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30-09-1382

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OPINION

Ref: GEDA 09-0919

TO: Administrator, Guam Economic Development Authority

FROM: Attorney General

SUBJECT: Guam Industrial Services Inc. – Qualifying Certificate

By letter dated September 11, 2009, you have requested an opinion on the issue of whether Guam Industrial Services, Inc. possesses a valid qualifying certificate due to changes made by former Governor Carl T.C. Gutierrez to the Qualifying Certificate (“QC”) after it was recommended for approval by the Guam Economic Development Authority board (“GEDA”).

A review of Guam law and the legislation that created the Guam Economic Development Agency indicates that Guam law does not permit the Governor to modify the terms and conditions of a QC unless the modifications have first been reviewed and recommended by GEDA.

1. GEDA’s Roles and Responsibilities

GEDA is a public non-profit corporation to assist in the implementation of an integrated program for the economic development of Guam. See 12 GCA §§50101 and 50103. Title 12 GCA §50101 provides in part:

There is hereby created a public, non-profit corporation to be known as the Guam Economic Development Authority (“Authority”) with functions, powers and responsibilities as hereinafter provided.

GEDA is to take an active part in the economic development of Guam and performs more than just an advisory role. Title 12 GCA §50103(b) outlines this role:

The Corporation is authorized to control and implement that part of the basic plan for the economic development of Guam, assigned to it by the Governor of Guam. The Corporation shall also be an active participant in the development of said basic plan.

In sum, GEDA's role is more than just advisory; it is given specific duties in order to expand economic development in Guam.

## II. Issuance of Qualifying Certificates

GEDA plays a role in the issuance of QC's. Title 12 GCA §50104(o) outlines GEDA's role with respect to QC's which is as follows:

To recommend to the Governor of Guam the issuance, modification, revocation and suspension of Qualifying Certificates in accordance with the provisions of this Division. This power does not include the power to recommend that the Governor of Guam execute Exclusive Certificates.

Title 12 GCA §58100 *et seq.* also outlines GEDA's role with respect to the issuance of QC's. The following sections in 12 GCA Chapter 58 highlight GEDA's responsibilities with respect to the QC law:

Title 12 GCA §58101 defines a QC as follows:

### **§58101. Qualifying Certificate Defined.**

A *Qualifying Certificate* is a contract valid for a given period of time, executed by the Governor upon recommendation of the Authority, between the government of Guam and the Beneficiary, which has qualified for certain tax rebates or tax abatements or for both in return for meeting certain employment, investment, and other requirements as described in this Chapter and in the Qualifying Certificate.

Title 12 GCA § 58106 describes the issuance of the QC and provides:

### **§58106. Qualifying Certificate: Issuance of.**

A Qualifying Certificate may be issued by the Governor of Guam *upon the recommendation of the Authority* to any applicant that proposes to engage in an eligible business,...(emphasis added).

Title 12 GCA § 58109 outlines the findings that GEDA is to consider in making its recommendation to the Governor and provides:

### **§58109. Authority's Findings on Applications.**

In making its recommendation to the Governor the Authority shall consider and make specific findings on the following:

- (a) The impact of the Beneficiary's proposed activities upon established businesses and markets in Guam;
- (b) The financial risks facing the Beneficiary in undertaking the proposed activities;

- (c) The location of the proposed activities;
- (d) The importance of the proposed activities to the economy of Guam and to the official economic policies of the government of Guam, if any;

Title 12 GCA § 58132 addresses modifications of tax benefits:

**§58132. Modification of Tax Benefits.**

In the event that a Beneficiary proposes to substantially expand or add to its activities and desires to obtain a modification of its original Qualifying Certificate to include its proposed additional activities, then *upon findings and recommendations of the Authority, the Governor may modify* the original Qualifying Certificate, subject to the following conditions:

- (a) Findings. The Authority specifically finds that the additional proposed activities of the Beneficiary satisfy the requirements of §58103 and §58106 of this Chapter and that the Authority makes recommendations required by §58109 of this Chapter;... . (Italics added).

Title 12 GCA §58126 deals with GEDA making recommendations for changes to the QC. It provides:

**§58126. Recommendations.**

All recommendations of the Authority for issuance, modification, renovation and suspension of Qualifying Certificates shall be forwarded to the Governor of Guam, together with a memorandum of the Authority's findings in support of its recommendations. Any recommendation of the Authority not approved by the Governor within sixty (60) calendar days from his receipt thereof shall be deemed disapproved on the sixty-first (61st) day following such receipt.

III. Conclusion

In accordance with 12 GCA §58109, GEDA is mandated to consider and make certain findings with respect to the QC applicant's business. Upon making the mandated findings, only then will GEDA make a recommendation to the Governor regarding the issuance of the QC. Upon receipt of GEDA's findings and recommendations, the Governor may take either of the following two actions:

1. The Governor may approve GEDA's recommendations and execute the QC (*see* 12 GCA §§ 58101 and 58106); or

**OPINION**

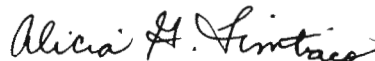
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2. The Governor may refuse to approve GEDA's recommendations and decline to execute the QC (*see* 12 GCA § 58126).

Once a QC has been issued, the Governor may not change its terms unless he first obtains the findings and recommendations of GEDA on the proposed changes (*see* 12 GCA § 58132).

The QC statute does not provide the Governor with any authority to make changes to a QC from the form it was in when it was originally recommended by GEDA. Based upon GEDA's enabling legislation and the QC statute, Guam law does not permit the Governor to modify the terms and conditions of a QC previously recommended by GEDA, unless GEDA submits additional findings and recommendations in support of the proposed modifications.

  
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