OFFICE OF THE
PUBLIC AUDITOR
GOVERNMENT OF GUAM

---oo--

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

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

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

So, in the interest of moving forward into this very important area, the senators of the 28th Guam Legislature designated the Office
of the Public Auditor to be the procurement appeal. With that, they provided us separate appropriation. This is a collateral responsibility of the Office of the Public Auditor.

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

So, we’re very pleased that Therese has joined us. And with that – let me just say, our rules have been posted on the internet since mid-May. And we are here to take testimony. People can submit testimony in person, in writing, via email. In fact, we have received some testimonies thus far. And we’re here to seek additional testimony. And with that, we’ll open it up and I’ll turn it over now to Therese, who is officially the Procurement Hearing Officer.
MS. TERLAJE: Thank you. Okay, for the record, I’d just like to make some notes here. And that is that, the notice for this hearing was published on May 21 and May 26 in both the PDN and Marianas Variety.

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

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

Prior to this hearing, written comment was submitted by Senator Tony Unpingco and testimony was submitted via email by Phil Isaac, Assistant AG; Sandra Cruz at Mair, Mair, Spade & Thompson; Dana Gutierrez-Reyes of Mair, Mair, Spade & Thompson; Serge Quenga at the
Compiler of Laws; and Vicki Renacia of UOG.

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

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

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

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

TESTIMONY FROM ANTHONY CAMACHO

STAFF ATTORNEY FOR CCU, GPA and GWA

MR. CAMACHO: Yes. I’m Anthony Camacho. I am a staff attorney for the CCU,
the Guam Power Authority and the Guam Waterworks Authority. And I’m testifying today on behalf of those three agencies.

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

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

I’ve reviewed the rules from back to back, all 15 pages of them, including the exhibits and the draft document. Some notes in terms of -- some of my thoughts at least, in Section 12102(a), which essentially describes the jurisdiction of the Public Auditor.
I note that this particular section closely tracks, if not identical to language to any OPA statute or enabling statute authorizing her to hear procurement appeals. However, the language, it states, “No prior determination shall be final and conclusive” as it applies to the agency.

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

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

And, for the record, I know I hate regurgitating numbers off books, but it’s stated in the -- I’m quoting 5 GCA, Section 5480 and also 5 GCA, Section 5703 -- or, correction, 5 GCA, Section 5480(b), which talks
about limited finality for administrative determination.

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

And essentially the specific decisions here that have that type of finality or decisions concerning requirement for bid security, whenever a procurement officer makes a determination that no requirement for a performance bond in a solicitation or when a procurement officer makes a sole source procurement determination, or when there is a determination for emergency procurement, or when there is a determination of best qualified professional and competitive selection procedures for procurement.

Also when there is a determination of non-responsibility or whether the determination calls for proprietary data from a contractor not be required. Likewise, when there is a
determination of a type of contractor to be used, or when there is a determination of approval of contractor’s accounting system, or when there’s a determination to use both of your contract.

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

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

MS. TERLAJE: I think, and, yeah, Anthony can correct me if I’m overstating here. But, we set a standard that, no prior determinations are final or conclusive. His comment is that, by statute, there are some determinations made by the agency or the procuring officer that should be final and conclusive unless erroneous, arbitrary, capricious, or contrary to law.
And I think we can harmonize these, as
he has asked to do, by stating these exceptions
and stating a different standard for these
types of procurement, review of these
determinations -- or, just recognizing them,
that these exist and that we should follow the
law.

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

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

Because from his lay perspective, not
knowing all the details, the mere fact that he
lost this, he might be of a different set that
the decision made was already erroneous or was
capricious because, let’s say, Vendor A always
gets the contract and he’s trying to bid on the contract and he still didn’t get it. Do you follow what I mean?

MR. CAMACHO: Yes, I do.

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

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

MS. BROOKS: Uh-huh, okay.

MS. TERLAJE: Yeah, whether it was erroneous.

MR. CAMACHO: Like maybe “aggrieved”, okay, “by solicitation or award of a contract, by the protest, or by the Appeal, and who filed a protest or Appeal”.

MS. BROOKS: That’s where he’s proposing “or” to “and”?

MS. TERLAJE: We review that again, the
agency should review that during the protest.

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

MS. TERLAJE: Right.

MR. CAMACHO: Do we have to go through every single law that applies and show how it applies? Or, you know, if they’re alleging that, you know, we violated a law somehow, they should at least make a showing, violated this statute.

MS. BROOKS: Okay. That’s rather than a broad brush?

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

Well, you say it’s wrong. Why do you think it’s wrong? And if it’s one of these, at least that allows us to answer more
specifically. And it will also make for a more expedited hearing. I know we make all these motions for clarifications or, you know, you can’t respond to it if you have no information.

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

MR. CAMACHO: Well, that’s correct. Generally --

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

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

MS. BROOKS: Yes, yeah .

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

MS. BROOKS: Right.

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

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

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

12103(b), I believe there’s a grammatical error; 12103(b). And that is where it defines Interested Party. It would just make more sense if the fourth sentence be -- the “or”. It should be “and”.

MS. BROOKS: Right before number 2?

MR. CAMACHO: Yeah, right before number 2.

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

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

MS. TERLAJE: Okay.

MR. CAMACHO: Like maybe “aggrieved”, okay “by the solicitation or award of a contract, by the protest, or by the Appeal, and
who filed a protest or Appeal”.

MS. BROOKS: That word “or” to be “and”?

MS. TERLAJE: Yeah. Okay.

MS. BROOKS: So, they have to do “1” and “2” as opposed to “1” or “2”?

MR. CAMACHO: That’s correct.

MS. TERLAJE: Correct, definitely.

MR. CAMACHO: Well, here --

MS. BROOKS: And by putting in “and”, is that making it harder for the appellant as opposed to easier?

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

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

MR. CAMACHO: Well, that goes to -- okay. Generally, one of the things I see with the rule, I’ll discuss this later in certain section, is that, it’s kind of expansive what it allows an interested party to do things like file a rebuttal, present evidence. The reason being is, you can then define interested party broadly and you bring in people who didn’t file a protest. One of the defenses is, you didn’t
file your protest in accordance with the statute, you have no standing in the hearing to decide the protest. It’s another story if one of the parties, either the protester or the agency, subpoenas another interested party, like another bidder for example, to come forth with any testimony.

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

Basically, if there’s 10 bidders and only one files a protest, the way this is worded and in combination with the other
sections you have here would allow all the
bidders, for example, to submit rebuttals to
the agency’s response to the protest instead of
just the protestor -- that’s the way the other
statutes read.

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

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

MR. CAMACHO: That is interesting --

MS. BROOKS: But it’s good for the
public, right?

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

MR. CAMACHO: An administrative --

MS. TERLAJE: or materials that they
weren’t normally going to access.

MR. CAMACHO: That’s correct too.

MS. TERLAJE: Well, we’ll consider
those.

MR. CAMACHO: We’d ask that that, you
know, if interested parties is going to be expanded in this way that the parties not be allowed to participate in the hearing unless they’re specifically subpoenaed by one of the parties or by the OPA.

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

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

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

MS. BROOKS: Yes, uh-huh.

MR. CAMACHO: For contract dispute, before the notice of final decision by a procurement officer must include the statement, you may obtain judicial review of this decision
by -- in fact, reading it at the beginning -- beginning an action in the Superior Court of Guam. I recommend that that be amended also to state: By beginning an action with the Office of the Public Auditor.

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

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

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

MS. TERLAJE: These sets of regulations
that you’re recommending, we intend to write a
to Legislature and tell them what has
been pointed out to be inconsistent in other
regs or in the law also that need to be fixed.
Of course, we’ve been very limited in here --
MR. CAMACHO: Oh, yeah.
MS. TERLAJE: -- in this public
hearing, so. But, we’ll take all of these,
we’ll include them when we submit it to the
Legislature.
MR. CAMACHO: I just know these two
conflicts --
MS. TERLAJE: Sure.
MR. CAMACHO: -- do exits and it’s
certainly not the OPA’s fault -- other statutes
and regs.
MS. BROOKS: Well, we appreciate you
pointing it out. Thank you.
MR. CAMACHO: And then, Section
12104(c)(2), where it talks about the head of
the purchasing agency, shall furnish copies of
the appeal documents to interested parties,
bidders or offerors, which are essentially
bidders or offerors, with instructions to
communicate further directly with the Public
Auditor. That goes to including all interested parties to have a say, you know, kind of like –

MS. BROOKS: Yeah.

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

So, if it’s an ongoing procurement, and there is a protest and it’s at the OPA level, but they have, I guess, a question generally about the procurement, they should still direct their inquiries to the procurement officer. If they have a question or inquiry concerning the procurement appeal, certainly that is one thing the OPA should be answering.

MS. BROOKS: Yeah.

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

MS. BROOKS: Appeal. Yeah.

MR. CAMACHO: In a lot of cases, you’re going to have appeals where the procurement
action is still pending, and certainly we still want to preserve the integrity of the procurement process for those procurement actions. And this goes to the other statutes which require, for example, procurement officer to keep a log of all communications with the bidder and so on and so forth. It also helps for our record keeping as far as procurement goes or the procurement itself that they still are being made to communicate with the procurement officer.

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

I ask the Detailed Agency Report should be amended to read “Answer”. That’s all. Because everybody knows what an answer is.

MS. BROOKS: Okay.

MR. CAMACHO: And Detailed Agency Report, like I said, it’s just a matter of
semantics. We have a preference for answer.

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

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

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

Some of those procurement actions are very complex, at least for GPA and GWA,
especially when they involve construction.

Okay? They’re not simple bids. They’re not simplistic contracts. And they involve sometimes millions, millions of dollars.

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

MS. BROOKS: What are you proposing then?

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

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

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

MS. BROOKS: They were requesting 10 days at least.
MS. TERLAJE: Yeah, I’ll tell you, I mirrored this after other jurisdiction, because -- I guess, in my thinking, the agency that is supposed to be preparing this report is also the same agency that had already written the decision on the protest. So, I assume they should have all their things ready to go.

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

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

Now, it’s also responding to allegations. For example, if they are alleging that our action’s arbitrary and capricious or contrary to law. We’re going to have to hit the books, do a research, and at least, in our
response say, well, according to this precedent and this, this is why it’s law. This is why we did what we did in that case. And that takes -- legal research does take some time.

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

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

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

MS. BROOKS: I’m, again, just going to
interject my own thinking. When you say judicial -- you know, the whole purpose of going through here is to make the process less ornerous, less judicial. Kind of an expedited matter so that things don’t have to be really as, you know, in the exact format as the way you would prepare a brief.

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

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

MS. BROOKS: I recognize -- yes, I --
MR. CAMACHO: -- they’re going to have an advantage if they have 60 days. And we only have five to respond to this. What will probably end up with is a fairly large appeal, very clearly stating their legal ground. And to give us five days to respond to that is not very realistic in terms of GPA and GWA. Maybe for some of the smaller agencies where it’s a simpler type of procurement.

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

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

MS. BROOKS: In theory.

MS. TERLAJE: ...these rules are written like that, and the rules before these were written like that. But in reality, nowadays,
yeah, most of these contractors hire lawyers
and the appeal, the protest themselves have
become very judicial like.

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

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

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

MS. BROOKS: Yes, yes.

MR. CAMACHO: I’ve already --

MS. BROOKS: Right.

MR. CAMACHO: I’ve already stated that
before. This is the one that really needs to
be -- rebuttal to the agency’s report (sic) as
far as the answer really should be limited to
the protestor not another party, although
interested, who didn’t file a protest. Because
they essentially, I’m making on due process or
standing ground. It really lacks standing essentially to participate in a hearing without filing a protest.

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

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

MS. BROOKS: Right.

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

Essentially, it’s not -- for appeal, okay? The contractor would be the one to file the appeal because it’s the agency that makes the final action. And it’s the contractor who appeals that action to the OPA, so I think that this particular section should be revised to read “contractor”.

MS. TERLAJE: Yes. If I can just comment on that. I totally agree with you.
That’s why I put the source here, because I just had to mirror the statute language. I think the statute itself is identical and it’s off, yeah.

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

MS. BROOKS: Okay.

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

MS. TERLAJE: Amend.

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

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

MR. CAMACHO: I still submit that -- it’s just my humble opinion.

MS. TERLAJE: Go ahead.

MR. CAMACHO: With the rule making authority, you have the opportunity to correct that error that exist --
MS. BROOKS: Rather than perpetuate the error in the rules. That’s a valid point. Okay.

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

MS. BROOKS: Sure.

MR. CAMACHO: Pointing out though.

MS. TERLAJE: Okay. That’s a good point.

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

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

For example, in a sealed bid, the bidder that bid that -- the bidder’s abstract, for example, isn’t released until after the award of the bid. Likewise, of all the bids, only the bidder who is awarded the contract, that’s the only bid that’s subject to public
release. And all the other bids are not.

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

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

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

MR. CAMACHO: (pauses; peruses document)

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

MR. CAMACHO: You could cite that in there, but at the same time, in handling the records, I’m trying to make it clear that -- in our interest especially, and especially bids,
and if it’s a pending -- especially if no award has been made. Okay?

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

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

MR. CAMACHO: That’s correct, yes.

MS. BROOKS: Or public disclosure?

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

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

MR. CAMACHO: Yes.

MS. BROOKS: Okay. The proprietary in
nature still remains proprietary in nature. And I think there is something in the rules that we’re proposing that the protester, right, has to identify that portion that is proprietary in nature, if I’m not mistaken. So, the burden of proof, I guess, really belongs on the bidder or the person that -- you know, because we even have that in other areas that identify this is -- and it’s not to be revealed at any time.

MR. CAMACHO: I think your tape stopped.

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

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

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

MS. BROOKS: Right.

MR. CAMACHO: -- made very clear that they’re not for public disclosure.
MS. BROOKS: Right.

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

MS. BROOKS: Uh-huh.

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

MS. BROOKS: And they already know the --

MR. CAMACHO: All information is out and they can’t compete. They can no longer adequately compete because everybody knows what everybody’s bid is.

MS. BROOKS: Right.

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

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

    MR. CAMACHO: Yeah, we cite all --
    MS. TERLAJE: -- we are not allowed to
release that -- I mean, we’ll have to put that
in all different sections here probably --
    MR. CAMACHO: Pursuant to the law.
    MS. BROOKS: Right. So, put the burden
on the agency to tell us.
    MR. CAMACHO: We could -- yes.
    MS. TERLAJE: On things that they’re
submitting --
    MR. CAMACHO: Now the protester could,
if they submit their documents, the agency
action -- the statute really applies to the
agency. The agency, you know, you will not,
for example, release any information, you know,
in a proposal, an RFP, to anybody else. And
only the proposal or the operator who gets
awarded the contract, only that proposal gets
publicly release. Nobody else gets released.
Stuff like that, you know.
    MS. BROOKS: So, going back to what
Therese said. If we put the burden on the
agency to decide what should be --
    MR. CAMACHO: Yeah, we can --
MS. BROOKS: -- citing whatever rule or law that allows you to do that. And then we’ll take that into consideration?

MR. CAMACHO: Yes.

MS. BROOKS: Okay.

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

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

MR. CAMACHO: Sorry I’m taking so much of your time.

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

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

MS. BROOKS: Right, yes.
MR. CAMACHO: -- to a certain extent, 12107(b); this particular section talks about Ex Parte Communications with the OPA. Or, generally, you know, communications with the OPA by the party.

MS. BROOKS: Right.

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

MS. TERLAJE: Yes, that makes sense.

MS. BROOKS: That has relevance to this case.

MR. CAMACHO: Yes.

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

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

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

MR. CAMACHO: And Guam’s small, we can’t get away with, you know, blanket
provision. In Section 12108(a), where it talks about hearing officers will determine whether hearing is necessary for resolution of the appeal. It’s our position that, due process mandates that a hearing is mandatory if requested by one of the parties.

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

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

Here, as written, if the hearing officer says, well, I’m just not going to grant you a hearing, for whatever reason, I believe
that would lead to due process -- or, due
process argument -- that’s wrong.

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

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

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

MS. BROOKS: Okay.

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

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

MR. CAMACHO: Or, unless -

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

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

MS. BROOKS: Okay.

MS. TERLAJE: We can put that language
in about the waiving your right to a hearing.
And that would probably address that.
MR. CAMACHO: Yeah. And I submit, you know, probably --

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

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

MS. TERLAJE: Right.

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

That’s kind of a very broad -- broad brush. Really, there’s no identification of who has the burden of proof. And, I guess, if
you’re going to leave that language as is, I’d ask that you follow the Supreme Court of the United States decision Chevron versus NRDC. That’s 487 U.S. 837, where it says that, “Deference should be given to an agency’s interpretation of the law if it is reasonable.” That’s essentially the reasonableness test.

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

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

MS. TERLAJE: I think that this is -- what you’re referring to in the Chevron case, if that’s going to be included, it’s going to have to go somewhere else. Not necessarily towards how the evidence’s going to be
reviewed, but interpretation of the law; right?

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

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

MR. CAMACHO: I’d actually request that some statement --

MS. BROOKS: Be added.

MR. CAMACHO: Yeah, hopefully tracking that language.

MS. BROOKS: Okay.

MR. CAMACHO: Deference should be given to agency’s interpretation of law if it’s reasonable.

MS. BROOKS: Okay; statement be added.
MR. CAMACHO: You could put in there, either -- you know, the last sentence in the paragraph, or a different section altogether.

MS. BROOKS: Okay.

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

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

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

12501(a), this is my last one. This is essentially -- 12501(a), that implies to -- in
fact, I’m trying to put it in layman’s terms here. When a protest is filed, the agency can make a determination to proceed with the award of the contract that despite the protest, essentially, you know, there’s no staying if the significant interest of the territory are at stake.

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

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

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

MR. CAMACHO: Okay.

MS. TERLAJE: That one should only be protestor.

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

MS. TERALJE: Okay.

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

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

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

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

MS. TERLAJE: I think it’s about seven days.

MS. BROOKS: Seven days, ‘til --

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

MS. BROOKS: We’ll post it on the website. We’ll post it on the website tomorrow that we’ll still be taking a couple comments up
‘til -- okay.

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

    MS. BROOKS: Thank you.

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

    MS. BROOKS: Yeah, you’re the one. So, appreciate you having -- okay.

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

    MS. BROOKS: There up front, still?

    Okay.

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

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

    MS. TERLAJE: Does anyone else want
copies of the testimony made right now?

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

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

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

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

TESTIMONY FROM LOU PEREZ

DIRECTOR, DEPARTMENT OF ADMINISTRATION

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

MS. BROOKS: Thank you very much for
MS. PEREZ: We just have a few. First of all, I just want to start by also commending your office for coming up with the much needed, much awaited, procurement appeals and rules and regulation.

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

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

I’m ending, so with that, Claudia and I are happy to be here. We do have some very,
just a short -- a few items that we ask that
you consider prior to actually forwarding rules
and regs over to the Guam Legislature. And
before Claudia goes through some of the
details, it will go very quickly, because it
basically echoes some of the concerns that the
previous witness, Mr. Camacho, had stated. And
I’m happy for the legal opportunity to listen
to the legal concerns on some others.

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

MS. BROOKS: Okay.

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

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

MS. PEREZ: That’s right.

MS. BROOKS: -- and can see those
inconsistencies of law. And therefore I think you testimony will have greater weight, because you’re dealing with it on a day-to-day basis. So, we would appreciate getting that.

MS. PEREZ: All right.
MS. BROOKS: Thank you.
MS. PEREZ: With that, I’ll go ahead and have our Chief Procurement Officer to outline some of the concerns to the proposed language.

CLAUDIA ACFALLE
CHIEF PROCUREMENT OFFICER
GENERAL SERVICES AGENCY

MS. ACFALLE: Okay. We share the same concerns with Tony Camacho’s testimony, on 12102. And what we are seeing there is -- or what I’ve suggested was -- where it says that the Public Auditor shall have the power to review and determine. And what I added there was whether there was substantial evidence to uphold the determination made by the Chief Procurement Officer, the Director of Public Works, or the head of the purchasing agency.
I’m assuming here, at this point, Therese, that we -- you know, the appellant, right, of course, the only reason why they would appeal to the OPA’s office is if they were not satisfied with the decision of the Chief Procurement Officer.

MS. BROOKS: Right.

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

MS. TERLAJE: Okay.

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

MS. BROOKS: Let me just ask you, again, just an observation, okay? And I’m coming in here, again, with no preconceived
notion. You’ve made a determination to give it to Company “A”; Company “B” protest it because they feel that they should have won it. And so, they will a file the protest, and then you’re going to make a determination, saying, no, you disagree with Company “B”, it still goes to Company “A”.

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

MS. ACFALLE: We’ll still provide --

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

MS. ACFALLE: And it will be --

MS. BROOKS: Okay; all right. Okay.

MS. ACFALLE: Okay. On 12104(a), the second sentence where it says there, they deleted it because -- the agency cannot prevent
the appellant — it says here that that
electronic filing may also be allowed when
available and approved by the agency. But we
can’t prevent them from filing an appeal,
right?

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

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

MS. TERLAJE: That’s a typo that I need
to change.

MS. ACFALLE: Okay.

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

MS. TERLAJE: OPA.

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

MS. ACFALLE: Okay.

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

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

MS. BROOKS: Sure.

MS. ACFALLE: -- down in our office, we just wanted to -- if the failure to do the minimum in the form and filing of an appeal, is ground for automatic denial of the appeal. For example, labeling the envelope “Appeal”. Because in the case of protest, right, and even if we get it through a fax, a fax copy, and then the original could be submitted later, we still entertain it, because it is still a protest. So, we just wanted to make sure that there’s something in there that, you know, about denying.

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

MS. ACFALLE: Yeah.

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

MS. TERLAJE: That’s the most -- number one concern.

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

MS. TERLAJE: Right, that’s correct.

In the statute that --

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

MS. TERLAJE: Yeah.

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

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

MS. ACFALLE: Especially if it’s in the best interest of the --

MS. BROOKS: Yeah, right.
MS. ACFALLE: We deal with those.

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

MS. ACFALLE: Yeah.

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

MS. ACFALLE: Absolute, substantively.

MS. BROOKS: Yeah, right.

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

MS. BROOKS: Oh, yeah.

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

I notice earlier, Tony stated, you know, to be allowed to have more time to file the record, or the document to the OPA’s office, which I would agree. Because, you know, in their case it may vary.
MS. BROOKS: How many days are you suggesting?

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

MS. BROOKS: Sure.

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

MS. TERLAJE: The way it’s written -- the procurement file that, I think, should be able to be made available in five days. And that’s how I originally wrote this. And then I changed it, because I thought, we really don’t need everything in that file. What’s required
in the statute to be put in a procurement filing, is a lot.

MS. ACFALLE: That’s right.

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

MS. ACFALLE: I see.

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

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

MS. ACFALLE: That’s right.

MS. TERLAJE: I think it’s a disservice to you not to have -- if the attorney on the other side protesting --
MS. ACFALLE: Right, our attorney - then more to him.

MS. TERLAJE: Yeah. You’re going to have to work that out with him. And we’ll consider the five days. We’re going to consider that five days.

MS. ACFALLE: We also don’t want to delay it any further.

MS. TERLAJE: Yeah.

MS. BROOKS: Right.

MS. TERLAJE: Right.

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

MS. BROOKS: Because as long as it’s in protest, it --

MS. ACFALLE: It has its case.

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

MS. ACFALLE: Yes.

MS. BROOKS: Okay. And so, that’s not a problem. But then if you have to file a formal answer, then that’s the one that
requires a little bit more time, may require a
little more time?

MS. ACFALLE: Yeah.

MS. BROOKS: Okay.

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

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

MS. ACFALLE: Okay.

MS. TERLAJE: Ten days after that --

MS. ACFALLE: Is for the interested?

MS. TERLAJE: Yes.

MS. ACFALLE: Okay.

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

MS. ACFALLE: Okay.

MS. BROOKS: One of the things that we will do, I’ve asked Therese to do, is to kind of, maybe as an attachment, a proposed timeline so these people would see, okay, the protest is
filed on this, this is what has to happen, and so on. It’s kind of like --

   MS. TERLAJE: Highlight.

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

   MS. TERLAJE: No. That’s for the appellants response.

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

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

   MS. BROOKS: Oh!

   MS. ACFALLE: Yeah, the document will be made available. And in order to avoid the other selection in having to put a decision together, everybody just coming at any time to request for these files or documents, the information, I’m recommending that after a decision has been made, by the Office of the
Public Auditor to, again, you know, whoever wants to request, it becomes public record after that.

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

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

MS. TERLAJE: Can I just point something out to you and Anthony, and if you guys could help me justify this, you know. It doesn’t have to be right now. But in 5 GCA, 5703, it says, the Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror, or contractor after
protesting. That’s why we tried to allow them access at every point. Right? But I know that the issues of, you know, confidentiality of the bid, the proposals, things like that have to be addressed.

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

MS. ACFALLE: Well, yes, I tend to with Tony’s earlier statement about the bids not, you know, formal and confidential. But there is a distinction between the proposal and the actual, you know -- invitation for bid and request for proposal.

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

But on a bidder, an invitation to bid, it still -- it’s open.

MS. BROOKS: Uh-huh.
MS. TERLAJE: All the bids are open.

MS. ACFALLE: Yeah, these are open bids.

MS. BROOKS: Right.

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

MS. BROOKS: Right.

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

MS. BROOKS: Okay.

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

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

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

MS. PEREZ: Yes, we’ve also had experience dealing with protest that have gone to the courts, where some of the information we allowed to the protestor was actually being challenged and that we should have never had
disclosed it. Because then, it puts the one that was --

MS. TERLAJE: Competing bidders.

MS. PEREZ: That’s right.

MS. BROOKS: Right, yes.

MS. PEREZ: And then it just -- we’re just continually just going to court about all the --


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

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

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

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

MS. PEREZ: It’s actually awaiting -- there’s a request for reconsideration.

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

MS. PEREZ: As long it’s the original appeal.

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

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

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

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

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

MS. BROOKS: Right. It says that in our audit proposal too, that you have to identify it first up front what is proprietary.
Because if you don’t, then the whole RFP is public.

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

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

    MS. PEREZ: By definition.

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

    MS. TERLAJE: All right. Your number?

    MS. ACFALLE: Okay. Now, 12108 --

    MS. PEREZ: 104- --

    MS. TERLAJE: (b)(8).
MS. ACFALLE: 12104 (c)(8)--

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

MS. ACFALLE: Okay, that one there I’m not – we’re recommending that maybe in your transmittal you note -- we recommend some changes.

MS. BROOKS: Law change.

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

MS. BROOKS: Yeah, yeah.

MS. ACFALLE: -- to file the appeal.

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

MS. PEREZ: Inclined.

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

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

MS. TERLAJE: Yes.

MS. ACFALLE: I know the statute mentions where if we are -- you know, we have to advise, even if it’s in proposal, to offeror, they’re getting the award. If they’re
going to be awarded the contract, that document becomes public record.

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

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

MS. TERLAJE: Yeah.

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

MS. BROOKS: Right.

MS. ACFALLE: -- that it will have to be exposed. And if they don’t want it, then they would have to --
MS. BROOKS: Right.

MS. ACFALLE: Thank you.

MS. TERLAJE: Well, thank you very much.

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

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

MS. BROOKS: Thank you very much too.

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

MS. BROOKS: You are more or less observers?

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

MS. TERLAJE: Oh! Okay. All right.

(unintelligible: discussion amongst panel)

MS. TERLAJE: Any questions? Questions or comments from what has been presented? And you’re with?

MS. PUBLIC: Guam Power.
MS. BROOKS: Okay; okay. GPA’s well supported. (laughter)

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

MS. PUBLIC: Right now, it’s still in court, right?

MS. TERLAJE: Because, yeah, there’s no -- uh-huh.

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

So, in Therese’s case, there is an
opportunity that in the vent she has to recuse herself, she can. What happens in my case, if I have to recuse myself -- and that’s a good -- we don’t know yet what should happen.

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

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

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

MR. PUBLIC: Have the court intervene.

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

MS. BROOKS: Well, one thing I have suggested to Therese is, where she feels that
she can make the determination herself without, you know -- that she go ahead and do it. Where I have to recuse myself, she becomes the -- (pauses). So it prevents it going to court, you know, one more time. You know, other than just going to court directly because I have to recuse myself. In the event where -- like in -- that she be the final determiner. Because in all practicality, I’m going to rely 99 and nine-tenth on what she says. You know, so -- (pauses).

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

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

MS. BROOKS: That’s the only one that I know for certain that, you know, where we make a determination. But then there might be other instance, let’s just say, hypothetically, like if we made a determination in awarding something from our own office operation. All right? Then, you know, who would make that review? Not that we buy a lot of stuff. (laughter). But still, you know, you have to, again, when you go through great pain to make
sure everything is done correctly, but still there could be that, you know, feeling. And who would be the appropriate determinant for making that.

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

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

But again, we can’t predict what the
Legislature will do. But they deserve the opportunity also for 90 days.

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

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

HAGATNA, GUAM, WEDNESDAY, MAY 31, 2006
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,
<table>
<thead>
<tr>
<th>Page</th>
<th>Change</th>
<th>Initial</th>
</tr>
</thead>
</table>

2006.

George B. Castro

CHANGES TO TRANSCRIPTION

DEPO RESOURCES
George B. Castro
Court Reporter
Tel.(671)688-DEPO * Fax(671)472-3094