

1 Vanessa L. Williams, Esq.
2 414 West Soledad Avenue
3 GCIC Bldg., Suite 500
4 Hagåtña, Guam 96910
5 Telephone: 477-1389
6 Email: vlw@vlwilliamslaw.com

7 Attorney for Purchasing Agency
8 *Guam Solid Waste Authority*

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO OPA-PA: 15-008

9 **BEFORE THE PUBLIC AUDITOR**
10 **PROCUREMENT APPEALS**
11 **TERRITORY OF GUAM**

12 IN THE MATTER OF
13 MAEDA PACIFIC CORPORATION,

14 Appellant,

15 and

16 GUAM SOLID WASTE AUTHORITY

17 Purchasing Agency.

) Docket OPA PA-15-008

) **MOTION TO DISMISS**
) **FOR LACK OF JURISDICTION**
) **AND FOR RECUSAL**
) **& MEMORDANDUM OF POINTS**
) **AND AUTHORITIES**

18 **MOTION TO DISMISS**

19 Pursuant to 5 G.G.A. § 5703 and 2 GAR § 12104(c)(9), the Guam Solid Waste
20 Authority (“GSWA”) hereby moves to dismiss the appeal of Maeda Pacific Corporation
21 (“Maeda”) due to the Public Auditor’s lack of jurisdiction and recusal or disqualification from
22 hearing this matter. This motion is supported by the following Memorandum of Points and
23 Authorities, the record of the proceedings and papers on file, together with any and all
24 arguments to be adduced at the hearing of the within entitled motion.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **BACKGROUND**

27 On or about November 1, 2012, Maeda entered into contract No. GSWA-12-02 with
28 GSWA. (Notice of Appeal, Formal Contract, Aug. 17, 2015.) On June 19, 2015 Maeda filed a
protest with the receiver of GSWA alleging it did not owe the government of Guam any money

1 and that the government of Guam owed Maeda money. (Notice of Appeal, Appellant's Letter,
2 Aug. 17, 2015.) On July 12, 2015, the Public Auditor issued an open letter to the public
3 regarding the Guam Solid Waste Authority and the Federal Receiver. A true and correct copy
4 of the Public Auditor "Letter to Publishers and Broadcasters regarding the Guam Solid Waste
5 Authority and the Federal Receiver" is attached as **Exhibit A**. (See
6 <http://www.opaguam.org/announcements/guam-solid-waste-authority-and-federal-receiver>).

7 On July 19, 2015 GSWA issued a final decision denying Maeda's claim over money
8 owed to or by the Government of Guam. (Notice of Appeal, Agency's Decision, Aug. 17,
9 2015.) On August 14, 2015 Maeda filed a claim with the Office of the Attorney General. A
10 copy of Maeda's Government Claim is attached as **Exhibit B**. On August 17, 2015, Maeda
11 filed the appeal herein. This Motion to Dismiss for Lack of Jurisdiction and Motion for Recusal
12 follows.

13 ARGUMENT

14 "The Public Auditor shall not have jurisdiction over disputes having to do with money
15 owed to or by the government of Guam." 5 G.C.A. § 5703; 2 G.A.R. § 12103(a). *See also* 2
16 G.A.R. § 12301(a) ("Disputes having to do with money owed to or by the government of Guam
17 shall not be submitted."). This dispute plainly has to do with money owed to or by the
18 government of Guam. This was acknowledged expressly in Maeda's Statement of Issues filed
19 with the OPA on August 17, 2015. Indeed, Maeda filed a claim with the Office of the Attorney
20 General in accordance with the contract and the Government Claims Act prior to filing the
21 present appeal with the OPA. It has been well settled by the Supreme Court in a dispute
22 virtually identical to this, that the Government Claims Act provides the final exclusive
23 administrative remedy to be used by the contractor. *Pacific Rock Corp. v. Dept. of Education*,
24 2001 Guam 29 ¶¶ 31-32, 39. Further, the Public Auditor should recuse herself pursuant to 2
25 G.A.R. § 12601. Therefore, the appeal must be immediately dismissed.

1 **I. MAEDA’S CLAIM IS A DISPUTE HAVING TO DO WITH MONEY.**

2 **A. Maeda Expressly Acknowledged this is a Money Dispute Governed under**
3 **the Government Claims Act.**

4 The present dispute has to do with claims of money owed to or by the government of
5 Guam. In the first paragraph of Maeda’s Statement of Issues, Maeda states:

6 [Maeda] appeals from the Final Decision issued by the Gershman,
7 Brickner & Bratton, Inc. (“GBB”) as representatives and Receiver
8 for the Guam Solid Waste Authority (“GSWA”) regarding the
9 Harmon Residential Transfer Station Contract No. GSWA-12-02.
10 Appellant asserts that it is owed Five Hundred Six Thousand Four
11 Hundred Eighty-Three Dollars and Thirty-Nine Cents
12 (\$506,483.39). GSWA has assessed Six Hundred Sixty-Three
Thousand Dollars (\$663,00.00) 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)[.]

13 (Notice of Appeal, Appellant’s Statement of Issues ¶ 1, Aug. 17, 2015).

14 Maeda could not make it any clearer that this was first and foremost an appeal from a
15 decision on a dispute having to do with claims for money owed to or by the government of
16 Guam. As it is undisputed that this appeal is from a final decision over the dispute of whether
17 Maeda owes or is owed money by the government of Guam, the Public Auditor has no
18 jurisdiction over the dispute. *See* 5 G.C.A. § 5703; 2 G.A.R. § 12103(a).

19 Maeda should be estopped from asserting the Public Auditor’s jurisdiction. In an
20 undisputed portion of the contract, Maeda expressly recognized that the Government Claims
21 Act (Title 5, Chapter 6 of the Guam Code Annotated) applies to claims of money owed by or to
22 Maeda against the Government. (Notice of Appeal, Formal Contract FC-5, Aug. 17, 2015.)
23 Consistent with this express acknowledgement, Maeda filed its government claim for this
24 dispute having to do with money with the Office of the Attorney General on August 14, 2015 –
25 three days prior to filing this appeal. *See Exhibit B.* The government claim is an appeal from
26 the same decision appealed herein. Consistent with Maeda’s Statement of Issues in this appeal,
27 Maeda admits that the Government Claim has to do with money owed to or by the government
28 of Guam. The facts upon which Maeda based its claim were “[f]ailure to make final payment

1 due based upon wrongful assessment of liquidated damages.” *Id.* (Emphasis added). With the
2 appeal already pending under the Government Claims Act, and Maeda’s prior admissions that
3 the appeals from the underlying decision have to do with money owed to or by the government
4 of Guam, the Public Auditor cannot exercise jurisdiction over this dispute.

5
6 **B. The Guam Supreme Court Determined the Public Auditor Cannot Aid
Claimants who are Seeking Monetary Relief.**

7 In the landmark decision of *Pacific Rock Corp. v. Dept. of Education*, 2001 Guam 29,
8 the Guam Supreme Court clarified the interplay between the Procurement Law and the
9 Government Claims Act and found the Procurement Appeals Board – now the Public Auditor –
10 cannot aid claimants seeking monetary relief. There, the contractor Pacific Rock, was unable
11 to obtain final payment for the remaining amounts under the contract and for change orders. *Id.*
12 at ¶ 7. The Government determined that it was entitled to liquidated damages. *Id.* at ¶ 9. After
13 unsuccessful negotiations, Pacific Rock filed a government claim under the Claims Act. *Id.* at
14 ¶ 10. The issue ultimately before the Supreme Court was whether the limitations provisions of
15 the Procurement Law or the Claims Act applied to Pacific Rock’s contract claims for the
16 payment of money. *Id.* at ¶ 20. The issue turned on which final administrative remedy under
17 the Procurement Law was available to Pacific Rock.

18 The Supreme Court found that 5 GCA §§ 5427(a)-(f) provided the final method of
19 resolving contract and breach of contract controversies at the administrative level under the
20 Procurement Law. *Id.* at ¶¶ 33-34, 39. (“5 GCA §§ 5427 sets for the final administrative
21 measure that a contractor such as Pacific Rock must undertake under the Procurement
22 Law[.]”)(Emphasis added). This section provides for resolving contract disputes at the *agency*
23 level. This thereby precludes any other further administrative remedy under the Procurement
24 Law, such as that of an appeal to the Public Auditor. Indeed, the Supreme Court spelled out that
25 the Procurement Appeals Board, which is now replaced by the Public Auditor, “does not aid
26 claimants such as Pacific Rock who are seeking monetary damages under a breach of contract
27 theory [and] has no jurisdiction over disputes such as the present, which involve money owed to
28

1 or by the Government of Guam.” *Pacific Rock Corp. v. Dept. of Education*, 2001 Guam 29 ¶¶
2 31-32.

3 Maeda is in the exact same position as Pacific Rock. Here, Maeda also claims and is
4 unable to obtain final payment for the remaining amounts under the contract and for change
5 order. Here, the government has also determined it is entitled to liquidated damages. Like
6 Pacific Rock, Maeda also filed a government claim under the Claims Act. With such clear
7 statutory and regulatory language, and binding precedent from the Supreme Court of Guam,
8 there can be no question that the Public Auditor has no jurisdiction over this dispute.

9
10 **C. Maeda Cannot Extricate this Appeal from Its Claim for Money Damages.**

11 Maeda attempts to assert the OPA’s jurisdiction by claiming it merely seeks a
12 determination of the validity of the Liquidated Damages clause. This is mere wordplay. The
13 validity of the Liquidated Damages clause is only relevant because this a dispute having to do
14 with how much money Maeda will owe to the government of Guam. This is an illusory attempt
15 of bypassing the property administrative remedy under the Government Claims Act. The law
16 cannot be interpreted so as to permit nonsensical results. That is, even if the OPA were to
17 determine whether the contract clause was valid, the Government Claims Act is still the final
18 administrative remedy for determining the correct amount of liquidated damages. The OPA’s
19 decision would be superfluous if it was determined under the Government Claims Act that the
20 stipulated amount in the contract was a reasonable amount of liquidated damages.

21 The Legislature clearly did not intend to bifurcate the adjudication of these claims by
22 semantically dividing a claim. The plain language of the statute states “[t]he Public Auditor
23 shall not have jurisdiction over disputes having to do with money owed to or by the government
24 of Guam.” 5 G.C.A. § 5703; 2 G.A.R. § 12103(a). No matter how Maeda phrases their claim
25 before the OPA, this is definitely a “dispute[] having to do with money owed to or by the
26 government of Guam.” *Id.* The appeal must be denied for the Public Auditor’s lack of
27 jurisdiction over disputes having to do with money owed to or by the government of Guam.

1
2 **II. THE PUBLIC AUDITOR SHOULD RECUSE HERSELF FROM THIS APPEAL.**

3 GSWA respectfully requests that the Public Auditor, Doris Brooks, recuse herself from
4 this appeal due to her apparent bias against the management and receivership of the Guam Solid
5 Waste Authority. Guam Procurement Law provides:

6 The Public Auditor may recuse herself or himself at any time and
7 notify all parties, or any party may raise the issue of
8 disqualification and state the relevant facts prior to the hearing.
9 The Public Auditor shall make a determination and notify all
10 parties. In the event of disqualification or recusal of the Public
11 Auditor, a procurement Appeal must be taken to the Superior
12 Court of Guam in accordance with 5 GCA §5480.

13 2 G.A.R. § 12601.

14 The Public Auditor’s role involves investigating, auditing, and ultimately deciding a
15 procurement appeal. (Decision and Order Re: Purchasing Agency’s Motion for the Public
16 Auditor to Recuse Herself, *In the Appeal of Teleguam Holding LLC*, Appeal No. OPA-PA-10-
17 002. ”). Objectivity and impartiality is critical to the adjudicatory process. *See e.g.* 5 G.C.A. §
18 9222 (“A hearing officer or agency member shall voluntarily disqualify himself and withdraw
19 from any case in which he cannot accord a fair and impartial hearing or consideration.”).

20 Here, Ms. Brooks, as Public Auditor, is the administrative adjudicator of this appeal
21 responsible for providing a fair and impartial hearing or consideration to GSWA. However, in
22 her July 12, 2015 open letter issued to publishers and broadcasters regarding the Guam Solid
23 Waste Authority and the Federal Receiver, she raised the question of whether she can be fair
24 and impartial when it comes to the positions of the Guam Solid Waste Authority under the
25 management of the Federal Receiver. *See Exhibit A.* In this opinion letter the Public Auditor
26 repeatedly expressed her “dismay” with the continued management of GSWA under the
27 Receiver, as well as her belief that the Receiver of GSWA has made a “misrepresentation” to
28 the District Court of Guam. The Public Auditor further conveyed her belief that GSWA’s legal
positions are frivolous due to the “free rein given to the Receiver.” The Public Auditor also
shared her “heavy heart” about the continued management of GSWA under the Receiver. After

1 sympathizing with the Governor's office on purported "bad blood...between the Receiver and
2 the Governor's representatives," the Public Auditor concluded that existing management under
3 the Receiver should end and be transitioned back to the "GSWA Board, chosen by the
4 Governor[.]" *Id.* at 3.

5 This opinion was not a part of the audit of the GSWA, nor was her open opinion letter to
6 the public in performance with any of the Public Auditor's other statutory duties. *See* 1 G.C.A.
7 §§ 1908-1909. This open letter to the public also appears to be the first opinion of its kind in
8 the history of the Public Auditor. GSWA could find no other open letter or press release from
9 the Public Auditor outside of her statutory duties that opines on her confidence – or lack thereof
10 - in the management of any other public agency. Any decision rendered by the Public Auditor
11 in this matter would be clouded by uncertainty over whether the Public Auditor was truly fair
12 and impartial. Therefore, in the interests of justice, GSWA respectfully request the Public
13 Auditor recuse herself.

14 CONCLUSION

15 For the foregoing reasons, the appeal should be summarily dismissed for the OPA's
16 lack of jurisdiction to hear the appeal under 5 G.C.A. § 5703. The appeal should also be
17 dismissed due to the disqualification or recusal of the Public Auditor in accordance with 2
18 G.A.R. § 12601.

19 Respectfully submitted this 1st day of September, 2015.

20
21 

22 _____
23 VANESSA L. WILLIAMS, ESQ.
24 *Attorney for Guam Solid Waste Authority*

Exhibit A



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

July 12, 2015

**Letter to Publishers and Broadcasters re
Guam Solid Waste Authority and the Federal Receiver**

The June 25, 2015 release of the FY 2014 financial audit of the Solid Waste Funds reflects three full years of operations at Layon Landfill by the Receiver. In less than three months, the books will close on FY 2015 and we will have four years of financial performance.

Thanks to the free rein that District Court Judge Frances Tydingco-Gatewood granted the Receiver, Guam has probably the most modern landfill of all of the Pacific Island countries. It's likely more up-to-date than many stateside landfills.

When OPA hosted the 13th Pacific Association of Supreme Audit Institutions (PASAI) Congress in September 2013 with attendance of over 60 delegates that included the Auditor Generals from 22 countries, such as New Zealand, Australia, New Caledonia, Papua New Guinea, to name a few, as well as the Acting Inspector General of the Department of the Interior, we toured the landfill operations at Harmon and Layon.

PASAI conducted a cooperative audit on solid waste in 2011 of which Guam and nine other island governments participated. I forewarned the Congress to take action and address their solid waste issues as not addressing them can come at a heavy price, which Guam is now experiencing.

I recently read in the paper with dismay and a heavy heart the Judge's decision to further delay the transition of management of the Layon landfill operations to the Guam Solid Waste Authority (GSWA).

It is my understanding that the GSWA Board has been requesting for the authority and funding to advertise and hire a general manager and other senior staff so that the Board can have its management team in place and be ready for the transition of managing Layon. However, according to one board member, the

Receiver has not even allowed the Board to advertise for the general manager position and other senior positions for its management team.

To be clear, the Board is NOT requesting to take over the closing of the Ordot Dump, a project that is still in progress. The Board wants to begin the transition of Layon.

I have also watched with dismay the disagreements between the Receiver and the Governor's office on future capital projects and how they would be funded. I can see now how some of that bad blood occurred between the Receiver and the Governor's representatives.

I say this because of my most recent experience with the Receiver and the 2014 financial audit of the Solid Waste Funds. Completion of the audit was repeatedly delayed because of the continued objections by the Receiver on certain aspects of the numbers, reconciliation of those numbers, the wordings of certain statements, and my comments over a particular consultant contract.

The Receiver reports on a cash basis to the Judge and the audit is on a modified accrual basis. There were other bones of contention pertaining to certain findings on procurement.

Let me just say that I refrained from responding in like kind to the less than professional comments by email and telephone to me and the Deloitte and Touche auditors. In the end, we agreed to disagree.

I also bring to the public's attention the Receiver's misrepresentation in his March 5, 2015 quarterly report to the District Court. At page 23 of the report, writing about OPA Procurement Appeal 14-010, Morrico Equipment, LLC v. Guam Solid Waste Authority, the Receiver said, "On February 20, 2015, the Office of Public Accountability upheld the protest on technical grounds citing lack of evidence in the record for the specification that was protested. While we disagree with the decision, we will revise the bid and reissue the procurement."

Despite the representation to the Judge that he would reissue the bid, the Receiver appealed the Public Auditor's decision to the Superior Court the very next day on March 6, 2015. The latest order from Judge Barcinas, issued June

30, sets trial for January 22, 2016 and motions to dismiss to be heard on August 21, 2015.

While any government entity can appeal the Public Auditor's procurement decision to the Superior Court, since 2006, when procurement appeals became the responsibility of my office, no other government entity has appealed a procurement decision; only vendors have appealed.

Because of the free rein given to the Receiver, the people of Guam are paying for the legal costs of the Receiver's appeal to the Superior Court. Money is coming from the Solid Waste Operations Fund, the solid waste rate payers of Guam, the taxpayers of Guam, as well as staff time and resources from the OPA and the Superior Court. In addition, there are Morriconi's legal costs, time, and resources.

I write this open letter to say to the people of Guam, that after four years of the Receiver managing Layon, the Board should be given the opportunity and funding to get its management team in place and be allowed to manage and operate the Layon Landfill. FY 2016 should be the year GovGuam is allowed to prove to the Judge, and more importantly to the people of Guam, that Guamanians are fully capable of running Layon.

This transition can and should be under the watchful eye of the Court. The GSWA Board, chosen by the Governor and confirmed by the Legislature, should be handed the responsibility of managing and operating the Layon landfill.

Respectfully submitted,



Doris Flores Brooks, CPA, CGFM

Public Auditor

Exhibit B

081415 58



Office of the Attorney General
ELIZABETH BARRETT-ANDERSON

Attorney General of Guam
278 West O'Brien Drive
Hagåtña, Guam 96910 • USA
(671) 475-3324 • (671) 472-2493 (Fax)
www.guamattorneygeneral.com

CLAIM AGAINST THE GOVERNMENT

(Please complete the form in its entirety. DO NOT leave any portions blank. Write "N/A" or "None" where appropriate.)

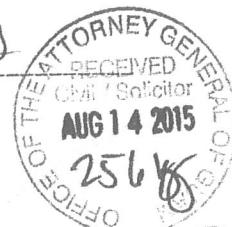
1. Name of Claimant MAEDA PACIFIC CORPORATION
2. Mailing Address c/o 130 Aspinall Avenue, Suite 2A, Hagåtña, Guam 96910
Home/Work Address c/o 130 Aspinall Avenue, Suite 2A, Hagåtña, Guam 96910
3. Home Telephone c/o 477-9891 Work Telephone c/o 477-9891
4. Amount of Damages you are claiming: Five Hundred Six Thousand, Four Hundred Eighty-Three Dollars and Thirty-Nine Cents (\$506,483.39)
5. Any other relief you are claiming None at this time
6. Government Agency Responsible Guam Solid Waste Authority (GSWA)
7. Date Claim arose July 19, 2015
8. Your Statement of facts upon which you base your claim. Attach extra sheets if necessary. Failure to make final payment due based upon wrongful assessment of liquidated damages.
9. Attach a copy of all documents pertaining to your claim, such as a police report, accident report or a contract. See attached Contract and GSWA final decision.
10. The lowest estimate of repair is Five Hundred Six Thousand, Four Hundred Eighty-Three Dollars and Thirty-Nine Cents (\$506,483.39)
11. I have the following insurance covering this claim: None.
12. I am the real party in interest except for the following parties who have an interest in this claim: N/A
13. I have received the following compensation/repairs from other parties: None on this claim.
14. Name, address, and telephone of attorney representing claimant, if any:
Phillip Torres, Esq., Torres Law Group, 130 Aspinall Avenue, Suite 2A, Hagåtña, Guam 96910;
Telephone: (671) 477-9891

All notices will be sent to your mailing address above or if you have an attorney, to your attorney's address. If you want to change the address at which you will receive notices you must file in writing a change of address with the Claims Officer.

I, Phillip Torres, counsel for Maeda Pacific Corporation, do hereby submit this claim on its behalf and declare under penalty of perjury that the foregoing is true and correct.

Dated: August 13, 2015.

Phillip Torres
PHILLIP TORRES, ESQ.
Attorneys for Claimant
TORRES LAW GROUP



ORIGINAL

5.0840

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 binding 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

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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

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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

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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

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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.

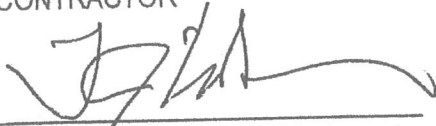
(d) In the event there is a violation in the process set forth in subsection (c) above, Contractor may be placed on probationary status by the Chief Procurement Officer of the General Services Agency, or its successor, for a period of one (1) year. During the probationary status, a contractor will not 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

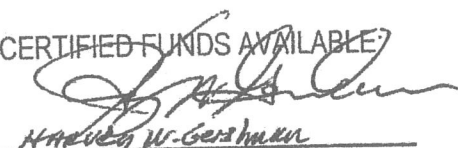
FOR THE GOVERNMENT OF GUAM



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: 11/1/12

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: 11/1/12

FORMAL CONTRACT

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

APPROVED:

LEONARDO M. RAPADAS
Attorney General, Guam

Date

EDDIE BAZA CALVO, Governor of Guam


Date

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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)



SOLID WASTE
MANAGEMENT
CONSULTANTS
R E C E I V E R

July 19, 2015

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 contract 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 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