

**OFFICE OF THE
PUBLIC AUDITOR
GOVERNMENT OF GUAM**

-o0o-

PUBLIC HEARING

**PROPOSAL RULES OF PROCEDURE FOR
PROCUREMENT APPEALS**

May 31, 2006

PREPARED BY: **GEORGE B. CASTRO**
DEPO RESOURCES
#49 Anacoco Lane, Nimitz Hill Estates
Piti, Guam 96915
Tel: (671)688-DEPO * Fax: (671)472-3094

**OFFICE OF THE
PUBLIC AUDITOR
GOVERNMENT OF GUAM**

-o0o-

PUBLIC HEARING

**PROPOSAL RULES OF PROCEDURE FOR
PROCUREMENT APPEALS**

May 31, 2006

Public hearing for the Proposed Amendments to Procurement Law and Procurement Regulations was taken on Tuesday, May 31, 2006 at the hour of 2:00 p.m., at the Office of the Public Auditor, Government of Guam, Suite 401 Pacific Daily News Building, 238 Archbishop Flores Street, Hagatna, Guam. That at said time and place there transpired the following:

APPEARANCES

Doris Flores Brooks	Public Auditor
Therese Terlaje, Esq.	Hearings Officer

DEPO RESOURCES

George B. Castro

COURT REPORTER

Tel.: (671)688-DEPO * Fax: (671)472-3094

ORAL TESTIMONIES

Anthony Camacho, Esq.

Counsel, Consolidated
Commission on Utilities,
Guam Power Authority,
and Guam Waterworks
Authority

Lou Perez

Director, Department of
Administration

Claudia Acfalle

Chief Procurement
Officer, DOA, General
Services Agency

DEPO RESOURCES

George B. Castro

COURT REPORTER

Tel.: (671)688-DEPO * Fax: (671)472-3094

1 **HAGATNA, GUAM, WEDNESDAY, MAY 31, 2006: 2:00 P.M.**

2

3

4 MS. BROOKS: Good afternoon everybody.
5 My name is Doris Flores Brooks and I would like
6 to officially call the public hearing on the
7 proposed procurement rules and regulations
8 under the Office of the Public Auditor.

9 We're here to gather testimony for the
10 public as to the proposed rules and
11 regulations. I'd like to just kind of give,
12 for the benefit more of the hearing, give a
13 little bit of background information of how
14 this came about.

15 Public Law 28-68, more commonly known
16 as the FY06 Budget Act, gave the responsibility
17 of procurement appeals to the Office of the
18 Public Auditor. Prior to that, there was a
19 Procurement Appeals Commission, however, the
20 Commission did not fully have members on board
21 and therefore it really was not in the position
22 to act formerly and take appeal.

23 So, in the interest of moving forward
24 into this very important area, the senators of
25 the 28th Guam Legislature designated the Office

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 of the Public Auditor to be the procurement
2 appeal. With that, they provided us separate
3 appropriation. This is a collateral
4 responsibility of the Office of the Public
5 Auditor.

6 And what we did was then hired an
7 attorney, Ms. Therese Terlaje. She has a lot
8 of experience. Therese came on board effective
9 March 1st. She brings with her, not only
10 private sector experience, but more
11 importantly, government sector experience,
12 having served for over a dozen years as the
13 majority as well as minority legal counsel of
14 the various Guam Legislature.

15 So, we're very pleased that Therese has
16 joined us. And with that -- let me just say,
17 our rules have been posted on the internet
18 since mid-May. And we are here to take
19 testimony. People can submit testimony in
20 person, in writing, via email. In fact, we
21 have received some testimonies thus far. And
22 we're here to seek additional testimony. And
23 with that, we'll open it up and I'll turn it
24 over now to Therese, who is officially the
25 Procurement Hearing Officer.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. TERLAJE: Thank you. Okay, for the
2 record, I'd just like to make some notes here.
3 And that is that, the notice for this hearing
4 was published on May 21 and May 26 in both the
5 PDN and Marianas Variety.

6 The notices for the hearing were also
7 delivered to the Governor, the Lieutenant
8 Governor and the Speaker, and all senators of
9 the Guam Legislature, the Guam Bar Association,
10 all agency heads of the government departments,
11 autonomous agencies and public corporations,
12 the Office of the Attorney General, the
13 Compiler of Laws, the Guam Contractor License
14 Board and the Policy Office.

15 Notice was also posted, as Doris said,
16 on the OPA website, www.guamopa.org, and the
17 public had the opportunity to review the rules
18 at the OPA Office or on the website since May
19 17.

20 Prior to this hearing, written comment
21 was submitted by Senator Tony Unpingco and
22 testimony was submitted via email by Phil
23 Isaac, Assistant AG; Sandra Cruz at Mair, Mair,
24 Spade & Thompson; Dana Gutierrez-Reyes of Mair,
25 Mair, Spade & Thompson; Serge Quenga at the

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 Compiler of Laws; and Vicki Renacia of UOG.

2 After today's hearing, we will continue
3 to take testimony for about seven days and then
4 we intend to transmit this to the Legislature.
5 So, after that, testimony should be transmitted
6 directly to the Legislature.

7 Those presenting oral testimony today
8 will be recorded so that we can make a
9 transcript of this hearing.

10 So, without further delay, we'll now
11 receive oral testimony from Mr. Anthony
12 Camacho. He also provided written notes. If
13 anybody would like a copy to follow along,
14 please come up here.

15 MS. BROOKS: And, Anthony, if you
16 wouldn't mind, for the record, just identify --
17 cite your full name and your position and then
18 go into your testimony.

19

20

21

TESTIMONY FROM ANTHONY CAMACHO

22

STAFF ATTORNEY FOR CCU, GPA and GWA

23

24

25

MR. CAMACHO: Yes. I'm Anthony
Camacho. I am a staff attorney for the CCU,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 the Guam Power Authority and the Guam
2 Waterworks Authority. And I'm testifying today
3 on behalf of those three agencies.

4 I first wanted to begin by commending
5 the Office of the Public Auditor for the great
6 work that's been undertaken. I've been in the
7 procurement, the practice of procurement law,
8 now for almost 10 years. This is the first
9 time that we had the administrative
10 adjudication part of procurement appeal
11 protest. And also on the short period of time
12 that you've had the authority to do this, the
13 creation of these rules, it just takes us light
14 years ahead and propels the practice of
15 procurement law exponentially.

16 And I want to thank the Office of the
17 Public Auditor and especially the new counsel
18 and the Procurement Hearing Officer for all the
19 fine work done on the rules.

20 I've reviewed the rules from back to
21 back, all 15 pages of them, including the
22 exhibits and the draft document. Some notes in
23 terms of -- some of my thoughts at least, in
24 Section 12102(a), which essentially describes
25 the jurisdiction of the Public Auditor.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 I note that this particular section
 2 closely tracks, if not identical to language to
 3 any OPA statute or enabling statute authorizing
 4 her to hear procurement appeals. However, the
 5 language, it states, "No prior determination
 6 shall be final and conclusive" as it applies to
 7 the agency.

8 There is language in other statutes
 9 though that states essentially that, some
 10 determinations made by the procurement officers
 11 of the heads of the agency are essentially
 12 final and conclusive, unless they are clearly
 13 erroneous, arbitrary, capricious or contrary to
 14 law. Which means that someone protesting those
 15 specific actions will have to make a showing
 16 that they were final, conclusive and erroneous,
 17 arbitrary, or contrary to law.

18 We simply ask that the OPA amend this
 19 particular section to harmonize those statutes
 20 by including that standard.

21 And, for the record, I know I hate
 22 regurgitating numbers off books, but it's
 23 stated in the -- I'm quoting 5 GCA, Section
 24 5480 and also 5 GCA, Section 5703 -- or,
 25 correction, 5 GCA, Section 5480(b), which talks

1 about limited finality for administrative
2 determination.

3 And this comes with a statute that
4 essentially waives sovereign immunity in
5 connection with the contracts. So, this
6 essentially authorizes members of the public to
7 protest procurement actions made by the
8 Government of Guam and the autonomous agencies
9 or public corporations.

10 And essentially the specific decisions
11 here that have that type of finality or
12 decisions concerning requirement for bid
13 security, whenever a procurement officer makes
14 a determination that no requirement for a
15 performance bond in a solicitation or when a
16 procurement officer makes a sole source
17 procurement determination, or when there is a
18 determination for emergency procurement, or
19 when there is a determination of best qualified
20 professional and competitive selection
21 procedures for procurement.

22 Also when there is a determination of
23 non-responsibility or whether the determination
24 calls for proprietary data from a contractor
25 not be required. Likewise, when there is a

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 determination of a type of contractor to be
2 used, or when there is a determination of
3 approval of contractor's accounting system, or
4 when there's a determination to use both of
5 your contract.

6 In this particular statute, we simply
7 ask that that language, that these types of
8 determinations are final and conclusive unless
9 they're clearly erroneous, contrary to
10 arbitrary, capricious or contrary law, be added
11 in there, just to harmonize all the existing
12 statutes. I think we have those -- we have
13 those anyway.

14 MS. BROOKS: Just as a point of
15 clarification, translate -- (laughter) -- into
16 simple language.

17 MS. TERLAJE: I think, and, yeah,
18 Anthony can correct me if I'm overstating here.
19 But, we set a standard that, no prior
20 determinations are final or conclusive. His
21 comment is that, by statute, there are some
22 determinations made by the agency or the
23 procuring officer that should be final and
24 conclusive unless erroneous, arbitrary,
25 capricious, or contrary to law.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 And I think we can harmonize these, as
2 he has asked to do, by stating these exceptions
3 and stating a different standard for these
4 types of procurement, review of these
5 determinations -- or, just recognizing them,
6 that these exist and that we should follow the
7 law.

8 MR. CAMACHO: Now bear with me, that's
9 all related to a larger, legal theory of review
10 of agency determinations. Okay? Basically,
11 those are sovereign immunity -- certainly not
12 to argue in the wee hours of the night, so.

13 MS. BROOKS: But, let me just ask this
14 question, because I come here more as a lay
15 person, and for, let's say, an appellant who
16 disagrees with, let's say, a ruling or
17 determination made to a Vendor, that appellant
18 might view the decision as erroneous or
19 arbitrary or capricious. And, whose burden of
20 proof then is it to decide this?

21 Because from his lay perspective, not
22 knowing all the details, the mere fact that he
23 lost this, he might be of a different set that
24 the decision made was already erroneous or was
25 capricious because, let's say, Vendor A always

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 gets the contract and he's trying to bid on the
2 contract and he still didn't get it. Do you
3 follow what I mean?

4 MR. CAMACHO: Yes, I do.

5 MS. BROOKS: So, how do we distinguish
6 that? Because to the vendor's mind that --

7 MS. TERLAJE: What the statute means is
8 that, the vendors would have to claim that
9 that's true, that it was erroneous or
10 capricious. That that would have to be one of
11 their allegations. If they just said it was
12 wrong, possibly that wouldn't go anywhere. But
13 they'd have to make one of these allegations.
14 And then we have to determine if that's
15 correct.

16 MS. BROOKS: Uh-huh, okay.

17 MS. TERLAJE: Yeah, whether it was
18 erroneous.

19 MR. CAMACHO: Like maybe "aggrieved",
20 okay, "by solicitation or award of a contract,
21 by the protest, or by the Appeal, and who filed
22 a protest or Appeal".

23 MS. BROOKS: That's where he's
24 proposing "or" to "and"?

25 MS. TERLAJE: We review that again, the

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 agency should review that during the protest.

2 MR. CAMACHO: Yeah, that's very
3 important for an agency to respond. For
4 example, if the protestor says, well, it's
5 contrary to law and nothing else. So, okay,
6 well, how do I answer that?

7 MS. TERLAJE: Right.

8 MR. CAMACHO: Do we have to go through
9 ever single law that applies and show how it
10 applies? Or, you know, if they're alleging
11 that, you know, we violated a law somehow, they
12 should at least make a showing, violated this
13 statute.

14 MS. BROOKS: Okay. That's rather than
15 a broad brush?

16 MR. CAMACHO: Yeah. And likewise, if
17 they're saying it's arbitrary and capricious,
18 well, there are different ways to respond to
19 that as an agency. And it would help us, you
20 know, from an agency perspective if we knew
21 exactly which of these, particular
22 determinations --

23 Well, you say it's wrong. Why do you
24 think it's wrong? And if it's one of these, at
25 least that allows us to answer more

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 specifically. And it will also make for a more
2 expedited hearing. I know we make all these
3 motions for clarifications or, you know, you
4 can't respond to it if you have no information.

5 MS. BROOKS: So what I hear you saying
6 is, you would like the appellant or the vendor
7 who did not get the award to be more specific
8 as to his alleged wrong?

9 MR. CAMACHO: Well, that's correct.
10 Generally --

11 MS. BROOKS: Other than just say, I
12 didn't get it or I know it was done unfairly.

13 MR. CAMACHO: The procurement law
14 states that a protest has to be in a certain
15 form, when it gets to our level.

16 MS. BROOKS: Yes, yeah .

17 MR. CAMACHO: What ever gets to your
18 office. For example, they have to state the
19 grounds of their protest.

20 MS. BROOKS: Right.

21 MR. CAMACHO: And in doing that,
22 they'll -- I guess by the time it gets to your
23 level, they should clearly state whether or not
24 a final determination is arbitrary, capricious,
25 contrary to law, so on and so forth.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: Okay.

2 MR. CAMACHO: You talked a little bit
3 about burden of proof. I was going to get to
4 that as we go on. But for now, I'm just going
5 to continue on here.

6 I crossed out Section 12102(b), simply
7 because that was there erroneously that closely
8 tracks language of the statute. So, we have no
9 issue with that.

10 12103(b), I believe there's a
11 grammatical error; 12103(b). And that is where
12 it defines Interested Party. It would just
13 make more sense if the fourth sentence be --
14 the "or". It should be "and".

15 MS. BROOKS: Right before number 2?

16 MR. CAMACHO: Yeah, right before number
17 2.

18 MS. TERLAJE: Okay. Well, that makes a
19 big difference.

20 MR. CAMACHO: Yeah, well, it does, but
21 it just makes more sense that way.

22 MS. TERLAJE: Okay.

23 MR. CAMACHO: Like maybe "aggrieved",
24 okay "by the solicitation or award of a
25 contract, by the protest, or by the Appeal, and

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 who filed a protest or Appeal".

2 MS. BROOKS: That word "or" to be
3 "and"?

4 MS. TERLAJE: Yeah. Okay.

5 MS. BROOKS: So, they have to do "1"
6 and "2" as opposed to "1" or "2"?

7 MR. CAMACHO: That's correct.

8 MS. TERLAJE: Correct, definitely.

9 MR. CAMACHO: Well, here --

10 MS. BROOKS: And by putting in "and",
11 is that making it harder for the appellant as
12 opposed to easier?

13 MR. CAMACHO: Well, it makes -- it
14 clearly identifies --

15 MS. BROOKS: Because you have to have
16 two things to comply as opposed to one thing.

17 MR. CAMACHO: Well, that goes to --
18 okay. Generally, one of the things I see with
19 the rule, I'll discuss this later in certain
20 section, is that, it's kind of expansive what
21 it allows an interested party to do things like
22 file a rebuttal, present evidence. The reason
23 being is, you can then define interested party
24 broadly and you bring in people who didn't file
25 a protest. One of the defenses is, you didn't

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 file your protest in accordance with the
2 statute, you have no standing in the hearing to
3 decide the protest. It's another story if one
4 of the parties, either the protester or the
5 agency, subpoenas another interested party,
6 like another bidder for example, to come forth
7 with any testimony.

8 But, I don't believe that allowing an
9 interested party and just tell them who submits
10 a bid but the 14 days goes back from the
11 action. If they don't file a protest to have a
12 second bite at the apple, like, oh, okay, this
13 other guy filed a protest -- so I'm going to
14 take advantage of his timeliness and his work
15 and submit my rebuttal to whatever the agency's
16 doing. There's a fundamental fairness issue
17 there. Likewise, there's also a due process
18 issue there. A protester is fully defined when
19 he files an appeal. Interested party, I guess,
20 in the -- as defined here is very broad. It's
21 anyone who has an interest in the solicitation
22 or the award of the contract.

23 Basically, if there's 10 bidders and
24 only one files a protest, the way this is
25 worded and in combination with the other

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 sections you have here would allow all the
2 bidders, for example, to submit rebuttals to
3 the agency's response to the protest instead of
4 just the protestor -- that's the way the other
5 statutes read.

6 MS. TERLAJE: That is how it reads. I
7 understand. I understand your point. It's
8 also been made by some of the other
9 testimonies.

10 MS. BROOKS: So, let's see. Is that
11 good or bad? (laughter)

12 MR. CAMACHO: That is interesting --

13 MS. BROOKS: But it's good for the
14 public, right?

15 MS. TERLAJE: The other, I guess, issue
16 that was raised is that that allows other
17 bidders who have not protested to gain access
18 possibly to negotiation --

19 MR. CAMACHO: An administrative --

20 MS. TERLAJE: or materials that they
21 weren't normally going to access.

22 MR. CAMACHO: That's correct too.

23 MS. TERLAJE: Well, we'll consider
24 those.

25 MR. CAMACHO: We'd ask that that, you

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 know, if interested parties is going to be
2 expanded in this way that the parties not be
3 allowed to participate in the hearing unless
4 they're specifically subpoenaed by one of the
5 parties or by the OPA.

6 MS. BROOKS: Okay. Point well taken,
7 thank you.

8 MR. CAMACHO: And going on, in Section
9 12104(b)(6), which concerns contract disputes.
10 Essentially, I noted that if the OPA -- you
11 know, I know that the statute allows the OPA to
12 hear the appeals of final determinations for
13 contract disputes.

14 I noted that there are a couple other
15 sections of the existing administrative
16 regulations or procurement regulations that
17 will require amendment to harmonize the OPA's
18 power. For example, in 2 GAR Division 4
19 Chapter 9, Section 9103, Subsection (d)(2)(e),
20 please bear with me, that's just the --

21 MS. BROOKS: Yes, uh-huh.

22 MR. CAMACHO: For contract dispute,
23 before the notice of final decision by a
24 procurement officer must include the statement,
25 you may obtain judicial review of this decision

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 by -- in fact, reading it at the beginning --
2 beginning an action in the Superior Court of
3 Guam. I recommend that that be amended also to
4 state: By beginning an action with the Office
5 of the Public Auditor.

6 MS. BROOKS: Yeah, we made note of
7 that.

8 MR. CAMACHO: And then the other one
9 is, 2 GAR our Division 4 Chapter 9, Section
10 9103, Subsection (g)(3)(i). It requires a
11 mandatory dispute clause be in every government
12 contract. Okay? And that clause, the
13 mandatory clause, states that the decision --
14 this is for contract disputes now -- the
15 decision of the procurement officer, final,
16 conclusive unless fraudulent or the contractor
17 brings an action seeking judicial review of the
18 decision of the Superior Court of Guam.

19 That last section should be amended to
20 read: Seeking administrative review of the
21 decision of the Office of the Public Auditor.
22 Just so there's no issues there that it clearly
23 just -- it brings these two statutes of
24 regulations up to date.

25 MS. TERLAJE: These sets of regulations

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 that you're recommending, we intend to write a
2 letter to Legislature and tell them what has
3 been pointed out to be inconsistent in other
4 regs or in the law also that need to be fixed.
5 Of course, we've been very limited in here --

6 MR. CAMACHO: Oh, yeah.

7 MS. TERLAJE: -- in this public
8 hearing, so. But, we'll take all of these,
9 we'll include them when we submit it to the
10 Legislature.

11 MR. CAMACHO: I just know these two
12 conflicts --

13 MS. TERLAJE: Sure.

14 MR. CAMACHO: -- do exits and it's
15 certainly not the OPA's fault -- other statutes
16 and regs.

17 MS. BROOKS: Well, we appreciate you
18 pointing it out. Thank you.

19 MR. CAMACHO: And then, Section
20 12104(c)(2), where it talks about the head of
21 the purchasing agency, shall furnish copies of
22 the appeal documents to interested parties,
23 bidders or offerors, which are essentially
24 bidders or offerors, with instructions to
25 communicate further directly with the Public

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 Auditor. That goes to including all interested
2 parties to have a say, you know, kind of like -
3 -

4 MS. BROOKS: Yeah.

5 MR. CAMACHO: The other problem is, it
6 kind of conflicts with the existing procurement
7 statutes and regulations which require, I
8 guess, the agencies to identify the procurement
9 officer. Okay?

10 So, if it's an ongoing procurement, and
11 there is a protest and it's at the OPA level,
12 but they have, I guess, a question generally
13 about the procurement, they should still direct
14 their inquires to the procurement officer. If
15 they have a question or inquiry concerning the
16 procurement appeal, certainly that is one thing
17 the OPA should be answering.

18 MS. BROOKS: Yeah.

19 MR. CAMACHO: So, I ask that that be a
20 little specified, that that be specified and
21 limited to the inquiries concerning the status
22 of the appeal.

23 MS. BROOKS: Appeal. Yeah.

24 MR. CAMACHO: In a lot of cases, you're
25 going to have appeals where the procurement

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 action is still pending, and certainly we still
2 want to preserve the integrity of the
3 procurement process for those procurement
4 actions. And this goes to the other statutes
5 which require, for example, procurement officer
6 to keep a log of all communications with the
7 bidder and so on and so forth. It also helps
8 for our record keeping as far as procurement
9 goes or the procurement itself that they still
10 are being made to communicate with the
11 procurement officer.

12 12104(c)(3): This is essentially --
13 after the procurement appeal to the OPA. Then
14 the head of the purchasing agency may file a
15 Detailed Agency Report. So, I guess it's one
16 of semantics. For most lawyers, they're used
17 to complaint and an answer. Okay? Detailed
18 Agency Report is in essence our answer, the
19 agency's answer, to the appeal itself.

20 I ask the Detailed Agency Report should
21 be amended to read "Answer". That's all.
22 Because everybody knows what an answer is.

23 MS. BROOKS: Okay.

24 MR. CAMACHO: And Detailed Agency
25 Report, like I said, it's just a matter of

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 semantics. We have a preference for answer.

2 And the other problem we had was the
3 requirement that the agency respond to the
4 appeal within five working days after receiving
5 the notice of the appeal.

6 The OPA, I guess, is required to decide
7 these impartially. Okay? Meaning to say they
8 neither favor either party, if they want to
9 decide it in accordance with the law and with
10 the existing right of the parties.

11 This kind of makes it very difficult
12 and very challenging for the agency to respond
13 to a protest. And the reason why is, the
14 appellant. Essentially for a protest, a
15 solicitation or award of a contract has 14 days
16 under the law to get their stuff together and
17 actually file that complaint. That's 14 days
18 of work. Likewise, for a debarment or
19 suspension proceedings. The appellant would
20 have 60 days to prepare that complaint. And
21 for a contractor or breach of contract
22 controversy, that's another 60 days for them to
23 prepare the complaint.

24 Some of those procurement actions are
25 very complex, at least for GPA and GWA,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 especially when they involve construction.
2 Okay? They're not simple bids. They're not
3 simplistic contracts. And they involve
4 sometimes millions, millions of dollars.

5 For us to respond to something that the
6 other party had 14 days or 60 days to prepare
7 and give us only 5 days to come up with a
8 response is very challenging and it's -- this,
9 in our opinion, it would be very difficult for
10 us to do that.

11 MS. BROOKS: What are you proposing
12 then?

13 MR. CAMACHO: I propose that it at
14 least match the period of time that the
15 appellant has to prepare their actual claim.
16 At a minimum, few weeks. But I ask those
17 especially for the contract and a breach of
18 contract controversy, that we be allowed at
19 least 60 days to respond.

20 MS. BROOKS: I know there was a concern
21 raised by the University in that area.

22 MS. TERLAJE: Yeah, they were
23 requesting 10 days.

24 MS. BROOKS: They were requesting 10
25 days at least.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. TERLAJE: Yeah, I'll tell you, I
2 mirrored this after other jurisdiction, because
3 -- I guess, in my thinking, the agency that is
4 supposed to be preparing this report is also
5 the same agency that had already written the
6 decision on the protest. So, I assume they
7 should have all their things ready to go.

8 There may be other issues that, you
9 know, are thrown into the appeal that weren't
10 there and you'd have to answer that somehow.
11 But, for the most part, you've got the record
12 of the procurement, the record of the protest,
13 and you've got -- your decision on the protest
14 has to be based on something, so all those back
15 up documents should be available.

16 MR. CAMACHO: Well, it goes beyond
17 that. We're not just -- it's not like the
18 Sunshine Act request where we are just
19 providing documents. I mean, that's fairly
20 easy -- find them and you deliver.

21 Now, it's also responding to
22 allegations. For example, if they are alleging
23 that our action's arbitrary and capricious or
24 contrary to law. We're going to have to hit
25 the books, do a research, and at least, in our

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 response say, well, according to this precedent
2 and this, this is why it's law. This is why we
3 did what we did in that case. And that takes -
4 - legal research does take some time.

5 So we're not just providing documents
6 here, we're also making a legal response,
7 making a legal answer, to the challenge to our
8 action. So, we require a little longer. And
9 we simply ask for more time, especially in the
10 case for contract dispute. The reason being
11 is, the only interested parties are the agency
12 and the contractor. Its already been awarded
13 the contract. And it's usually a dispute about
14 timing -- or about, you know, particular rights
15 that they may have or think they have or breach
16 of contract, so.

17 Yeah, so we ask, especially for
18 contract disputes, we ask for 60 days to
19 respond to those, just like they have 60 days -
20 - just like the appellant would have 60 days to
21 file his onerous response.

22 In the Superior Court of Guam, for
23 example, in judicial review, you would have 60
24 days to respond to the complaint.

25 MS. BROOKS: I'm, again, just going to

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 interject my own thinking. When you say
2 judicial -- you know, the whole purpose of
3 going through here is to make the process less
4 onerous, less judicial. Kind of an expedited
5 matter so that things don't have to be really
6 as, you know, in the exact format as the way
7 you would prepare a brief.

8 I'm just thinking out of what I kind of
9 envision this, that this would be a simplified
10 way of trying to decide something without all
11 of the formality of a judicial review. And I
12 could be wrong in how I envision this. But
13 that was the whole idea, so that it would be
14 less costly for both the appealing parties as
15 well as for the government entity, as opposed
16 to, you know, going to court where you have to
17 do all -- and, maybe I'm just a little bit --
18 my thought process and maybe actuality might be
19 a little bit -- you know, in conflict.

20 MR. CAMACHO: For GPA and GWA
21 especially, yeah. The protest or the appeal
22 will mostly likely be prepared by an attorney.
23 It will be a legal document. These are big
24 companies --

25 MS. BROOKS: I recognize -- yes, I --

1 MR. CAMACHO: -- they're going to have
2 an advantage if they have 60 days. And we only
3 have five to respond to this. What will
4 probably end up with is a fairly large appeal,
5 very clearly stating their legal ground. And
6 to give us five days to respond to that is not
7 very realistic in terms of GPA and GWA. Maybe
8 for some of the smaller agencies where it's a
9 simpler type of procurement.

10 MS. BROOKS: Yeah. And then you have
11 to differentiate as to either at the dollar
12 level or something that -- you know, because
13 the whole idea, at least my envisioning of
14 this, is to make it simple so that we're not
15 using lawyers to lawyers and in each side
16 incurring additional costs to do this. I mean,
17 that was really kind of like a layman's way of
18 filing an appeal that doesn't have to have all
19 the legal language.

20 MS. TERLAJE: I think, in theory,
21 right...

22 MS. BROOKS: In theory.

23 MS. TERLAJE: ...these rules are written
24 like that, and the rules before these were
25 written like that. But in reality, nowadays,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 yeah, most of these contractors hire lawyers
2 and the appeal, the protest themselves have
3 become very judicial like.

4 MR. CAMACHO: Yes, it's very -- very
5 complex, for GPA and GWA at least --

6 MS. TERLAJE: Well, I expect that. And
7 we'll consider the five days, because that's
8 also been another point that's been brought up
9 to us, but I'd like to get everybody's
10 testimony on that.

11 MR. CAMACHO: And then going on, 12104
12 (c)(4) -- and this is where I kind of hinted on
13 this before. This is kind of expansive because
14 it allows rebuttals by interested parties.
15 Interested parties who didn't file a protest.

16 MS. BROOKS: Yes, yes.

17 MR. CAMACHO: I've already --

18 MS. BROOKS: Right.

19 MR. CAMACHO: I've already stated that
20 before. This is the one that really needs to
21 be -- rebuttal to the agency's report (sic) as
22 far as the answer really should be limited to
23 the protestor not another party, although
24 interested, who didn't file a protest. Because
25 they essentially, I'm making on due process or

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 standing ground. It really lacks standing
2 essentially to participate in a hearing without
3 filing a protest.

4 MS. BROOKS: But if we were to cure
5 your earlier one about the two requirements, 1
6 and 2, then that would eliminate who could be
7 an interested party?

8 MR. CAMACHO: Yes. Or, you could keep
9 that there but change this statute and --

10 MS. BROOKS: Right.

11 MR. CAMACHO: -- say, only the
12 appellant could file a rebuttal. Going on,
13 real quick. 12104(c)(8); this says that after
14 notice of appeal to the Public Auditor has been
15 filed by the head of the purchasing agency. I
16 believe that this is another typo or --

17 Essentially, it's not -- for appeal,
18 okay? The contractor would be the one to file
19 the appeal because it's the agency that makes
20 the final action. And it's the contractor who
21 appeals that action to the OPA, so I think that
22 this particular section should be revised to
23 read "contractor".

24 MS. TERLAJE: Yes. If I can just
25 comment on that. I totally agree with you.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 That's why I put the source here, because I
2 just had to mirror the statute language. I
3 think the statute itself is identical and it's
4 off, yeah.

5 So, I want to leave it in since that's
6 the way the statute reads, we pointed out to
7 the Legislature that, you know, this doesn't
8 really make that much sense. And we'll put
9 your comments in as well. Hopefully then they
10 can make the amendment to the statute.

11 MS. BROOKS: Okay.

12 MR. CAMACHO: Yeah but these are your
13 regulations. You have the authority to --

14 MS. TERLAJE: Amend.

15 MR. CAMACHO: -- make it clear. I
16 mean, and make them amendable?

17 MS. TERLAJE: Then again -- that will
18 be saying the opposite of what the statute said
19 or at least that's what we think it says.

20 MR. CAMACHO: I still submit that --
21 it's just my humble opinion.

22 MS. TERLAJE: Go ahead.

23 MR. CAMACHO: With the rule making
24 authority, you have the opportunity to correct
25 that error that exist --

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: Rather than perpetuate the
2 error in the rules. That's a valid point.
3 Okay.

4 MR. CAMACHO: I leave it up to your
5 discretion.

6 MS. BROOKS: Sure.

7 MR. CAMACHO: Pointing out though.

8 MS. TERLAJE: Okay. That's a good
9 point.

10 MR. CAMACHO: And then, in 12105(b),
11 Agency Reports, where it talks about submitting
12 or -- yeah, one of the things you're suppose to
13 submit, or one of the things the agency is
14 suppose to submit as part of its answer is a
15 copy of the appellant's bid.

16 The problem we had is that, under the
17 Guam Procurement Law and Guam Procurement
18 Regulations, information, specifically bids,
19 can only be released at certain times. Okay?

20 For example, in a sealed bid, the
21 bidder that bid that -- the bidder's abstract,
22 for example, isn't released until after the
23 award of the bid. Likewise, of all the bids,
24 only the bidder who is awarded the contract,
25 that's the only bid that's subject to public

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 release. And all the other bids are not.

2 And the reason that -- that is
3 basically to preserve the integrity of the
4 procurement process. So -- and I understand
5 also that, I guess, the public -- the OPA has a
6 valid interest in seeing the copy of the bid.
7 But in other sections here, it says that -- you
8 know, all their stuff is provided to OPA as
9 public information.

10 Something should be inserted here
11 stating that, if the contract hasn't been
12 awarded or it's under procurement law, it
13 wouldn't be disclosed, even -- (pauses; to
14 answer cell phone).

15 MS. TERLAJE: Anthony, what about
16 Section 12106? Do you think that doesn't
17 adequately address that concern?

18 MR. CAMACHO: (pauses; peruses
19 document)

20 MS. TERLAJE: Required to be withheld
21 by law or regulation.

22 MR. CAMACHO: You could cite that in
23 there, but at the same time, in handling the
24 records, I'm trying to make it clear that -- in
25 our interest especially, and especially bids,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 and if it's a pending -- especially if no award
2 has been made. Okay?

3 MS. BROOKS: But if I understand your
4 concern, let me just, again, I want to put it
5 for the benefit of the group here as well as
6 myself, who is not a lawyer. Okay?

7 You're asking that, if the bid has not
8 been awarded, that the details of the bid not
9 be opened for public scrutiny?

10 MR. CAMACHO: That's correct, yes.

11 MS. BROOKS: Or public disclosure?

12 MR. CAMACHO: Or, at least that it be -
13 - the procurement rules and statutes state that
14 they're not suppose to publicly disclose this
15 part of the bid documents or the procurement
16 file, that they not be publicly disclosed. But
17 certainly if the OPA wants to look at them, by
18 law I believe you can.

19 MS. BROOKS: Because I do believe there
20 is something -- we have already addressed it,
21 where there is information that is proprietary
22 in nature. Right? I think that's your
23 concern.

24 MR. CAMACHO: Yes.

25 MS. BROOKS: Okay. The proprietary in

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 nature still remains proprietary in nature.
2 And I think there is something in the rules
3 that we're proposing that the protester, right,
4 has to identify that portion that is
5 proprietary in nature, if I'm not mistaken.
6 So, the burden of proof, I guess, really
7 belongs on the bidder or the person that -- you
8 know, because we even have that in other areas
9 that identify this is -- and it's not to be
10 revealed at any time.

11 MR. CAMACHO: I think your tape
12 stopped.

13 MS. BROOKS: We'll take a moment to
14 change our -- (pauses).

15 MS. TERLAJE: Your concern is, is the
16 agency handling of the documents?

17 MR. CAMACHO: That's correct.
18 Essentially, if we're going to be disclosing
19 information of the previous procurement file to
20 the OPA, those portions which are not available
21 for public release clearly have to be
22 identified as --

23 MS. BROOKS: Right.

24 MR. CAMACHO: -- made very clear that
25 they're not for public disclosure.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: Right.

2 MR. CAMACHO: Although to decide to
3 protest, certainly I will not doubt your
4 jurisdiction to review them.

5 MS. BROOKS: Uh-huh.

6 MR. CAMACHO: Just so that --
7 otherwise, if they are publicly disclosed,
8 what's bad for the agency is, that essentially
9 jeopardizes the entire procurement action. And
10 then whenever the protest is resolve one way or
11 the other, we have to go back and start it all
12 over again, because, let's say that --

13 MS. BROOKS: And they already know the
14 --

15 MR. CAMACHO: All information is out
16 and they can't compete. They can no longer
17 adequately compete because everybody knows what
18 everybody's bid is.

19 MS. BROOKS: Right.

20 MR. CAMACHO: Then there are a lot of
21 problems, so.

22 MS. TERLAJE: Would it be satisfactory
23 to add a provision right here in the Agency
24 Report section that says that, you the agency
25 shall mark those types of documents or

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 information and that --

2 MR. CAMACHO: Yeah, we cite all --

3 MS. TERLAJE: -- we are not allowed to
4 release that -- I mean, we'll have to put that
5 in all different sections here probably --

6 MR. CAMACHO: Pursuant to the law.

7 MS. BROOKS: Right. So, put the burden
8 on the agency to tell us.

9 MR. CAMACHO: We could -- yes.

10 MS. TERLAJE: On things that they're
11 submitting --

12 MR. CAMACHO: Now the protester could,
13 if they submit their documents, the agency
14 action -- the statute really applies to the
15 agency. The agency, you know, you will not,
16 for example, release any information, you know,
17 in a proposal, an RFP, to anybody else. And
18 only the proposal or the operator who gets
19 awarded the contract, only that proposal gets
20 publicly release. Nobody else gets released.
21 Stuff like that, you know.

22 MS. BROOKS: So, going back to what
23 Therese said. If we put the burden on the
24 agency to decide what should be --

25 MR. CAMACHO: Yeah, we can --

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: -- citing whatever rule or
2 law that allows you to do that. And then we'll
3 take that into consideration?

4 MR. CAMACHO: Yes.

5 MS. BROOKS: Okay.

6 MR. CAMACHO: We can certainly do that
7 as part of an answer.

8 MS. BROOKS: All right; okay. Good.
9 Your comments are good so far. Thank you.

10 MR. CAMACHO: Sorry I'm taking so much
11 of your time.

12 MS. BROOKS: No. This is a long
13 process and I think, you know, that -- and I
14 apologize -- we'll give you opportunity, but I
15 think, you know -- we're not going to get this
16 all right the first time. And we envision that
17 over time, you know, it will improve. But,
18 where we can get a lot of the input and
19 feedback from the entity, we appreciate that.
20 And, Anthony, we appreciate you taking the time
21 to review this. So, thank you.

22 MR. CAMACHO: Okay. And then,
23 12105(d), that -- same thing, when we talk
24 about the bid abstract --

25 MS. BROOKS: Right, yes.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MR. CAMACHO: -- to a certain extent.
2 12107(b); this particular section talks about
3 Ex Parte Communications with the OPA. Or,
4 generally, you know, communications with the
5 OPA by the party.

6 MS. BROOKS: Right.

7 MR. CAMACHO: The agency and the
8 appellant or the protester. Essentially, if
9 the OPA and the staff, when they entertain
10 questions or complaints, that we simply ask
11 that a provision be added that such questions
12 or complaints in any OPA responses should be
13 disclosed to the other parties in the appeal.
14 That's all.

15 MS. TERLAJE: Yes, that makes sense.

16 MS. BROOKS: That has relevance to this
17 case.

18 MR. CAMACHO: Yes.

19 MS. BROOKS: Not necessarily -- because
20 we get a lot of other issues that aren't --

21 MR. CAMACHO: Oh, no. Only those --

22 MS. BROOKS: Relevant to this too --
23 well, okay.

24 MR. CAMACHO: And Guam's small, we
25 can't get away with, you know, blanket

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 provision. In Section 12108(a), where it talks
2 about hearing officers will determine whether
3 hearing is necessary for resolution of the
4 appeal. It's our position that, due process
5 mandates that a hearing is mandatory if
6 requested by one of the parties.

7 I believe, for example, a protester or
8 even the agency, if they demand a hearing, I
9 believe the Organic Act of Guam would require,
10 as part of the administrative review, that that
11 party requesting a hearing be granted a hearing
12 before any official decision is made on the
13 appeal. It shouldn't be left up to the
14 discretion of the hearing officer.

15 And that's essentially part of the due
16 process clause of the Organic Act, that states
17 that, you know, no -- or, basically the
18 fundamental rights of the -- the fundamental
19 rights are at risk by some government action,
20 the government can't take action unless a
21 party's been afforded right to notice and a
22 hearing to respond to such action.

23 Here, as written, if the hearing
24 officer says, well, I'm just not going to grant
25 you a hearing, for whatever reason, I believe

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 that would lead to due process -- or, due
2 process argument -- that's wrong.

3 You have a fundamental -- it's our
4 position that the agency and a protester has
5 the fundamental right to a hearing. You know,
6 if they requested it, it's mandatory.

7 MS. BROOKS: Okay. You raise a valid
8 point. What are you proposing?

9 MR. CAMACHO: That it just, that part
10 where it says, hearing officer will determine -
11 -

12 MS. BROOKS: Okay.

13 MR. CAMACHO: -- whether a hearing is
14 necessary for resolution of appeal be deleted.

15 MS. TERLAJE: I agree with you. I just
16 -

17 MR. CAMACHO: Or, unless -

18 MS. TERLAJE: -- think it -- yeah.

19 MR. CAMACHO: Unless the parties -- and
20 I think it's, you waive your right to a
21 hearing.

22 MS. BROOKS: Okay.

23 MS. TERLAJE: We can put that language
24 in about the waiving your right to a hearing.
25 And that would probably address that.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MR. CAMACHO: Yeah. And I submit, you
2 know, probably --

3 MS. TERLAJE: I think it would, yeah,
4 intended that, if no one requests a hearing, no
5 hearing is necessary. But, we'll revert to --
6 put waiver right to a hearing. That should
7 address your concern.

8 MR. CAMACHO: Yeah. And I also go on
9 to recommend that you have a specific form for
10 doing so. You know, it's just like --

11 MS. TERLAJE: Right.

12 MR. CAMACHO: -- so there's no question
13 later on. In 12108(d), Hearing Proceedings.
14 This goes to your first question when you said,
15 what's the burden of proof. Well, it says that
16 you're not following the evidentiary
17 guidelines. You know, these are informal
18 proceedings and expedited proceedings. But, I
19 guess, here where it just says, "The weight to
20 be attached to evidence presented in any
21 particular form will be within the discretion
22 of the hearing officer."

23 That's kind of a very broad -- broad
24 brush. Really, there's no identification of
25 who has the burden of proof. And, I guess, if

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 you're going to leave that language as is, I'd
2 ask that you follow the Supreme Court of the
3 United States decision Chevron versus NRDC.
4 That's 487 U.S. 837, where it says that,
5 "Deference should be given to an agency's
6 interpretation of the law if it is reasonable."
7 That's essentially the reasonableness test.

8 Essentially if we interpret the
9 procurement statute and regulation one way, and
10 it's reasonable, some deference needs to be
11 given to that, because we're the one, or the
12 agency's are the one that have to enact the
13 statute and implement it on a day-to-day basis.

14 MS. BROOKS: I understand your comment,
15 but where in (b) needs to change? Because the
16 weight to be attached to the evidence presented
17 is within the discretion... So, where in
18 12108(b) would we make the change? Because we
19 say in here it shall be informal, the testimony
20 shall be written, the weight, the attached --

21 MS. TERLAJE: I think that this is --
22 what you're referring to in the Chevron case,
23 if that's going to be included, it's going to
24 have to go somewhere else. Not necessarily
25 towards how the evidence's going to be

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 reviewed, but interpretation of the law; right?

2 MR. CAMACHO: Yeah, or you could just
3 say, you know, deference be given to the
4 agency's interpretation of law, if it's
5 reasonable. That's all. I guess, if you're
6 really going to the Chevron case, they have
7 very specific, you know -- there's a very
8 specific definition of the reasonableness test.
9 Which is -- which is accepted on Guam and the
10 other 50 states and territories. And then in -
11 -

12 MS. BROOKS: But going back to (d)
13 then, you're just making a statement that we
14 should consider that, but you're not proposing
15 any change in the proposed rules?

16 MR. CAMACHO: I'd actually request that
17 some statement --

18 MS. BROOKS: Be added.

19 MR. CAMACHO: Yeah, hopefully tracking
20 that language.

21 MS. BROOKS: Okay.

22 MR. CAMACHO: Deference should be given
23 to agency's interpretation of law if it's
24 reasonable.

25 MS. BROOKS: Okay; statement be added.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MR. CAMACHO: You could put in there,
2 either -- you know, the last sentence in the
3 paragraph, or a different section altogether.

4 MS. BROOKS: Okay.

5 MR. CAMACHO: And then, 12108(h),
6 Disclosure. Once again, I already discussed
7 that, you know, in terms of parts that are
8 terms are not discloseable at certain times.

9 And then 12109(h)(1); when you talk
10 about sanctions, disobedient parties,
11 essentially parties that are not listening to
12 the orders of the OPA. I believe that where --
13 instead of the language where it states,
14 "refusing to allow disobedient party to support
15 or oppose designated claim to defenses, it
16 should be -- basically, I think, there's
17 sanctions that talk about dismissal of the
18 action or dismissal of their defense. That's
19 just a matter of semantics though. That's all.

20 The sanction of dismissal in court, for
21 example, is very well recognized. Likewise,
22 you know, the sanction of dismissal at your
23 level will also be -- also recognized.

24 12501(a), this is my last one. This is
25 essentially -- 12501(a), that implies to -- in

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 fact, I'm trying to put it in layman's terms
2 here. When a protest is filed, the agency can
3 make a determination to proceed with the award
4 of the contract that despite the protest,
5 essentially, you know, there's no staying if
6 the significant interest of the territory are
7 at stake.

8 And, here, in -- and that comes from
9 5GSA, Section 5425(g). The regulation is a
10 little expansive here, because we go to the
11 statute. The statute says that, only the party
12 essentially who -- only the protestor need be
13 given notice of that type of determination.
14 And that ostensibly allows the protestor then
15 to go to court or go to the OPA and file the
16 appropriate documents to oppose that.

17 Here, once again, there would be
18 interested party lines. That would allow
19 anybody, you know, to include -- if there's 10
20 bidders and everyone filed a protest --

21 MS. TERLAJE: I totally agree with you
22 that -- the typo here, because this is a
23 totally different type of party that we need in
24 this case. So, yes, I think I can state with
25 confidence that that one for sure will be

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 amended.

2 MR. CAMACHO: Okay.

3 MS. TERLAJE: That one should only be
4 protestor.

5 MR. CAMACHO: And I'll just add -- I
6 ask that we closely track this stuff.

7 MS. TERLAJE: Okay.

8 MR. CAMACHO: And once again, I know
9 I've taken a lot of time --

10 MS. BROOKS: No, no, not at all.

11 MR. CAMACHO: -- I apologize, but --

12 MS. BROOKS: No, we appreciate you, and
13 in fact, maybe if there's any other additional
14 comments you'd like to make, please turn them
15 in for us. We will be taking testimony up 'til
16 about 10 days, from now?

17 MS. TERLAJE: I think it's about seven
18 days.

19 MS. BROOKS: Seven days, 'til --

20 MS. TERLAJE: Seven more days. Sorry,
21 I didn't calculate what that day was
22 (laughter).

23 MS. BROOKS: We'll post it on the
24 website. We'll post it on the website tomorrow
25 that we'll still be taking a couple comments up

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 'til -- okay.

2 MR. CAMACHO: And I want to thank you
3 all also again for your great work and
4 certainly thank you for the notice of hearing
5 and the opportunity to be heard.

6 MS. BROOKS: Thank you.

7 MS. TERLAJE: We want to thank you for
8 your detailed review. You're the one that has
9 implement it.

10 MS. BROOKS: Yeah, you're the one. So,
11 appreciate you having -- okay.

12 MS. TERLAJE: All right. After Anthony
13 Camacho -- before that, if anyone needs copies
14 of his testimony -- there aren't any of that?
15 Of the rules, and -- they made enough copies of
16 the rules? If anyone needs copies made --

17 MS. BROOKS: There up front, still?
18 Okay.

19 MR. CAMACHO: If you need more copies,
20 I can make some.

21 MS. BROOKS: I think we have enough,
22 right? Okay. Does anybody want copies of his?
23 We'll make a few more copies. Okay. All
24 right. We'll make a few more copies.

25 MS. TERLAJE: Does anyone else want

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 copies of the testimony made right now?

2 MS. BROOKS: Now, you're going to give
3 us this? We'll make copies so that others can
4 have them available.

5 MS. TERLAJE: We'll have Lou Perez and
6 Claudia, if you can both come up. Sorry about
7 the tight order here.

8 MS. BROOKS: We realized after, but we
9 thought, when we got this place, it was big,
10 but didn't realize for a public hearing, it may
11 not be (laughter).

12 Okay. Thank you. And it's now
13 approximately 2:55 and we are hearing testimony
14 from our next citizen. If you could just state
15 for the record your name and your position and
16 then go into your testimony.

17

18

TESTIMONY FROM LOU PEREZ

19

DIRECTOR, DEPARTMENT OF ADMINISTRATION

20

21 MS. PEREZ: Okay. Lou Perez, Director
22 of Department of Administration. I have with
23 me Claudia Acfalle, Chief Procurement Officer,
24 General Services Agency.

25

MS. BROOKS: Thank you very much for

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 coming.

2 MS. PEREZ: We just have a few. First
3 of all, I just want to start by also commending
4 your office for coming up with the much needed,
5 much awaited, procurement appeals and rules and
6 regulation.

7 You know, the General Services and
8 Adminis- -- General Services Agency for the
9 Government of Guam, does on occasion receive a
10 protest. And, we feel for the protesters that
11 maybe they feel they have not been fully heard
12 and to the extent whether to allow -- the only
13 other option is to go to court if they do not
14 agree with the determination of the procurement
15 officer, chief procurement officer, of the
16 agency, which happens to be the procuring
17 officer for request for proposal.

18 So, we feel this is a very good thing.
19 And we're happy for the opportunity to review
20 your proposed rules and regs. And also, I
21 believe there is some suggested language in
22 terms of the statute that you're asking the
23 Legislature to consider.

24 I'm ending, so with that, Claudia and I
25 are happy to be here. We do have some very,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 just a short -- a few items that we ask that
2 you consider prior to actually forwarding rules
3 and regs over to the Guam Legislature. And
4 before Claudia goes through some of the
5 details, it will go very quickly, because it
6 basically echoes some of the concerns that the
7 previous witness, Mr. Camacho, had stated. And
8 I'm happy for the legal opportunity to listen
9 to the legal concerns on some others.

10 I do encourage our Public Auditor to
11 suggest to read the --

12 MS. BROOKS: Okay.

13 MS. PEREZ: -- we already see there are
14 some conflicting. And I know you've been
15 receiving those directly because you stated it
16 when you opened the hearing.

17 MS. BROOKS: If you have any other
18 suggestions that you might also see, please
19 transmit that to us so that we can try to get
20 as many of those changes in as possible so the
21 Legislature has an opportunity. So, we
22 appreciate your feedback in those areas,
23 because you deal with it more that we do --

24 MS. PEREZ: That's right.

25 MS. BROOKS: -- and can see those

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 inconsistencies of law. And therefore I think
2 you testimony will have greater weight, because
3 you're dealing with it on a day-to-day basis.
4 So, we would appreciate getting that.

5 MS. PEREZ: All right.

6 MS. BROOKS: Thank you.

7 MS. PEREZ: With that, I'll go ahead
8 and have our Chief Procurement Officer to
9 outline some of the concerns to the proposed
10 language.

11

12

CLAUDIA ACFALLE

13

CHIEF PROCUREMENT OFFICER

14

GENERAL SERVICES AGENCY

15

16 MS. ACFALLE: Okay. We share the same
17 concerns with Tony Camacho's testimony, on
18 12102. And what we are seeing there is -- or
19 what I've suggested was -- where it says that
20 the Public Auditor shall have the power to
21 review and determine. And what I added there
22 was whether there was substantial evidence to
23 uphold the determination made by the Chief
24 Procurement Officer, the Director of Public
25 Works, or the head of the purchasing agency.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 I'm assuming here, at this point,
2 Therese, that we -- you know, the appellant,
3 right, of course, the only reason why they
4 would appeal to the OPA's office is if they
5 were not satisfied with the decision of the
6 Chief Procurement Officer.

7 MS. BROOKS: Right.

8 MS. ACFALLE: So in line with that, of
9 course, their appeal will be on the same basis
10 of their protest. Because then otherwise it's
11 going to go out of -- you know, out of
12 alignment here. So, their focus should still
13 be on the same basis of their protest if they
14 submitted it.

15 MS. TERLAJE: Okay.

16 MS. ACFALLE: And that's why I'm saying
17 -- I mean, I just suggested so that -- just a
18 minor change there, whether -- to determine
19 whether there were substantial evidence to
20 uphold the determination made by the CPO, the
21 Director of Public Works, or the head of the
22 purchasing agency.

23 MS. BROOKS: Let me just ask you,
24 again, just an observation, okay? And I'm
25 coming in here, again, with no preconceived

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 notion. You've made a determination to give it
2 to Company "A"; Company "B" protest it because
3 they feel that they should have won it. And
4 so, they will a file the protest, and then
5 you're going to make a determination, saying,
6 no, you disagree with Company "B", it still
7 goes to Company "A".

8 So that's why then Company "B" will
9 come to our office to protest, saying that they
10 disagree with your -- of the decision. Because
11 you made the determination and you -- you know
12 (pauses). So, until -- my concern here is,
13 whether there was substantial evidence to
14 uphold the determination. We really won't know
15 this until we look at all --

16 MS. ACFALLE: We'll still provide --
17 it will still be provided --

18 MS. BROOKS: Yeah; okay. So that's my
19 comment here. This really won't happen until
20 all the evidence is submitted.

21 MS. ACFALLE: And it will be --

22 MS. BROOKS: Okay; all right. Okay.

23 MS. ACFALLE: Okay. On 12104(a), the
24 second sentence where it says there, they
25 deleted it because -- the agency cannot prevent

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 the appellant -it says here that that
2 electronic filing may also be allowed when
3 available and approved by the agency. But we
4 can't prevent them from filing an appeal,
5 right?

6 MS. TERLAJE: Yeah, what I meant there
7 is the OPA.

8 MS. ACFALLE: The OPA, okay, I
9 understand.

10 MS. TERLAJE: That's a typo that I need
11 to change.

12 MS. ACFALLE: Okay.

13 MS. BROOKS: The intent here was
14 really, you know, as we move into electronic
15 age, rather than having paper - and that was
16 that was meant to be the OPA.

17 MS. TERLAJE: OPA.

18 MS. BROOKS: Because we're new to this
19 process, we're still in the paper stage.

20 MS. ACFALLE: Okay.

21 MS. BROOKS: So, at some point, we will
22 allow people to file electronically, you know,
23 just like the court is in the process of doing
24 some of that, so that we will eventually move
25 to that level also. So, that should have been

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 OPA.

2 MS. ACFALLE: Okay. 12104(b), this is a
3 question I'm posing -- and again, because we
4 do -- you know, I deal with protest a lot --

5 MS. BROOKS: Sure.

6 MS. ACFALLE: -- down in our office, we
7 just wanted to -- if the failure to do the
8 minimum in the form and filing of an appeal, is
9 ground for automatic denial of the appeal. For
10 example, labeling the envelope "Appeal".
11 Because in the case of protest, right, and even
12 if we get it through a fax, a fax copy, and
13 then the original could be submitted later, we
14 still entertain it, because it is still a
15 protest. So, we just wanted to make sure that
16 there's something in there that, you know,
17 about denying.

18 MS. TERLAJE: Well, yeah, that's a very
19 good question. I have to say the answer is not
20 written in here.

21 MS. ACFALLE: Yeah.

22 MS. TERLAJE: Maybe if we try to put
23 the answer in there, I think -- I thought about
24 -- yeah, we just want to label it so it doesn't
25 get mixed up with any other business affair.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. ACFALLE: Yeah.

2 MS. TERLAJE: That's the most -- number
3 one concern.

4 MS. ACFALLE: Because right now, it
5 looks like the only reason why you can deny it
6 is because it did not meet the filing period,
7 of requirement.

8 MS. TERLAJE: Right, that's correct.
9 In the statute that --

10 MS. BROOKS: In my own dealing with
11 procurement, as we've evaluated, sometimes we
12 find that things are denied because of what I
13 call, substance over form. The form wasn't
14 submitted, but yet substantively everything was
15 there. And so, where there -- if they forgot
16 to check off something, to me, I don't feel
17 that that should be a denial --

18 MS. TERLAJE: Yeah.

19 MS. BROOKS: -- if substantively the
20 whole package was complete.

21 So, we're not looking to disqualify
22 someone merely for a, you know, a technicality.

23 MS. ACFALLE: Especially if it's in the
24 best interest of the --

25 MS. BROOKS: Yeah, right.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. ACFALLE: We deal with those.

2 MS. BROOKS: So that's just from my own
3 experience too, you know, that I have seen
4 that. And sometimes -- and we want to
5 discourage that.

6 MS ACFALLE: Yeah.

7 MS. BROOKS: But if substantively, it
8 does have an affect, you know, then --

9 MS. ACFALLE: Absolute, substantively.

10 MS. BROOKS: Yeah, right.

11 MS. ACFALLE: Okay. 12104(c)(3), where
12 it says -- we are recommending to --

13 MS. BROOKS: Oh, yeah.

14 MS. ACFALLE: -- yeah, to indicate the
15 Chief Procurement Officer, the Director of
16 Public Works, or the head purchasing agency
17 shall submit to the Public Auditor a complete
18 copy of the procurement file relevant to the
19 appeal within five working days of receiving
20 notice of an appeal. Okay?

21 I notice earlier, Tony stated, you
22 know, to be allowed to have more time to file
23 the record, or the document to the OPA's
24 office, which I would agree. Because, you
25 know, in their case it may vary.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: How many days are you
2 suggesting?

3 MS. PEREZ: I guess -- the way we see -
4 to solve it, would be either informal in that
5 we provide the complete procurement file, and
6 from there, you determine whether you think
7 there is -- they have actually -- the
8 accusation can be upheld and then you'll have
9 the hearing. So, we don't really perceive
10 calling our attorney at this point in this
11 process.

12 MS. BROOKS: Sure.

13 MS. PEREZ: We give you the files to
14 determine if there's some regulation or rule
15 process that we did not follow, which gives
16 credence to the appellant's claim. If we do
17 engage the services of the attorney general,
18 I'm not sure whether the five working days is
19 going to be adequate either.

20 MS. TERLAJE: The way it's written --
21 the procurement file that, I think, should be
22 able to be made available in five days. And
23 that's how I originally wrote this. And then I
24 changed it, because I thought, we really don't
25 need everything in that file. What's required

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 in the statute to be put in a procurement
2 filing, is a lot.

3 MS. ACFALLE: That's right.

4 MS. TERLAJE: And I'm thinking,
5 sometimes with procure- -- I mean, the appeal,
6 might be on a, you know, lesser issue that
7 doesn't really require all of that.

8 MS. ACFALLE: I see.

9 MS. TERLAJE: But, I thought I was a
10 little bit short cutting there to allow you
11 less -- you know, less to duplicate all of
12 that, you know, copying and audio, testimonies.
13 I mean, your deliberation, things like that.
14 So, those are two different things.

15 So, I think, we've allowed you to
16 submit less than the entire working file. But,
17 I agree, that if submitting the document -- my
18 original thinking was five days was more than
19 enough time. But, yeah, if you're going to
20 submit an answer, the attorney general should
21 submit an answer, I think.

22 MS. ACFALLE: That's right.

23 MS. TERLAJE: I think it's a disservice
24 to you not to have -- if the attorney on the
25 other side protesting --

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. ACFALLE: Right, our attorney -
2 then more to him.

3 MS. TERLAJE: Yeah. You're going to
4 have to work that out with him. And we'll
5 consider the five days. We're going to
6 consider that five days.

7 MS. ACFALLE: We also don't want to
8 delay it any further.

9 MS. TERLAJE: Yeah.

10 MS. BROOKS: Right.

11 MS. TERLAJE: Right.

12 MS. ACFALLE: Because some of these,
13 you know, we would like to proceed of course.

14 MS. BROOKS: Because as long as it's
15 in protest, it --

16 MS. ACFALLE: It has its case.

17 MS. BROOKS: Uh-huh, okay. So, I hear
18 two comments relative to this, that giving us
19 the file within five working days is not
20 onerous to anyone. Right? You can produce the
21 file, whatever is relevant in the file, for us.

22 MS. ACFALLE: Yes.

23 MS. BROOKS: Okay. And so, that's not
24 a problem. But then if you have to file a
25 formal answer, then that's the one that

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 requires a little bit more time, may require a
2 little more time?

3 MS. ACFALLE: Yeah.

4 MS. BROOKS: Okay.

5 MS. ACFALLE: And, 12104(4), I would
6 just recommend to delete that, because again -
7 it's in line with item three, right? The 10
8 days, and then it goes to a 5-day again. That
9 could be done in view of the three.

10 MS. TERLAJE: The ten days is for the
11 comments from the other people. You can submit
12 your report in five days.

13 MS. ACFALLE: Okay.

14 MS. TERLAJE: Ten days after that --

15 MS. ACFALLE: Is for the interested?

16 MS. TERLAJE: Yes.

17 MS. ACFALLE: Okay.

18 MS. TERLAJE: Or the opposing party to
19 submit, yeah. Then you get five days to rebut
20 it.

21 MS. ACFALLE: Okay.

22 MS. BROOKS: One of the things that we
23 will do, I've asked Therese to do, is to kind
24 of, maybe as an attachment, a proposed timeline
25 so these people would see, okay, the protest is

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 filed on this, this is what has to happen, and
2 so on. It's kind of like --

3 MS. TERLAJE: Highlight.

4 MS. BROOKS: -- a highlight of
5 chronology. And, she's in the process of
6 preparing that. And we'll attach that as part
7 of this, so that way people will have a general
8 idea of what is the timeline. So, we would not
9 want to delete Number 4.

10 MS. TERLAJE: No. That's for the
11 appellants response.

12 MS. BROOKS: Right, uh-huh. Okay.

13 MS. ACFALLE: 12104(6); this says, the
14 Public Auditor shall upon request make
15 available, we recommend after decision has been
16 made. Because it doesn't indicate when, at
17 what time, or at what point.

18 MS. BROOKS: Oh!

19 MS. ACFALLE: Yeah, the document will
20 be made available. And in order to avoid the
21 other selection in having to put a decision
22 together, everybody just coming at any time to
23 request for these files or documents, the
24 information, I'm recommending that after a
25 decision has been made, by the Office of the

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 Public Auditor to, again, you know, whoever
2 wants to request, it becomes public record
3 after that.

4 MS. BROOKS: Thank you for pointing --
5 our intent actually is to also post the
6 decision on the web. Okay? So, that way
7 everybody has -- in addition to formally
8 notifying, we will first formally notify the
9 parties of the decision and then after the
10 notification, then we will post it. That way,
11 anyone has access.

12 And we're in the process of preparing a
13 whole area just for the procurement appeal, so
14 that people will know what is being appealed,
15 what the status is, where we are in the appeals
16 process. So, we're looking at avenues like
17 that and we're using the web so that, that way
18 it's open and everybody has information.

19 MS. TERLAJE: Can I just point
20 something out to you and Anthony, and if you
21 guys could help me justify this, you know. It
22 doesn't have to be right now. But in 5 GCA,
23 5703, it says, the Public Auditor may consider
24 testimony and evidence submitted by any
25 competing bidder, offeror, or contractor after

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 protesting. That's why we tried to allow them
2 access at every point. Right? But I know that
3 the issues of, you know, confidentiality of the
4 bid, the proposals, things like that have to be
5 addressed.

6 But, you know, otherwise I think -- you
7 know, it has to be inclined to leave it open at
8 almost every point. If they can't respond,
9 they can't submit comments unless they know
10 what the appeal is. Right? So, we'd have to
11 allow them copies of that.

12 MS. ACFALLE: Well, yes, I tend to with
13 Tony's earlier statement about the bids not,
14 you know, formal and confidential. But there
15 is a distinguishment between the proposal and
16 the actual, you know -- invitation for bid and
17 request for proposal.

18 Because you have -- a request for
19 proposal, the only documents that can be
20 released is to the awarding offeror. That's
21 the only one. Anything else remains
22 confidential.

23 But on a bidder, an invitation to bid,
24 it still -- it's open.

25 MS. BROOKS: Uh-huh.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. TERLAJE: All the bids are open.

2 MS. ACFALLE: Yeah, these are open
3 bids.

4 MS. BROOKS: Right.

5 MS. ACFALLE: These are open bids. So,
6 they can all come in and hear everybody else's
7 price.

8 MS. BROOKS: Right.

9 MS. ACFALLE: But on a request for
10 proposal, that's where it differs.

11 MS. BROOKS: Okay.

12 MS. ACFALLE: Because in a request for
13 proposal, the only information or the only
14 document that can be released or become public
15 record is the one that's awarded to the
16 contractor.

17 MS. TERLAJE: I appreciate your point
18 is to avoid delay.

19 MS. ACFALLE: So, we'll just have to
20 keep this all in line.

21 MS. PEREZ: Yes, we've also had
22 experience dealing with protest that have gone
23 to the courts, where some of the information we
24 allowed to the protestor was actually being
25 challenged and that we should have never had

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 disclosed it. Because then, it puts the one
2 that was --

3 MS. TERLAJE: Competing bidders.

4 MS. PEREZ: That's right.

5 MS. BROOKS: Right, yes.

6 MS. PEREZ: And then it just -- we're
7 just continually just going to court about all
8 the --

9 MS. BROOKS: Differential, like Guam
10 Mass Transit.

11 MS. PEREZ: Yeah, three years in
12 protest and still not resolved. So --

13 MS. BROOKS: Uh-huh, uh-huh.

14 MS. PEREZ: In various -- it's hard for
15 us to try to award that contract.

16 MS. BROOKS: I thought a decision was
17 made already.

18 MS. PEREZ: It's actually awaiting -
19 there's a request for reconsideration.

20 MS. BROOKS: Just for the record, that
21 would not ever come to us now, because once
22 it's in court, it's already barred. Okay? The
23 moment someone files officially with the court,
24 this office now no longer has jurisdiction.
25 So, even any subsequent things regarding that,

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 it's --

2 MS. PEREZ: As long it's the original
3 appeal.

4 MS. BROOKS: Yeah. And, thank God.
5 (laughter).

6 MS. TERLAJE: What rule do you go by
7 now as to -- do you go to by the statute what
8 can be released, not be released, when you're
9 dealing with a protest and do you release?

10 MS. PEREZ: Okay, only if an award --
11 on an RFP, if it has been awarded and we don't
12 have a protest, then that is releasable
13 information. But only for the one that has
14 been awarded.

15 MS. TERLAJE: But when there is a
16 protest, what do you do in those situations?

17 MS. PEREZ: When there is a protest,
18 well we -- now, we have those questions
19 arising. I know there's some of that. Unless
20 they specifically put in, and they do have that
21 opportunity, because it's proprietary and
22 confidential.

23 MS. BROOKS: Right. It says that in
24 our audit proposal too, that you have to
25 identify it first up front what is proprietary.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 Because if you don't, then the whole RFP is
2 public.

3 MS. PEREZ: Yes. I'm not really sure,
4 and I'm hoping that the written responses we
5 receive from the AG maybe address this. I'm
6 not so sure. So, I haven't had the chance to
7 review his recommendation. I'm not aware of
8 not aware of the finding.

9 MS. BROOKS: One of the things that I'm
10 seeing though, you know, since we're talking
11 about procurement in general, one of the things
12 I'm seeing is that more and more entities are
13 using an RFP when they should not be. Okay.
14 And that, I think, was the basis of the Guam
15 Mass Transit. Because, you know, what
16 constitutes professional services versus
17 services, you know --

18 MS. PEREZ: By definition.

19 MS. BROOKS: Yeah. And that's where
20 I'm seeing a little bit more use of the RFP
21 maybe inappropriately. All right.

22 MS. TERLAJE: All right. Your number?

23 MS. ACFALLE: Okay. Now, 12108 --

24 MS. PEREZ: 104- --

25 MS. TERLAJE: (b)(8).

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. ACFALLE: 12104 (c)(8)--

2 MS. TERLAJE: Yeah, (c)(8).

3 MS. ACFALLE: Okay, that one there I'm
4 not - we're recommending that maybe in your
5 transmittal you note -- we recommend some
6 changes.

7 MS. BROOKS: Law change.

8 MS. ACFALLE: Yeah. Yeah, because it
9 should not be the government agency to --

10 MS. BROOKS: Yeah, yeah.

11 MS. ACFALLE: -- to file the appeal.

12 MS. BROOKS: Okay. And I think, Tony's
13 comment and yours is well taken. We know for
14 in fact the law is definitely in error, maybe
15 our rule, should be changed to be more --

16 MS. PEREZ: Inclined.

17 MS. BROOKS: -- inclined, what I call,
18 plain English. All right.

19 MS. ACFALLE: Therese, I think, we'll -
20 - to finish on the confidentiality.

21 MS. TERLAJE: Yes.

22 MS. ACFALLE: I know the statute
23 mentions where if we are -- you know, we have
24 to advise, even if it's in proposal, to
25 offeror, they're getting the award. If they're

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 going to be awarded the contract, that document
2 becomes public record.

3 MS. BROOKS: With the exception of the
4 -- well, maybe I'm going to ask for
5 clarification. And I noticed specifically
6 because when we do the RFP for audit services,
7 we do say in the RFP that if there's any
8 section in there that is determined to be
9 proprietary, that you must so state so. And
10 that the entity still may have to make a
11 determination whether or not they agree with
12 that. And then if the entity disagrees with
13 that, they notify the offeror and then the
14 offeror may decide to either [quote] retrieve
15 it. Okay? So, that is my understanding.

16 MS. ACFALLE: Just particularly to the
17 statute, is that confidentiality.

18 MS. TERLAJE: Yeah.

19 MS. ACFALLE: Prior to an award, they
20 should be advised that if it's confidential in
21 their solicitation --

22 MS. BROOKS: Right.

23 MS. ACFALLE: -- that it will have to
24 be exposed. And if they don't want it, then
25 they would have to --

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: Right.

2 MS. ACFALLE: Thank you.

3 MS. TERLAJE: Well, thank you very
4 much.

5 MS. BROOKS: Thank you. That was
6 short. Okay. (laughter)

7 MS. TERLAJE: Thank you very much. We
8 appreciate your testimony.

9 MS. BROOKS: Thank you very much too.

10 MS. TERLAJE: All right. Who's next?
11 Anita Cruz and Jolene Evangelista? No
12 testimony? Okay, Jolene now. All right, Jesse
13 Reyes? Testimony? Okay. Anyone else would
14 like to submit testimony? Are you sure?

15 MS. BROOKS: You are more or less
16 observers?

17 MR. PUBLIC: I have some problem. Guam
18 Public School System.

19 MS. TERLAJE: Oh! Okay. All right.

20 (unintelligible: discussion amongst
21 panel)

22 MS. TERLAJE: Any questions? Questions
23 or comments from what has been presented? And
24 you're with?

25 MS. PUBLIC: Guam Power.

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 MS. BROOKS: Okay; okay. GPA's well
2 supported. (laughter)

3 MS. TERLAJE: If I may ask, you know,
4 there's a provision in here when the Public
5 Auditor has to recuse, that it really -- I
6 mean, the statute doesn't allow any other
7 alternative. So, we wrote that it's going to
8 go to court, but we would like to propose that
9 the Legislature come up with an alternative.
10 And I'd to solicit your comment. If anyone has
11 any on what that alternative should be.

12 MS. PUBLIC: Right now, it's still in
13 court, right?

14 MS. TERLAJE: Because, yeah, there's no
15 -- uh-huh.

16 MS. BROOKS: Yeah, we were having some
17 discussions. I think we did answer, for
18 example, in the event that Therese has to
19 recuse herself, we put in there that -- then I
20 could go and hire -- (pauses; peruses
21 documents). I could hire another attorney.
22 And, I think, we'll be soliciting, of course,
23 attorneys who as a list of who might be
24 available.

25 So, in Therese's case, there is an

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 opportunity that in the vent she has to recuse
2 herself, she can. What happens in my case, if
3 I have to recuse myself -- and that's a good --
4 we don't know yet what should happen.

5 MS.PUBLIC: (question being asked;
6 audible but unintelligible)

7 MS. BROOKS: One exactly is in our
8 Enabling Act 1909, where we select the auditor.
9 Okay? And I make that determination, okay,
10 because -- (pauses). And our court case, that
11 was reaffirmed in Retirement court case where
12 the judge, Judge Manibusan, said the Public
13 Auditor has to make the decision.

14 So, in that particular case, where I
15 made the decision, and let's say a CPA firm
16 protest that, because I have made the decision,
17 although -- who then will become -- (pauses).

18 MR. PUBLIC: Have the court intervene.

19 MS. TERLAJE: Yeah. Well, right now
20 that's what it looks like. If the Legislature
21 asks, I want to be able to say we've heard, you
22 know, these types of comments, these types of
23 proposals.

24 MS. BROOKS: Well, one thing I have
25 suggested to Therese is, where she feels that

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 she can make the determination herself without,
2 you know -- that she go ahead and do it. Where
3 I have to recuse myself, she becomes the --
4 (pauses). So it prevents it going to court,
5 you know, one more time. You know, other than
6 just going to court directly because I have to
7 recuse myself. In the event where -- like in --
8 - that she be the final determiner. Because in
9 all practicality, I'm going to rely 99 and
10 nine-tenth on what she says. You know, so --
11 (pauses).

12 MS. TERLAJE: Yeah, there are some --
13 there are --

14 MS. PUBLIC: (question being asked;
15 audible but unintelligible).

16 MS. BROOKS: That's the only one that I
17 know for certain that, you know, where we make
18 a determination. But then there might be other
19 instance, let's just say, hypothetically, like
20 if we made a determination in awarding
21 something from our own office operation. All
22 right? Then, you know, who would make that
23 review? Not that we buy a lot of stuff.
24 (laughter). But still, you know, you have to,
25 again, when you go through great pain to make

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 sure everything is done correctly, but still
2 there could be that, you know, feeling. And
3 who would be the appropriate determinant for
4 making that.

5 MS. TERLAJE: Thank you again everyone.
6 And just a reminder that, when these are
7 submitted to Legislature, Legislature will also
8 -- hopefully have a public hearing on what
9 they're going to do with it. And they also
10 have additional time to comment there. Or, you
11 can submit anything to us in seven days; we'll
12 pass it on to them or incorporate it, you know,
13 it merits that. And, again, thank you very,
14 very much.

15 MS. BROOKS: Just as a summary. Our
16 target is to finalize everything and submit it
17 to the Legislature on or before June 30th. That
18 way they have the 90 days. And it's our hope
19 that within the 90 days, then come October 1
20 with the new budget act, it will be blessed.
21 And then effective October 1, we can then be
22 open for hearing any protest after that time.
23 Okay. That's really the goal of what we want
24 to do; be operational by October 1.

25 But again, we can't predict what the

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1 Legislature will do. But the deserve the
2 opportunity also for 90 days.

3 So, thank you so much everyone. We
4 appreciate your taking the time. I will now
5 officially close this public hearing as of
6 3:25.

7

8 (Public Hearing concluded at 3:25 p.m.)

9 **HAGATNA, GUAM, WEDNESDAY, MAY 31, 2006**

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, **George B. Castro**, Court Reporter, do hereby certify the foregoing 79 pages to be a true and correct transcript of the audio recording provided to me of the time and place as set forth herein.

I do hereby certify that thereafter the transcript was prepared by me or under my supervision.

I further certify that I am not a direct relative, employee, attorney or counsel of any of the parties, nor a direct relative or employee of such attorney or counsel, and that I am not directly or indirectly interested in the matters in controversy.

In testimony whereof, I have hereunto set my hand and seal of Court this 30th day of June,

1 2006.

2

3

4

5

George B. Castro

6

7

8

CHANGES TO TRANSCRIPTION

9

10

Page

Change

Initial

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

DEPO RESOURCES

George B. Castro

Court Reporter

Tel.(671)688-DEPO * Fax(671)472-3094

1
2
3
4
5
6
7
