of the written request. If the Government does not issue a written decision within sixty days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the Contractor may proceed as though the Government had issued a decision adverse to the Contractor.

(2) The Government shall immediately furnish a copy of the decision to the Contractor, by certified mail with a return receipt requested, or by any other method that provides evidence of receipt.

FORMAL CONTRACT
Harmon Residential Transfer Station
Project No. GSWA-12-02

(3) The Government's decision shall be final and conclusive, unless fraudulent or unless the Contractor appeals the decision.

(4) This subsection applies to appeals of the Government's decision on a dispute. For money owed by or to the Government under this Agreement, the Contractor shall appeal the decision in accordance with the Government Claims Act by initially filing a claim with the Office of the Attorney General no later than eighteen months after the decision is rendered by the Government or from the date when a decision should have been rendered. For all other claims by or against the Government arising under this Agreement, the Office of the Public Auditor has jurisdiction over the appeal from the decision of the Government. Appeals to the Office of the Public Auditor must be made within sixty days of the Government's decision or from the date the decision should have been made.

(5) The Contractor shall exhaust all administrative remedies before filing an action in the Superior Court of Guam in accordance with applicable laws.

(6) The Contractor shall comply with the Government's decision and proceed diligently with performance of this Agreement pending final resolution by the Superior Court of Guam of any controversy arising under, or by virtue of, this Agreement, except where the Contractor claims a material breach of this Agreement by the Government. However, if the Government determines in writing that continuation of services under this Agreement is essential to the public's health or safety, then the Contractor shall proceed diligently with performance of the Agreement notwithstanding any claim of material breach by the Government.

VIII. CLAIMS AGAINST GOVERNMENT. The Contractor expressly recognizes that the Government Claims Act (Title 5 of the Guam Code Annotated, Chapter 6) applies with respect only to claims of money owed by or to the Contractor against the Government if the claim arises out of or in connection with this Contract. The Contractor also expressly recognizes that all other claims by the Contractor against the Government are subject to the Guam Procurement Law (Title 5 of the Guam Code Annotated, Chapter 5).

IX. CONTRACT BINDING. It is agreed that this Contract and all of the Covenants hereof shall inure to the benefit of and be binding upon the Government and the Contractor respectively and his partners, successors, assignees and legal representatives. Neither the Government nor the Contractor shall have the right to assign, transfer or sublet his interests or obligations hereunder without written consent of the other party. It is hereby mutually agreed by and between the parties hereto that no mechanic, contractor, subcontractor, material man or other person can or will contract for or in any other manner have or acquire any lien upon the building or works covered by this Contract, or the land upon which the same is situated.

X. INDEMNITY. Contractor agrees to indemnify, save harmless and defend the Government and Gershman, Brickner & Bratton, Inc. as Receiver and their respective officers, employees, agents, representatives, successors and assigns from and against any and all liabilities, claims, penalties, forfeitures, suits and the costs and expenses incident thereof (including costs of defense, settlement and

FORMAL CONTRACT

Harmon Residential Transfer Station
Project No. GSWA-12-02

reasonable attorneys' fees), which they, individually or collectively, may incur, become responsible for or pay out as a result of death or bodily injury to any person, destruction or damage to any property, contamination of or adverse effects on the environment, or any violation of governmental laws, regulations or orders, to the extent caused, in whole or in part, by a breach of any term, provision, representation or warranty of this Contract or any negligent act or omission or willful misconduct of the Contractor, or its officers, employees or agents, or subcontractors. This indemnification is not to be deemed as a waiver of any immunity, which may exist in any action against the Government.

XI. INSURANCE. Contractor shall place and maintain with responsible insurance carriers licensed on Guam, insurance as required under Section 4.11, Contractor's and Subcontractor's Insurance, of the General Conditions.

Furthermore:

- All insurance companies must have an A.M. Best Rating of A-6 or its equivalent or higher.
- The cancellation provision on all policies must provide ninety (90) calendar days notice of cancellation to the Government.
- The Government of Guam, Guam Solid Waste Authority, and Gershman, Brickner & Bratton, Inc. as Receiver must be shown as additional insured on the general liability, auto liability, and excess liability policies.
- Contractor must agree to waive all rights of subrogation against the Government of Guam, Guam Solid Waste Authority, Gershman, Brickner & Bratton, Inc. and their officers, officials, employees from losses arising from work performed by the Contractor.
- Contractor and all subcontractors are to comply with the Occupational Safety and Health Act of 1970. Public Law 91-956, and any other laws that may apply to the Contract.
- Contractor, at a minimum, shall apply risk management practices accepted by Contractor's industry.
- The Contractor shall incorporate a copy of the insurance requirements as herein provided in each and every subcontract with each and every subcontractor in any tier, and shall require each and every subcontractor of any tier to comply with all such requirements. Contractor agrees that if for any reason its subcontractor(s) fails to procure and maintain insurance as required, all such required insurance shall be procured and maintained by Contractor at Contractor's expense.
- The Accord Certificate of Insurance or a pre-approved substitute is the required form in all cases where reference is made to a certificate of insurance or an approved substitute.
- The Government, at its sole discretion, reserves the right to review the insurance requirements and to make reasonable adjustments to insurance coverages and their limits when deemed necessary and prudent by Government based upon changes in statutory law, court decision or the claims

FORMAL CONTRACT

Harmon Residential Transfer Station
Project No. GSWA-12-02

history of the industry as well as of the Contractor. The Government shall be required to provide prior notice of ninety (90) calendar days.

Compliance by the Contractor and all subcontractors with the foregoing requirements as to carrying insurance shall not relieve the Contractor and all subcontractors of their liability provisions of the Contract.

XII. GOVERNMENT NOT LIABLE. The Government and Receiver, and their respective officers, agents, employees, and representatives assume no liability for any accident or injury that may occur to the Contractor, Contractor's agents, subcontractors, employees, or to Contractor's property while on the job or otherwise en route to or from the job during any travel required by the terms of this agreement.

Government, and Receiver, and their respective officers, agents, employees, and representatives shall not be liable to Contractor for any work performed by the Contractor prior to the written and signed approval of this Contract and the Contractor hereby expressly waives any and all claims for service performed in expectation of this Contract prior to its signature.

XIII. NOTICES. All notices between the Parties shall be in writing and shall be deemed served when personally delivered or when deposited in the mail, registered or certified, first-class postage prepaid, addressed as follows, or sent via facsimile or e-mail to the number or e-mail address provided by the Contractor:

To: **CONTRACTING OFFICER:**
GSWA/ Gershman, Brickner & Bratton, Inc. (Receiver)
David L. Manning, Receiver Representative
8550 Arlington Boulevard, Suite 304
Fairfax, VA 22031
Telephone: (703) 573-5800 Fax: (703) 698-1306
E-mail: dmanninggbb@gmail.com

To: **CONTRACTOR:**
Maeda Pacific Corporation
Thomas J. Nielsen, President
Mailing Address: P.O. Box 8110, Tamuning, Guam 96931
Physical Address: 150 Harmon Sink Road, Harmon 96913
Telephone: (671) 646-6050/4326 Fax: (671) 646-6666
E-mail: tnielsenmpc@teleguam.net

XIV. TERMINATION FOR CONVENIENCE.

(1) Termination. The Government may when its interest so requires, terminate this Contract in whole or in part, for the convenience of the Government. The Government shall give written notice of the

FORMAL CONTRACT
Harmon Residential Transfer Station
Project No. GSWA-12-02

termination to the Contractor specifying the part of the Contract terminated and when it is effective.

(2) Contractor's Obligations. The Contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the Contractor will stop work to the extent specified. The Contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The Contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Government may direct the Contractor to assign the Contractor's right, title, and interest under terminated orders or subcontracts to the Government. The Contractor must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(3) Right to Work Product. Upon termination of the Contract for the convenience of the Government, Contractor shall deliver to the Government all documents and reports, plans, drawings, information and other material produced by Contractor or any of its subcontractors in connection with the performance of this Contract and title thereto. The Contractor shall protect and preserve property in its possession or in the possession of any of its subcontractors in which the Government has an interest.

(4) Compensation.

(a) The Contractor shall submit a termination claim specifying the amount due because of the termination for convenience together with cost or pricing data to the extent required by 2 G.A.R. Div. 4 §3118 (Cost or Pricing Data) of the Guam Procurement Regulations bearing on such claim. If the Contractor fails to file a termination claim within one year from the effective date of termination, the Government may pay the Contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Government and the Contractor may agree to a settlement provided the Contractor has filed a termination claim supported by cost or pricing data to the extent required by 2 G.A.R. Div. 4 §3118 (Cost or Pricing Data) of the Guam Procurement Regulations and that the settlement does not exceed the total Contract price plus settlement costs reduced by payments previously made by the Government and the Contract price of the work not terminated.

(c) Absent complete agreement under Subparagraph (2) of this Paragraph, the Government shall pay the Contractor the following amounts, provided payments agreed to under Subparagraph (2) shall not duplicate payments under this Subparagraph:

- (i) Contract prices for services accepted under the Contract;
- (ii) Costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for accepted supplies or services; provided, however, that if it

appears that the Contractor would have sustained a loss if the entire Contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

- (iii) Costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Subparagraph (b) of this clause;
- (iv) The reasonable settlement costs of the Contractor including accounting, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the Contract for the termination and settlement of subcontracts hereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this Contract. Attorney's fees if for any reason it files suit against The Government must be paid by the Contractor. The total sum to be paid the Contractor under this Subparagraph shall not exceed the total Contract price plus the reasonable settlement costs of the Contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Subparagraph (b) of this Paragraph, and the Contract price of work not terminated.

(d) Cost claimed, agreed to, or established under Subparagraph (b) and (c) of this Paragraph shall be in accordance with Chapter 7 (Cost Principles) of the Guam Procurement Regulations.

XV. SEVERABLE PROVISIONS. If any provision of this Contract shall be deemed by a court of competent jurisdiction to be invalid, then such provision shall be deemed stricken from the Contract and the Contract shall be enforced according to its valid and subsisting terms and provisions. The terms of this Contract shall control in the event of any conflict between this Contract and any other document incorporated or referenced herein.

XVI. GOVERNING LAW AND VENUE. The validity of this Contract and any of its terms or provisions, as well as the rights and duties of the Parties to this Contract, shall be governed by the laws of Guam. The Contractor hereby expressly consents to the jurisdiction of and the forum of the courts of Guam with respect to any and all claims which may arise by reason of this Contract, except as otherwise may be provided by the Guam Procurement Law. The Contractor waives any and all rights it may otherwise have to contest the same or to proceed in a different jurisdiction or forum.

XVII. OWNERSHIP OF DOCUMENTS AND WORK PRODUCT. All briefs, memoranda and other incidental Contractor work or materials furnished hereunder shall be and remain the property of the Government including all publication rights and copyright interests, and may be used by the Government without any additional cost to the Government.

XVIII. GENERAL COMPLIANCE WITH LAWS. The Contractor agrees that Contractor is to comply with all federal and territorial laws, rules, regulations and ordinances applicable to the work being performed

FORMAL CONTRACT

Harmon Residential Transfer Station
Project No. GSWA-12-02

hereunder.

XIX. ACCESS TO RECORDS AND OTHER REVIEW. The Contractor, including his subcontractors, if any, shall maintain copies of all books, documents, papers, accounting records and other evidence pertaining to costs incurred and to make such materials available at their respective offices at all reasonable times during the Contract period and for three (3) years from the date of the final payment under the Contract, for inspection by the Government. All originals of any documents related to this Contract shall be provided to the Government as soon as possible, but not later than one day prior to the conclusion of this Contract. Each subcontract by the Contractor pursuant to this Contract shall include a provision containing the conditions of this Section.

XX. GENERAL ETHICAL STANDARDS. With respect to this Contract and any other contract that the Contractor may have, or wish to enter into, with any government of Guam agency, the Contractor represents that it has not knowingly influenced, and promises that it will not knowingly influence, any government employee to breach any of the ethical standards set forth in the Guam Procurement Law and in any of the Guam Procurement Regulations.

XXI. PROHIBITION AGAINST GRATUITIES AND KICKBACKS. With respect to this Contract and any other contract that the Contractor may have or wish to enter into with any government of Guam agency, the Contractor represents that he has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in the Guam Procurement Regulations.

XXII. RESTRICTION ON EMPLOYMENT OF SEX OFFENDERS. The Contractor warrants that no person in its employment who has been convicted of a sex offense under the provisions of Chapter 25 of Title 9 of the Guam Code Annotated, or convicted of an offense defined in Article 2 of Chapter 28 of Title 9 of the Guam Code Annotated regardless of the jurisdiction in which the conviction was obtained, shall provide services on behalf of the Contractor relative to this Contract. If any person employed by the Contractor and providing services under this Contract is convicted subsequent to the Parties entering into this Contract, then the Contractor warrants that it will notify the Government of the conviction within twenty-four hours of the conviction, and will immediately remove such convicted person from providing services under this Contract. If the Contractor is found to be in violation of any of the provisions of this paragraph, then the Government shall give notice to the Contractor to take corrective action. The Contractor shall take corrective action within twenty-four hours of notice from the Government, and the Contractor shall notify the Government when action has been taken. If the Contractor fails to take corrective steps within twenty-four hours of notice from the Government, then the Government in its sole discretion may suspend this Contract temporarily.

XXIII. COMPLIANCE WITH APPLICABLE U. S. DEPARTMENT OF LABOR WAGE DETERMINATION PURSUANT TO 5 GCA §§ 5801 - 5805.

(a) Contractor agrees that at all times it shall pay its employees whose purpose, in whole

FORMAL CONTRACT

Harmon Residential Transfer Station
Project No. GSWA-12-02

or in part, is the direct delivery of services or construction, in accordance with the Wage Determination or Determinations applicable to this Contract, except that if the prevailing wages for construction issued by the Guam Department of Labor are more than the wages set out in the Wage Determination for construction on Guam, then the prevailing wages set by the Guam Department of Labor shall apply for construction wages.

(b) In addition to subsection (a) above, Contractor agrees that it shall pay said employees health and similar benefits having a minimum value as detailed in the Wage Determination, and shall provide or pay them a minimum of ten (10) paid holidays per employee.

(c) Contractor is advised that the Guam Department of Labor, or its successor, shall monitor compliance with the provisions of 5 GCA Article 13, Wage and Benefit Determination. The Director of the Guam Department of Labor, or that person's successor, shall investigate possible or reported violations of the provisions of the law, and shall forward such findings to Guam Solid Waste Authority. The Guam Department of Labor, or its successor, will promulgate rules and regulations, pursuant to the Administrative Adjudication Law, as needed, to ensure that equitable investigation of violations and the maintenance of due process, as well as the assessment of any monetary penalties in the event of a violation, and provide that such monetary penalties shall be limited to assessment of no less than One Hundred Dollars (\$100.00) per day, and no more than One Thousand Dollars (\$1,000.00) per day, until such time as a violation has been corrected, as well as all back wages and benefits due have been paid.

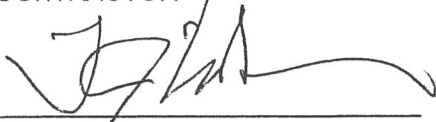
(d) In the event there is a violation in the process set forth in subsection (c) above, Contractor may be placed on probationary status by the Chief Procurement Officer of the General Services Agency, or its successor, for a period of one (1) year. During the probationary status, a contractor will not be awarded any contract by any instrumentality of the Government of Guam. A contractor who has been placed on probationary status or who has been assessed a monetary penalty pursuant to 5 GCA Article 13 may appeal such penalty or probationary status to the Superior Court of Guam.

(e) Contractor, as a part of its proposal, has submitted a Declaration of Compliance with Wage Determination Laws.

(f) In the event there is a non-compliance by Contractor as determined in subsection (c) above, the non-compliance shall constitute grounds for default under this Agreement.

IN WITNESS WHEREOF the Parties hereto have executed this Contract as of the day and year first written.

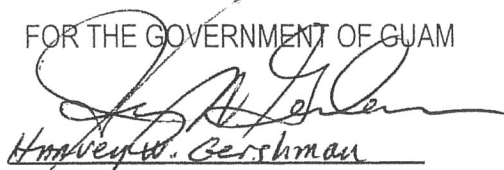
CONTRACTOR



Thomas J. Nielsen, President
Maeda Pacific Corporation

Date: 10/11/12

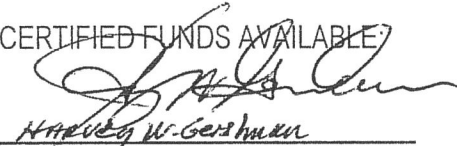
FOR THE GOVERNMENT OF GUAM



David L. Manning, Receiver Representative *OFFICER-IN-CHARGE*
Receiver – Gershman, Brickner & Bratton, Inc. in
its capacity as Receiver for the Guam Solid
Waste Authority

Date: 10/1/12

CERTIFIED FUNDS AVAILABLE



David L. Manning, Receiver Representative *OFFICER-IN-CHARGE*
Receiver – Gershman, Brickner & Bratton, Inc. in its
capacity as Receiver for the Guam Solid Waste
Authority

Amount: \$2,410,000.00

Date: 10/1/12

APPROVED:

LEONARDO M. RAPADAS
Attorney General, Guam

Date

EDDIE BAZA CALVO, Governor of Guam

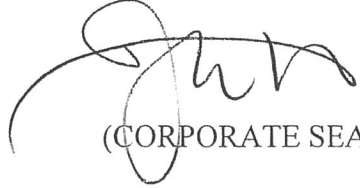
Date

FORMAL CONTRACT
Harmon Residential Transfer Station
Project No. GSWA-12-02



CORPORATE CERTIFICATION AS TO AUTHORIZATION TO BIND

I, Phillip Torres certify that I am the Secretary of the corporation named as Contractor herein; that Thomas J. Nielsen who signed this Contract on behalf of the Contractor, was then President of said corporation by authority of said corporation of its governing body, and is within the scope of its corporate powers to bind said corporation to the terms and conditions of this Contract.


(CORPORATE SEAL)

APPELLANT'S
LETTER

dated 6/19/2015

w/o Exhibits

TORRES LAW GROUP
A PROFESSIONAL LAW CORPORATION
130 ASPINALL AVENUE, SUITE 2A, HAGĀTÑA, GUAM 96910-5018

June 19, 2015

VIA HAND DELIVERY

Mr. David L. Manning
Receiver Representative
GERSHMAN, BRICKNER & BRATTON, INC.
Court Appointed Receiver of the
Government of Guam
Department of Public Works
Guam Solid Waste Authority
542 North Marine Corps Drive
Tamuning, Guam 96913

Re: Harmon Residential Transfer Station; Contract No. GSWA-12-02.

Dear Mr. Manning:

Please be advised that my office represents Maeda Pacific Corporation ("MPC"). I am in receipt of your letter dated April 15, 2015. MPC acknowledges your counteroffer to its letter dated December 12, 2014. Your letter addressed the topics of Substantial Completion, Liquidated Damages, Guam Fire Department ("GFD") Connection Relocation, the Oil-Water Separator, Change Order #5 and Performance Delays on the Harmon Residential Transfer Station, Contract No. GSWA-12-02. This letter is intended to continue the discussion of the settlement process and, as such, is privileged and confidential and not admissible in any litigation regarding the above referenced contract. The Guam Solid Waste Authority's ("GSWA") counteroffer of liquidated Damages is Five Hundred Six Thousand Seven Hundred Eighty-Three Dollars and Thirty-Nine Cents (\$506,783.39) from MPC's counteroffer of Seventy-Eight Thousand Dollars (\$78,000.00) to GSWA's Six Hundred Sixty-Three Thousand Dollars (\$663,000.00) originally assessed. For the reasons set forth below, MPC disagrees with the latest counteroffer and requests further consideration of the Liquidated Damages and Substantial Completion issues.

**A. RESPONSE TO GERSHMAN, BRICKNER & BRATTON'S
APRIL 15, 2015 LETTER.**

Many of the items discussed in Gershman, Brickner & Bratton's ("GBB") letter of

PHILLIP TORRES

Of Counsel: Lawrence J. Teker (inactive), Samuel S. Teker,
Nagatomo Yamaoka and Benjamin F. Hueber

Email: ptorres@tttguamlawyers.com
Telephone: (671) 477-9891/4 | Facsimile: (671) 472-2601

Mr. David L. Manning
Receiver Representative
June 19, 2015
Page 2

April 15, 2015, were completed before April 1, 2014. *Exhibit 1.* GSWA stated that Substantial Completion was not achieved by March 26, 2014 and gave numerous examples for its refusal to conduct a final inspection. It said that power was not provided to the site, the truck wash facility was not operational and not commissioned, the fire booster system was not accepted by the GFD, the sprinkler and fire alarm systems were not completely wired or accepted by the GFD and the contractor did not have a Certificate of Occupancy issued by the Department of Public Works ("DPW"). MPC does not contest those assertions as of March 26, 2014, but responds to those assertions below.

B. GFD CONNECTION RELOCATION.

GSWA states that delays in the GFD Connection Relocation resulted in it not being completed until March 30, 2014 and the delay and request for extension of time by MPC were unjustified because the piping was available on island. However, the justification for denial of the extension claim by GSWA was incorrect. The needed piping was not available on island. GSWA's decision to grant a ten (10) day extension instead of the thirty (30) days requested was improperly based on GSWA unilateral error.

C. PARKING LOTS.

GSWA claims that it was entitled to use the parking lots throughout the project and, therefore, for Substantial Completion purposes, did not take beneficial use of the parking lots. GSWA cited to Construction Notes 1 through 4 on Drawing C105 to support that contention. Note 1 does state that parking must be provided for GSWA trucks at all times during the construction. However, Note 1 is modified by Notes 2 through 4. Note 2 limits the truck parking to the West Side parking area while the East Side parking area is being completed. That occurred on December 2, 2013 and the trucks from the West Side parking lot moved to the East Side parking lot. Construction then began on the West Side parking lot. On March 24, 2014, GSWA began using both the East and West Side parking lots. At that point, GSWA had full beneficial occupancy of the parking facilities. Finally, Note 4 does not involve parking. It provides that GSWA shall have access to other existing buildings on the construction site throughout construction. *Exhibit 3.* Thus, by March 24, 2014, the parking lot construction had been completed and beneficial occupancy of the parking lots was taken by GSWA.

D. OIL-WATER SEPARATOR.

GSWA states that the Oil-Water Separator Containment law changed on November 19, 2013 and it required that new or replacement piping on installation begun after September 30, 2013 be secondarily contained. GSWA states that if MPC had installed the system by February 20, 2013, that requirement would not have applied to the project. On

Mr. David L. Manning
Receiver Representative
June 19, 2015
Page 3

December 16, 2013, the Guam Environmental Protection Agency ("GEPA") accepted the proposal of MPC for secondary containment and the Oil-Water Separator work was finished on January 8, 2014. *Exhibit 4.*

E. CHANGE ORDERS.

In addressing Change Order #5, GSWA justified its decision to disallow a time extension because: 1) not justified by the magnitude of deficiencies documented during the May 9, 2014 final inspection; 2) substantial completion was not contingent upon completion of the Change Order; and 3) most of the work caused by the Change Order was completed well in advance of Substantial Completion. *Exhibit 5.*

The deficiencies noted on May 9, 2014 had no bearing on the issuance of a time extension. Change Order #5.1 was submitted on February 21, 2014 and approved on March 17, 2014, well in advance of the GSWA's May 9, 2014 documentation of deficiencies. The time requested on Change Order 5.1 was thirty (30) days and only ten (10) days were granted. Change Order #5.2 was submitted on April 24, 2014 and approved on May 6, 2014, prior to your deficiency documentation on May 9, 2014. Obviously, the asserted reasons of excessive deficiencies in these instances were incorrect.

GSWA's claim that Substantial Completion was not contingent upon completion of the work items contained in the Change Orders does not justify GSWA's failure to grant a reasonable time extension. GSWA did nothing to inform MPC that the work requested in the Change Orders were considered incidental. Had GSWA informed MPC of this fact, MPC would not have diverted resources to these work items and away from critical path items. The fact that most of the work items on Change Order #5.2 were completed well in advance of your Substantial Completion date of June 19, 2014, was not a reason to deny a time extension. On the contrary, it was evidence of responsibility and responsiveness to GSWA's concerns. GSWA's characterization of the Change Order work as incidental means that MPC unnecessarily diverted employees from critical path items to non-critical path items. That diversion of employees is sufficient for GSWA to reconsider a time extension which was not reasonably granted.

Addressing Change Order #6, GSWA again claimed that no time adjustment was allowed because most items were completed before June 19, 2014, with the exception of installation of object markers and wall mounted sprayers in the Truck Wash building. That statement assumes that June 19, 2014 would be the Substantial Completion date. However, GSWA considered that work to be incidental to the operation of the facility and did not list that work on the final list of deficiencies. GSWA never informed MPC that the work was considered incidental. That work was listed on every deficiency list through May 9, 2014. MPC is entitled to a contract delay extension because it was misled and diverted workers to the Change Order work and away from critical path work. The cost proposal submitted

Mr. David L. Manning
Receiver Representative
June 19, 2015
Page 4

by MPC contains the justification for the requested time extension and denial of that time extension was not reasonable. *Exhibit 6.*

F. PUNCH LIST.

GSWA took the position, beginning in March 2014, that its list of correction items were not punch list items. It referred to those items in that manner until May 23, 2014 when it began calling them Final Inspection List of Deficiencies. That is in conflict with Chase Anderson's statements to the PDN in March 2014 that the work items remaining were punch list items. *Exhibit 8.*

G. SUBSTANTIAL COMPLETION AND BENEFICIAL OCCUPANCY.

Substantial Completion and beneficial use are interchangeable terms, both meaning the date when the construction site becomes usable for its intended purpose. GSWA took beneficial occupancy and started using the East Side parking lot on December 2, 2013. It started using the West Side Parking Lot on March 24, 2014, and it took beneficial use of the Metal Building on November 30, 2013. Interclean, the manufacturer's technical representative for the Truck Wash Facility completed the commissioning, startup, demonstration and training of GSWA staff on April 3, 2014 and GSWA started using the Truck Wash on April 7, 2014.

MPC started the process for obtaining GSWA's Certificate of Occupancy on April 1, 2014. That Certificate of Occupancy was signed by Chase Anderson of GSWA on April 1, 2014. *Exhibit 2.* MPC received a Certificate of Building Inspection and Permit Certification of Completion with Permit Conditions and Compliance from DPW on April 1, 2014. It was certified by the Department of Land Management on April 1, 2014, by the Guam Waterworks Authority on April 1, 2014, by the Guam Power Authority on April 30, 2014, by Guam Environmental Protection Agency on May 1, 2014, and by the Fire Prevention Bureau on April 30, 2014. On May 6, 2014, MPC received the Certificate of Occupancy and delivered it to GSWA. *Exhibit 8.* Courts, including the Guam Supreme Court, have found that the delivery of a Certificate of Occupancy constitutes Substantial Completion and cuts off liquidated Damages *B.M Company v. Avery*, CV422-95 (affirmed, 2001 Guam 27). Thus, it appears that Substantial Completion occurred no later than May 6, 2014.

MPC requested a final inspection for Substantial Completion on March 28, 2014. That inspection occurred on April 4, 2014. That day GSWA sent MPC a punch list of items to be completed. That list included fourteen (14) different sections of the project *Exhibit 7*, including:

- i) Ten items to be completed at the Truck Wash Facility. GSWA took beneficial use of that facility on April 7, 2014, when it

began washing its trucks in the facility. That facility was only used on certain days of the week by GSWA and certain minor changes were made to make better use of the facility. The truck wash facility was and is continuous. Therefore, any items remaining to be completed by MPC were punch list items which do not impair a finding of substantial completion.

- ii) The Metal Building. GSWA took beneficial use of the Metal building on November 30, 2013, when it began using the building. Therefore, any items remaining to be completed by MPC were punch list items not affecting beneficial occupancy by GSWA.
- iii) Items for the East and West Parking Lots. GSWA had already taken those lots for its beneficial occupancy before April 4, 2014.
- iv) Items for the Household Hazardous Waste Building. Most of those items were minor such as exterior painting, cleaning sidewalks and curbs replacing downspouts, remove protective plastic covering light fixtures and install door thresholds. None of those items negatively affect a finding of substantial completion.
- v) Items for the Office Building, Pay Station Building and Pump House Building. These too were minor items not affecting GSWA's use of the facilities. Most were for cleaning, painting, labeling, removing coverings and tape, and relocation of items.
- vi) Items for the exterior portions of the project for Drainage Ponds and Catch Basins, Residential Trash #1 and 2, Chain Link Fence and Gates, Decorative Fence and Bulk container Drop Off were punch list items. None of the listed items negatively affected a finding of substantial completion.

Despite Substantial Completion, the remainder of the site was not used by GSWA until after GSWA resolved its permit issues with the GEPA. GSWA held its grand opening in January, 2015. The site was available for GSWA's intended use in April 2014. The Substantial Completion date serves as the cutoff date for assessing Liquidated Damages. Partial beneficial occupancy cuts off any assessment of Liquidated Damages for the part of the construction site taken for partial beneficial use. GSWA's right to assess Liquidated Damages on those portions of the construction project ended on those dates but GSWA did not include that in its analysis and assessment of Liquidated Damages.

Mr. David L. Manning
Receiver Representative
June 19, 2015
Page 6

H. LIQUIDATED DAMAGES.

GSWA states that on September 3, 2013, it sent MPC a written notice that GSWA intended to assess Liquidated Damages for each calendar day that the work remained uncompleted. In response to that notice, MPC's good faith response was to increase its manpower and overtime work on the project.

In your pre-bid package, at page FC-4 of the proposed contract, the Liquidated Damages clause already contained the sum of Three Thousand Three Hundred Dollars (\$3,300.00) per calendar day. Courts have established that for a liquidated damage clause to be valid and enforceable it must be determined at the formative stages of the contract that actual damages would be extremely difficult to determine. To uphold a liquidated damages clause, Courts must find that the parties endeavored to negotiate a liquidated damages provision which was reasonably related to the damages the owner would suffer if the project was not completed. *B.M Company, supra*. The liquidated damages clause in this contract was not a negotiated item.

Here liquidated damages were assessed at One Hundred Thousand Dollars (\$100,000.00) a month. That figure does not bear any relationship to the actual costs to GSWA resulting from any delays to the project completion time. If there was a calculation of how that daily liquidated amount was computed, it was not shared, nor the product of negotiation, with MPC or any other bidders on the project. The failure to enter into such negotiations and support an estimate of losses has been held by Courts to render the liquidated damages clause void and unenforceable.

Liquidated Damages clause must be reasonably related to your actual damages. The time for evaluating reasonableness of liquidated damages is the time of contract formation. *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947). The damages must be a reasonable forecast of the likely or actual damages if a delay occurs and not disproportionate to the presumed loss or injury. *Mitchell Engineering & Construction Co., Inc.*, ENG BCA No. 3785, 89-2 BCA 21,753. They cannot be punitive nor negative performance incentives. They are used to compensate for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by untimely performance of the particular contract.

If there is no reasonable relation to the actual damages suffered, then those liquidated damages will be determined to be a penalty, notwithstanding anything in the contract stating that such damages are not a penalty. If the damages are found to be a penalty, then they may be unenforceable. A number of federal and state Courts, including Guam courts, have ruled on this issue. See, *B.M. Company, supra*, *Perdue v. Crocker National Bank*, 38 Cal. 3d 913 (1985); *Better Food Markets, Inc. v. American Dist. Tel. Co.*, 40 Cal. 2d 179, 253 P.2d 10 (1953); *Priebe, supra*.

Mr. David L. Manning
Receiver Representative
June 19, 2015
Page 7

Even though the parties may agree to a contract with a liquidated damages clause, such contract provisions are strictly construed by the Courts and Appellate Boards. *American Construction Company*, ENG BCA No. 5728, 91-2 BCA 24,009. In that circumstance, Courts look to documentation and calculations showing claimed actual damages due to any delay in performance of the contract caused by the contractor and those were never discussed. Here there was no negotiated agreement on daily Liquidated Damages.

I. REQUEST FOR MEETING FOR FINAL SETTLEMENT RESOLUTION.

MPC finished the contract in good faith and seeks a final resolution of its outstanding invoice and GSWA's assessment of Liquidated Damages. MPC asserts that GSWA incorrectly determined the Substantial Completion date. GSWA took beneficial use of various portions of the project before the claimed Substantial Completion date of June 26, 2014. Substantial Completion was accomplished on or about April 7, 2014. Liquidated Damages should not be assessed under the contract after April 7, 2014 and certainly not after May 6, 2014 when MPC delivered the Certificate of Completion and Occupancy Permit to GSWA. The additional items for completion were punch list items.

MPC further disputes that the Liquidated Damages Clause is legally valid and enforceable. That clause was not negotiated and, as applied, serves as a penalty provision. That is not to say that GSWA does not have a claim for its actual losses for the delay in the completion date and effective use of the premises. It is unclear what the actual losses to GSWA were from the adjusted scheduled completion date of December 8, 2014 to April 7, 2014, a period of ninety (90), but if computed to May 6, 2014, a period of one hundred nineteen (119) days. Further, it cannot be ignored that GSWA chose not to have its grand opening until January, 2015.

In accordance with 5GCA 5427 and 2 GAR 9103(g), MPC requests a meeting with GSWA, or other officials you may select, to finally resolve these issues of retention and damages. I look forward to your response. Should you have any questions or concerns, please feel free to contact me at my office.

Sincerely yours,



Phillip Torres

cc: Mr. Glenn Leon Guerrero, Director
Department of Public Works

AGENCY'S
DECISION

dated 7/19/2015



SOLID WASTE
MANAGEMENT
CONSULTANTS
RECEIVER

July 19, 2015

**TORRES LAW GROUP
RECEIVED**

Date: 7/20/15
Time: 9:52 am
By: [Signature]

Mr. Phillip Torres
Attorney
Torres Law Group
130 Aspinall Ave.
Suite 2A
Hagatna, Guam 96910-5018

Dear Attorney Torres:

This letter is in response to your letter of June 19, 2015. You had requested a meeting to discuss the issues of retention and liquidated damages arising from the above referenced contract (the "Contract"). Upon consideration of our prior attempts to resolve this controversy, the failure of Maeda Pacific Corporation ("MPC") to provide any reasonable counteroffer, careful review of the pertinent facts, and consultation with legal counsel, it is clear that this controversy cannot be resolved by mutual agreement, and that the meeting you requested is neither necessary nor appropriate.

GSWA hereby denies MPC's request for an extension of the Contract time. This letter will serve as GSWA's final decision pursuant to 5 G.C.A. § 5427(c). Therefore, GSWA demands that MPC make an immediate payment to GSWA of **One Hundred Fifty Six Thousand Five Hundred Sixteen Dollars & Sixty One Cents (\$156,516.61)** towards the **Six Hundred Sixty-Three Thousand Dollars (\$663,000.00)** in liquidated damages GSWA is entitled to under the Contract.

SUBSTANTIAL COMPLETION

The records of the contact clearly show that Substantial Completion did not occur until June 27, 2014. On March 21, 2014, MPC requested a Final Inspection for Substantial Completion. A written reply was provided to MPC on March 26, 2014 stating that based on the requirements of the Contract, the Construction Manager ("CM") did not concur with the Contractor's statement that the work was ready for final inspection or tests. Among the deficiencies that existed as of March 26, 2014, were: the site power was not provided; the truck wash facility was neither commissioned nor operable; the fire booster pump system was neither commissioned nor accepted by the Guam Fire Department ("GFD"); the sprinkler and fire alarm system were not completely wired and were neither commissioned nor accepted by the GFD; the required

demonstration and training was not provided; and the Contractor did not provide a Department of Public Works Certificate of Occupancy.

In order to assist MPC in achieving substantial completion as quickly as possible, a preliminary list titled "Items That Have Not Been Completed as of March 25, 2014" was prepared and forwarded to MPC. The list included 131 items that were monitored on a daily basis. Updated lists indicating completion of the incomplete items were provided to MPC on a weekly basis. Our records indicate that six (6) separate updated lists were provided to MPC from April 04, 2014 through May 02, 2014. Maintenance of the "Items List" terminated with the final inspection on May 09, 2014 and issuance of the "List of Deficiencies" referenced in the following paragraph.

On May 06, 2014, MPC submitted a letter certifying that the project was complete and requested a final inspection. On May 09, 2014, the CM team conducted and completed a final inspection. On May 19, 2014, a letter was issued by the CM stating that there were still numerous deficiencies identified that precluded the issuance of a Notice of Substantial Completion at that time. The letter transmitted a "Final Inspection of May 09, 2014 List of Deficiencies" with 39 items identified that required correction and included photos of the deficiencies, ten (10) of which required completion before the work could be considered substantially complete. Updated lists indicating completion of the deficient items were provided to MPC on a weekly basis. Our records indicate that four (4) separate updated "Deficiency Lists" were provided to MPC from May 23, 2014 through June 20, 2014.

On May 28, 2014, a follow up letter was issued to MPC indicating that seven (7) deficiency items remained incomplete and required correction prior to issuance of a Notice of Substantial Completion. On June 26, 2014, the CM received an email stating the balance of work requiring correction prior to issuing a Notice of Substantial Completion has been completed and was ready for final inspection. The CM team and Engineers of Record conducted a Final Inspection and found the project to be Substantially Complete as of June 27, 2014.

MPC has asserted that the Guam Supreme Court in *B.M. Co v. Avery*, 2001 Guam 27, equated the Certificate of Occupancy with Substantial Completion. Our counsel advises us that is this is not accurate. The Guam Supreme Court only noted that the issuance of an occupancy permit is but one factor indicating that a project is substantially completed. Other factors considered in determining Substantial Completion were whether the remaining deficiencies in the building were so grave as to deprive the owners of the benefit they reasonably expect to receive under the contract; the Owner's ability to rent the building out; and whether the deficiencies in performance were capable of being remedied by monetary compensation.

The determinative question of Substantial Completion is when the project was sufficiently complete such that owner could utilize the project for its intended purpose. Given the well documented sequence of events referenced above, there is no doubt that the Government of Guam was not able to use the facility for its intended purpose until June 27, 2014. Therefore, Substantial Completion did not occur until June 27, 2014.

NO EXCUSE FOR DELAY

On September 3, 2013, due to the construction being substantially behind schedule, MPC was provided written notice that the Contracting Officer intended to assess liquidated damages for each calendar day that work remained incomplete beyond the Contract completion date. The delays and lack of progress had been well documented and discussed at great length during the weekly progress meetings. During said meetings, the Construction Manager made numerous and continued requests for the Contractor to increase the quantity of skilled workmen, and/or provide additional crews as may be necessary to assure completion of the project within the Contract completion date.

On November 19, 2013, a letter was issued to MPC with regard to the GEPA requirement for secondary containment for the oil-water separator influent piping. Per GEPA Title 22, Division 10, Chapter 50 Guam Underground Storage Tanks Regulations, Subchapter 2, Paragraph 50113 – Piping Requirements, “...all new or replaced piping where installation began after September 30, 2013, must be secondarily contained in accordance with paragraph (5) of this section.” (Emphasis added.) If MPC had installed the OWS by February 20, 2013 as shown in the original baseline schedule, the requirement to provide secondary containment for the OWS influent piping would have been avoided. Per our records, the OWS separator did not arrive on island until August 13, 2013, and excavation for the foundation did not commence until November 27, 2013. Construction of the OWS foundation began 295 days beyond the original baseline schedule date of February 05, 2013. Any delays or impacts to the construction schedule (and related work) are the responsibility of the Contractor and a direct result of the Contractor’s failure to meet the performance milestones established in the baseline schedule.

On January 28, 2014, a final inspection was conducted by the GFD. A list of items requiring correction prior to acceptance was generated. The second item on the list required the fire department connection (“FDC”) to be located within 100 feet of the nearest hydrant. The relocation of the FDC required the preparation, submittal, review, and approval of revised drawings. The revised drawings were completed on February 14, 2014 and approved by the GFD on February 18, 2014. On February 18, 2014, Field Change Authorization No. 02 (FCA #02) was issued to the Contractor. FCA #02 included a price of \$1,595.39. The pricing provided also included a request for adjustment in Contract time of 30 workings days. The FCA was executed by MPC on March 17, 2014, and provided for a ten (10) day Contract time adjustment. Based on our records, the FDC was relocated between Saturday, March 29, 2014 and Sunday, March 30, 2014. The materials were available locally and the work took two (2) days to complete. Given the overall state of completion of the project at that time, the relocation of the FDC was not critical path. It is our opinion that the adjustment in Contract time of ten (10) calendar days as provided by FCA #02 was appropriate and adequate to complete the work.

The additional time requested was not justifiable because of the magnitude of deficiencies documented during the May 09, 2014, final inspection, because substantial completion was not contingent upon completion of the change order work, and because the majority of work provided via FCA #02 was completed well in advance of substantial completion. The work described in drafts of proposed Change Order No. 06 was completed by June 19, 2014 with the

exception of the installation of object markers and wall mounted sprayers in the truck wash building. This work was considered incidental to the operations of the facility, not identified on the "Final Inspection List of Deficiencies", and did not require completion prior to substantial completion.

There are numerous other examples of poor preparation of submittals and shop drawings, uncoordinated procurement and delivery of critical materials and products, lack of adequate field supervision, and poorly coordinated and planned execution of the field work that were well within the control of MPC. The actual placement date of concrete exceeded the baseline schedule completion milestones by as much as 164 calendar days. The original baseline schedule duration for each roof pour included 30 days for concrete curing. These 30 days were not carried through to the "Difference Between Baseline & Actual Concrete Placement" column which would have increased the number of days between the baseline and actual "roof" durations for each by 30 calendar days. The length of time required by MPC to prepare and submit shop drawings for the structures was excessive. Starting from the March 15, 2013 weekly progress meeting, durations were tracked through acceptance, and several submittals took over 125 calendar days to complete. Preparation of submittals was under the exclusive control of MPC, and the delays resulting from the lack of urgency with regard to their preparation certainly created a minimum delay of six (6) months. The specific length of time devoted by the Contractor to preparation of these submittals was well documented and discussed at many of the weekly progress meetings.

Other examples of events and circumstances within the control of the Contractor that created delay include the following:

- The fire pump building foundation was installed in the wrong location and required demolition, disposal, and reconstruction, as indicated by Daily CM Inspection Report of 06/05/13.
- During preliminary pressure testing for the truck wash facility plumbing, a leak was detected beneath the pavement at the backflow preventer piping. The concrete sidewalk around backflow preventer had to be demolished for the leak to be repaired. See Daily CM Inspection Report No. 304 of 01/16/14
- The Contractor was advised to complete pressure testing of all domestic waterlines prior to placement of concrete pavement between the residential trash area and truck wash facility. The pipeline was tested after placement of the concrete and a leak was detected beneath the newly placed concrete. The pavement required removal and replacement, as indicated by Daily CM Inspection Report No. 320 of 02/24/14.
- Four (4) separate quality assurance surveys of the 12-inch diameter HDPE storm drain piping installed between ponding basin No. 01 and No. 08 were conducted. The surveys revealed that the pipeline was not installed within the slope variations allowed by the plans and specifications. The pipeline had to be removed and reinstalled several times.

- A quality assurance survey of the 6-inch diameter SDR35 sanitary sewer piping between the residential trash drop off and oil-water separator, and the oil-water separator and the existing sewer manhole was conducted prior to placement of concrete encasement. The survey revealed that the pipeline was not installed within the slope requirements of the plans and specifications. The placement of the encasement had to be delayed while the pipeline elevations were corrected.

The delays in substantial completion were all within MPC's control. There is simply no excuse for the delays encountered. In any event, there is no provision in the Contract that would permit excusing delay in substantial completion under any circumstances. Liquidated damages are assessable for MPC's failure to complete the work within the time specified in the Contract.

LIQUIDATED DAMAGES

Paragraph 5.0 of the Contract provides:

It is hereby understood and mutually agreed, by and between the Contractor and the Government of Guam, that liquidated damages shall be assessed for each calendar day the Work remains incomplete beyond the Contract completion date. The Contractor further agrees to pay to the Government the sum of Three Thousand Three Hundred Dollars (\$3,300.00), not as a penalty, but as a reasonable liquidated damages for breach of this Contract by the Contractor by his failing, neglecting or refusing to complete the Work within the time herein specified and said sums shall be paid for each consecutive calendar day thereafter that the Contractor shall be in default after the time stipulated in the Contract for completing the Work ready for use and/or operation.

As detailed above, MPC did not substantially complete the Contract Work until June 27, 2014. The required Contract completion date was December 8, 2013. Therefore, GSWA is entitled to liquidated damages from MPC in the total amount of ***Six Hundred Sixty-Three Thousand Dollars (\$663,000.00)***.

With respect to the legal arguments you outlined in your letter, we are advised by our counsel as follows:

- GSWA cannot rely on *B.M. Company v. Avery* for the proposition that the Liquidated Damages clause is unenforceable. There, the Superior Court found the liquidated damages clause in a private construction contract for a commercial building was enforceable, despite not having negotiated an estimate of actual damages. The Court merely reduced the stipulated amount because actual damages of lost rental income could be assessed to determine a reasonable amount of liquidated damages. There are no similarities to this case. This is a public works contract for a publicly used facility, in which no rental income or the amount of actual damages could possibly be ascertained.

- The decision in *First International Corporation v. Maeda Corporation* is more applicable to this case than *Avery*. There, the Court found that the stipulated liquidated damages amount was enforceable because calculating the amount of damages arising for the loss of use of the project was impracticable at best. Further, Guam law expressly acknowledges the enforceability of liquidated damages clauses "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage." 18 G.C.A. § 88104.
- GSWA is entitled to recover these liquidated damages for MPC's inexcusable failure to complete the Contract work within the Contract time. In light of the plain language of the Contract, the Guam statutory deference to liquidated damages clauses, and the intent of Guam procurement law for public works contracts to include a liquidated damages clause, there is no doubt that the Courts of Guam would find the stipulated amount of liquidated damages is reasonable.

MPC'S RIGHT TO ADMINISTRATIVE AND JUDICIAL REVIEW

This is a final decision concerning this dispute over money owed to and by the Government of Guam. Accordingly, MPC has a right to appeal this decision in accordance with the Government Claims Act by initially filing a claim with the Office of the Attorney General no later than eighteen (18) months after this decision is rendered. MPC shall exhaust all administrative remedies before filing an action in the Superior Court of Guam in accordance with the Government Claims Act.

This letter is without prejudice to any other claims of GSWA regarding the Contract, all of which are expressly reserved.

Thank you.

Sincerely,



David L. Manning
Receiver Representative

c.c. Vanessa Williams, Attorney
Andrew Mishkin, Attorney