



Jerrick Hernandez <jhernandez@guamopa.com>

Re: Appeal of Graphic Center, Inc.; OPA-PA-21-012

Sosanbra Salas <ssalas@rwtguam.com>
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>

Tue, May 13, 2025 at 4:10 PM

Dear Mr. Hernandez:

Please see the attached document submitted for filing in the above-referenced matter. Should you have any questions or concerns, please feel free to contact our office. Thank you.

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Regards,
Sosanbra Salas Reyes

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 **5.13.25 Opposition to Guam Power Authority's Motion in Limine.pdf**
400K

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*Attorneys for Appellant,
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IN THE OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF

Case No. OPA-PA-21-012

GRAPHIC CENTER, INC.

**OPPOSITION TO GUAM POWER
AUTHORITY'S MOTION IN LIMINE**

Appellant.

I. INTRODUCTION

The Guam Power Authority (GPA) has moved *in limine* to prevent the taking of further evidence and witness testimony in this administrative proceeding. This Opposition is submitted by appellant Graphic Center Inc. (“Graphic center”) to address the failings of that effort.

II. ARGUMENT IN OPPOSITION

A. GPA seeks to have the OPA ignore the plain instructions of the Superior Court of Guam.

On October 29, 2024, the Superior Court of Guam concluded that “the procurement record contains no explanation as to why Infosend’s offer was allowed to continue while missing key documents, but Moonlights’s offer was rejected for

that reason." Decision and Order, 6. While not confirming that the procurement record was flawed to the point of requiring abandonment of the bid altogether, the Superior Court did order more "agency investigation and record Development." Decision and Order, 6. The Court explained that

it remains to be seen whether Graphic Center sufficiently showed to OPA that missing elements of the procurement record were "material" or thwarted judicial review, mainly because OPA failed to substantially engage in this question. Because OPA did not fully engage with the procurement record issues in its decision, rather than cancel the award from GPA to Infosend, the Court remands this matter to the OPA for further agency investigation and record development to determine the materiality of the information missing from the procurement record.

Decision and Order, 6

GPA chose not to appeal this conclusion to the Supreme Court of Guam. Now that the OPA is proceeding forward with further proceedings in accordance with the remand order, the GPA has moved in limine to "prevent the reopening of the record and exclude the introduction of new evidence...." Motion, 1. GPA seeks to have the OPA ignore the plain language of the remand order, and instead conduct a *de facto* appeal on remand, where no further record development would occur and the parties would presumably merely submit briefs based upon existing records. GPA says this, without offering a procedural mechanism though which the OPA will be able to glean in these remanded proceedings where in the procurement record the decision to push forward with Infosend was made. Will GPA submit declarations and affidavits to illustrate to the OPA where its procurement record supports the decision to forgive Infosend but oust Moonlight? Will its counsel make reference to segments of testimony provided more than three years ago that appear on recordings on a webpage? Will the parties simply ask the OPA to review the

record itself without the guidance of briefing or the taking of evidence from those who made the record? The OPA should reject GPA’s invitation to truncate these proceedings, and should instead engage with the remanded proceedings just as the Superior Court ordered, *i.e.*, proceed with “further agency investigation and record development.”

B. GPA mischaracterizes both the prior determinations of the OPA, and the ruling of the Superior Court with regard to the procurement record.

GPA says there is nothing more to do in these remanded proceedings, as a “full record” already exists. Motion, 1. To make this argument, GPA says that the Public Auditor has already determined that “InfoSend was capable of meeting the RFP’s requirements, GPA’s evaluation committee properly evaluated the proposals, and Graphic Center’s claim that InfoSend allegedly submitted an incomplete proposal was untimely.” Motion, 2 citing Decision and Order, 9, 10. GPA misapprehends the OPA’s decision. The OPA **did not find** that InfoSend was a capable offeror or that the GPA evaluation team did a good job, but instead merely found that “Graphic Center has failed to prove that InfoSend is unable to meet the requirement of the RFP and that GPA’s evaluation of the proposals were contrary to law....” Decision and Order, 9. The OPA made no affirmative determination about InfoSend. GPA’s sleight of hand regarding the OPA’s administrative determination continues with GPA’s insistence that InfoSend submitted a fully responsive bid. Neither the OPA, nor the Superior Court on review, made such a determination. The great bulk of the OPA’s decision regarding the responsiveness of the InfoSend Bid comes from the OPA’s refusal to

take up the issue of Infosend's full responsiveness to the bid because of the OPA's determination that Graphic Center had not raised a timely protest on that point.

As the Superior Court recognized, Guam law mandates that "each procurement officer shall maintain a complete record of each procurement." Decision and Order, 6, citing 5 G.C.A. § 5249. More, the Superior Court held that "Although GPA has argued orally that no exemption was made for Infosend and that Infosend's initial response contained all required documentation, the procurement record does not clearly support these statements." Decision and Order, 6. GPA, in seeking to simply stand upon the existing record, continues to ignore the fact that its procurement defense of this tender runs through the existing procurement record, and not some post award testimony developed as part of a procurement appeal defense and offered to the OPA three years ago. Put another way, GPA must show to the OPA during a merits hearing that its Procurement Record supports its procurement decision, as opposed to simply pointing toward testimony from procurement officials that does not match the written procurement record. Without a hearing on remand to do this that examines the actual procurement record and makes findings, the fact will remain that the procurement record is lacking.

C. Transcript designations

GPA's complains that the impending hearing before the OPA is somehow flawed, and witnesses should not be allowed to testify, because of a "failure to order a transcript of the testimony that would have permitted the Superior Court to rule on the completeness of the procurement record." Motion, 4. To be certain, GPA chose not to appeal this issue to the Supreme Court of Guam, leaving the

determination of the Superior Court intact. More, GPA ignores the course of the Superior Court litigation, and its own litigation conduct to make this attack.

GPA finds fault with these remand proceedings because “transcripts of the testimony of other witnesses who has testified.... were not included in the record submitted to the Superior Court.” Motion, 3. There was nothing flawed with the transcripts presented to the Superior Court. Guam’s Administrative Adjudication Act makes it clear that an appeal to the judiciary needn’t have transcripts made of every proceeding occurring at the agency level. 5 G.C.A. § 9241 sets out that “Judicial review may be had by filing a petition in the Superior Court for a writ of mandate in accordance with the provisions of the Code of Civil Procedure.” The statute further explains that “Within thirty (30) days after request therefor and payment of the expenses of preparation and certification by the petition, the agency shall prepare and deliver to the petitioner the complete record of the proceedings **or such parts of the record** as are designated by the petitioner.” 5 G.C.A. §9241. That is what occurred here.

In conformance with the Superior Court Scheduling Order, Graphic Center designated certain transcripts to be produced for its appeal through correspondence dated February 3, 2023.¹ Both the interested party and GPA counsel were copied on the correspondence. Recognizing that any party — as is the usual case under appellate procedure — could designate differing transcripts, the Superior Court scheduling order explained that the “OPA will provide transcript certifications within 15 days after receipt of the draft transcripts prepared by the

¹ That correspondence is attached to this Opposition as **Exhibit A**.

designating party.” Scheduling Order, 5 (emphasis added).² The Plaintiffs opening brief would come within 45 days after record submission, with GPA’s brief to come 30 days later. GPA submitted its opening brief on October 1, 2024 — 607 days after the Appellant first designated the transcripts it wanted for the Superior Court Appeal. GPA took no action in those 607 days to obtain further transcripts it though necessary, or to even complain about the record being submitted by the OPA to the Superior Court. GPA’s May 2025 complaint about the lack of a transcript it could have ordered more than two years ago rings hollow.

GPA complains that the lack of further transcripts was exacerbated by the Superior Court’s apparent reliance upon the Graphic Center’s citations to its Complaint. GPA incorrectly asserts that use of the complaint in Superior Court Briefings was somehow prohibited in the Superior Court. Motion, 5. GPA is wrong. GPA completely ignores the fact that the Graphic Center Petition was **Verified**, and as such, the allegations were functioning as evidence by providing a sworn declaration that the facts stated are true, which can be used to support, establish, or prove the matters asserted in the complaint. *See, Castino v. G.C. Corp.*, 2010 Guam 3. More, the GPA Answer to the Complaint was unverified. This failure by GPA means that its Answer to the Superior Court case could have been properly disregarded altogether. *Van Dox v. Superior Ct. of Guam*, 2008 Guam 7, ¶ 22.

² While no controlling here, the Guam Rules of Appellate Procedure illuminate the process of making cross designations. GRAP 7 allows for the appellant to order transcripts “of such parts of the proceedings not already on file as the Appellant considers necessary...” and for the appellee to make an additional order “if the Appellee considers it necessary to have a transcript or other parts of the proceedings....” GRAP 7.

D. GPA's appellate citations and reliance upon the rules of evidence are misplaced.

GPA would have the OPA conduct its hearings in accordance with the Guam Rules of Evidence, the Federal Rules of Civil Procedure, and precedent from the Tenth Circuit Court of Appeals. Motion 6-7. None of these control the proceedings moving forward.

GPA wants to use Guam R. Evid. 403 to prevent “needless cumulative evidence of facts already found in the record that exists from February 2022.” Motion, 6. GPA provides no source for this conjecture, and this contention challenges the Superior Court’s order that “further agency investigation and record development to determine the materiality of the information missing from the procurement record” Decision and Order, 6. The matter has been remanded to explore the procurement record’s completeness in capturing the decision to award the contract to Infosend. Hearings conducted by the OPA are intended to be as informal as reasonable and appropriate under the circumstances. Specifically, the hearings “shall not be bound by statutory rules of evidence or by technical or formal rules of procedure.” 2 Guam R. & Regs. 4-§ 12108. No artificial barriers should be installed to prevent compliance with that Superior Court command.

Similarly, GPA’s use of *Smith v. United States* is similarly misplaced. Again, turning to sleight of hand, GPA shares with the OPA six factors to be considered in the tenth circuit when, as GPA phrases it, “determining whether to reopen **evidence**.” Motion, 7, emphasis added. The Tenth circuit’s instructions were not about taking evidence at a formal hearing, but instead were aimed at formulating “several relevant factors in reviewing decisions concerning whether

discovery should be reopened" under the Federal Rules of Civil Procedure. *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987). Here, Graphic Center is merely moving forward on a case that has been remanded to an agency for further record development and investigation. GPA's efforts at thwarting Graphic center through the application of rules and procedures reserved for federal court should be rejected.

III. CONCLUSION

The Guam Power Authority (GPA) now seeks to prevent the Office of Public Accountability (OPA) from fulfilling the express directive of the Superior Court of Guam: to conduct further investigation and develop the administrative record in the challenged procurement. Despite the Court's clear finding that the procurement record failed to explain why Infosend's noncompliant proposal was permitted to advance while Moonlight's was not, GPA has moved to limit the remand proceedings, attempting to freeze the record and bar the very evidentiary development the Court ordered. In doing so, GPA asks the OPA to disregard the remand order's plain language and purpose, and instead treat these proceedings as a narrow exercise, rather than a substantive investigation into the deficiencies identified by the Court. GPA's position is procedurally unfounded and substantively contrary to both the mandate of the Court and the requirements of Guam procurement law. The OPA should reject GPA's effort to prematurely close the record and instead proceed as directed—with further agency investigation and record development.

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Respectfully submitted on this 13th day of May 2025 at Hagåtña, Guam.

RAZZANO WALSH & TORRES, P.C.

By: /S/ Joshua D. Walsh
JOSHUA D. WALSH
Attorneys for Appellant
Graphic Center, Inc.

EXHIBIT A

RAZZANO WALSH & TORRES, P.C.

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Sender's Direct E-Mail:
jdwalsh@rwtguam.com

February 3, 2023

VIA EMAIL

MThompson@ttalaw.net

Mitchell Thompson
Thompson Thompson & Alcantara, P.C.

Re: Graphic Center, Inc. v. Office of Public Accountability, Guam Power Authority, The Territory of Guam, and Infosend, Inc.; CV0207-22

Mr. Thompson,

In conformance with the Scheduling Order submitted by the parties to the Superior Court on December 22, 2022, Appellant Graphic Center, Inc. designates for use in the Superior Court proceedings the transcribed proceedings from the following dates:

- OPA-PA-21-012 Formal hearing, Part A – February 4, 2022, Testimony of James Borja
- OPA-PA-21-012 Formal hearing, Part A – February 4, 2022, Testimony of John Kim

In conformance with the scheduling order, Plaintiffs have designated these with a court reporter, and are preparing transcripts of the above designated proceeding and provide them to the OPA for certification and submission to the Court as part of the record on review.

Sincerely,



Joshua D. Walsh

*cc: Roxana Weil (roxana.w@infosend.com)
Graham Botha (gbotha@gpagwa.com)*