



1 12104(c)(3). *See* Submission of Procurement Record, Aug. 28, 2015, which is incorporated  
2 herein by reference;

3 (c) Copy of the Solicitation. GSWA submitted a copy of the solicitation, including the  
4 specification relevant to the protest, to the OPA on August 28, 2015 as part of the procurement  
5 record required by 2 G.A.R. § 12104(c)(3). *See* Submission of Procurement Record, Aug. 28,  
6 2015, which is incorporated herein by reference;

7 (d) Copy of the Abstract of Bids or Offers or Portions thereof Relevant to the Protest.  
8 GSWA submitted a copy of abstract of bids or offers or portions thereof relevant to the  
9 protest to the OPA on August 28, 2015 as part of the procurement record required by 2 G.A.R. §  
10 12104(c)(3). *See* Submission of Procurement Record, Aug. 28, 2015, which is incorporated  
11 herein by reference;

12 (e) Any other Documents Relevant to the Protest. GSWA submitted documents  
13 relevant to the protest to the OPA on August 28, 2015 as part of the procurement record required  
14 by 2 G.A.R. § 12104(c)(3). *See* Submission of Procurement Record, which is incorporated herein  
15 by reference.

16 (f) Decision from which the Appeal is Taken. GSWA submitted the decision from  
17 which Morrico's Appeal is taken to the OPA on August 28, 2015 as part of the procurement  
18 record required by 2 G.A.R. § 12104(c)(3). *See* Submission of Procurement Record, which is  
19 incorporated herein by reference;

20 (g) Statement Answering the Allegation of the Appeal. A statement answering the  
21 allegations of the Appeal and setting forth findings, actions, and recommendations in this matter,  
22 together with additional evidence or information necessary to determine the validity of Morrico's  
23 Appeal is attached;

24 (h) Determination of Award pursuant to 2 G.A.R. § 92101(e). GSWA submitted the  
25 determination of award to the OPA on August 28, 2015 as part of the procurement record required  
26 by 2 G.A.R. § 12104(c)(3). *See* Submission of Procurement Record, which is incorporated herein  
27 by reference;

1 (i) Statement Regarding Court Proceeding. A statement indicating whether the matter  
2 is the subject of a court proceeding is being filed concurrently herewith, and is incorporated herein  
3 by reference.

4 Respectfully submitted this 1<sup>st</sup> day of September, 2015.

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8 VANESSA L. WILLIAMS, ESQ.  
9 *Attorney for Guam Solid Waste Authority*  
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**AGENCY STATEMENT**

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GSWA denies the allegations in Maeda’s appeal. First, the appeal should be dismissed. The appeal is over a dispute having to do with money owed to or by the government of Guam. The Public Auditor lacks jurisdiction over disputes having to do with money owed to or by the government of Guam. Even if the Public Auditor finds she has jurisdiction over the appeal, the matter must still be dismissed based on the Public Auditor’s recusal or disqualification from hearing the matter. Should the appeal proceed to be heard on the merits, the appeal must be denied because Maeda’s contentions have no basis in law. The Liquidated Damages clause is valid and enforceable.

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**I. THE PUBLIC AUDITOR LACKS JURSDICTION OVER THE DISPUTE.**

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“The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam.” 5 G.C.A.§ 5703; 2 G.A.R. § 12103(a). *See also* 2 G.A.R. § 12301(a) (“Disputes having to do with money owed to or by the government of Guam shall not be submitted.”). This dispute plainly has to do with money owed to or by the government of Guam. This was acknowledged expressly in Maeda’s Statement of Issues filed with the OPA on August 17, 2015. Indeed, Maeda filed a claim with the Office of the Attorney General in accordance with the contract and the Government Claims Act prior to filing the present appeal with the OPA. It has been well settled by the Supreme Court in a dispute virtually identical to this, that the Government Claims Act provides the final exclusive administrative remedy to be used by the contractor. *Pacific Rock Corp. v. Dept. of Education*, 2001 Guam 29 ¶¶ 31-32, 39. Further, the Public Auditor should recuse herself pursuant to 2 G.A.R. § 12601. Therefore, the appeal must be immediately dismissed. GSWA incorporates by reference its Motion to Dismiss for Lack of Jurisdiction and for Recusal.

**II. THE LIQUIDATED DAMAGES CLAUSE IS VALID AND ENFORCEABLE.**

Maeda alleges that the Liquidated Damages clause is the contract is invalid and unenforceable. Guam law does not support Maeda’s position. Guam law expressly acknowledges the enforceability of liquidated damages clauses "when, from the nature of the case, it would be



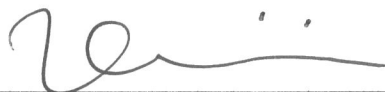
1 impracticable or extremely difficult to fix the actual damage." 18 G.C.A. § 88104. Further, public  
2 policy mandates liquidated damages clauses in territory construction contracts. See 5 G.C.A. §  
3 5306(c)(1) ("The Policy Office shall promulgate regulations requiring the inclusion in territory  
4 construction contracts of clauses providing for appropriate remedies and covering...liquidated  
5 damages as appropriate[.]")(Emphasis added).

6 Maeda's positions to the contrary have already been rejected by Guam courts. In *Santa Fe*  
7 *Corporation v. Flores*, Superior Court of Guam Civil Case No. CV1036-95, p. 9 (Jan. 14, 1997)  
8 the court rejected a California court's reasoning that a liquidated damages clause was void as an  
9 illegal penalty clause because Guam law clearly provides that liquidated damages provisions are  
10 valid and enforceable. In *First International v. Maeda Corporation*, Superior Court of Guam  
11 Civil Case No. CV0788-97, Decision and Order p. 23 (Sep. 22, 1999), the court found that the  
12 liquidated damages clause was valid and enforceable under 18 G.C.A. § 88104 because  
13 calculating the loss of use of a facility was impracticable at best. In *B.M. v. Avery*, Superior Court  
14 of Guam Civil Case No. CV422-95, Decision and Order, p. 9 (Sep. 18, 2000), upheld by the  
15 Supreme Court in 2001 Guam 29 ¶ 16, the court found the liquidated damages clause was valid  
16 and enforceable, but merely declined to enforce it beyond the contract completion date. See also  
17 *Wasson v. Berg*, 2007 Guam 16 ¶ 30, recognizing the public policy of using liquidated damages  
18 clauses due to the inherent difficulty of affixing actual damages.

### 19 CONCLUSION

20 The matter should be dismissed based on the Public Auditor's lack of jurisdiction or  
21 disqualification and recusal from hearing the appeal. Should the OPA proceed to consider  
22 Maeda's appeal on the merits, Maeda's appeal must be denied. The Liquidated Damages clause  
23 is valid and enforceable.

24 Respectfully submitted this 1<sup>st</sup> day of September, 2015.

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27 VANESSA L. WILLIAMS, ESQ.  
28 *Attorney for Guam Solid Waste Authority*

# **Exhibit A**

**TORRES LAW GROUP**  
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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

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Mr. David L. Manning  
Receiver Representative  
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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

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

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.

## 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*.



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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. Andrew Gayle  
GSWA Board