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Mayor



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MEMORANDUM

T O: Danny A. Mateo, Council Chair
F R O M: Adrienne N. Heely, Deputy Corporation Counsel *Adrienne N. Heely*
D A T E: November 10, 2011
SUBJECT: **REQUEST FOR LEGAL OPINION RELATING TO SECTION 9-13 OF THE REVISED CHARTER OF THE COUNTY OF MAUI (1983), AS AMENDED**

This memorandum is in response to your memorandum dated November 4, 2011 requesting our Department's response to the following:

1. Are the requirements of Section 9-13 of the Charter being met through the current audit process?
2. If it is determined that auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in "Government Auditing Standards" do not satisfy the Charter's requirements:
 - a. What should the Council use as its basis for determining "financial accountability"?
 - b. What should the Council use as its basis to determine whether the information and statements presented in the CAFR comply with the requirement for reporting "financial accountability"?

We are of the opinion that the requirement of Section 9-13 of the Revised Charter of the County of Maui (1983) as amended ("Charter") are being met through the County's current audit process.

Section 9-13 of Charter directs the Council to annually provide for an independent audit:

"Within six (6) months after the beginning of each fiscal year, the county council shall provide for an independent audit of the accounts and other evidences of financial transactions of the county and of all operations for which the county is responsible. The audit shall be made by a certified public accountant or firm or certified public accountants, designated by the council, who have no personal interest, direct or indirect, in the fiscal affairs of the county or any of its operations. *The audit shall include both financial accountability and adequacy of the financial and accounting system.* If the State makes such an audit, the council may accept it as satisfying the requirements of this section. The scope of the audit shall be in accordance with the terms of a written contract to be signed by the council chair, which contract shall encourage recommendations for better financial controls and procedures and shall provide for the completion of the audit within a reasonable time after the close of the previous fiscal year. A copy of the audit reports shall be filed with the county clerk and shall be a public record."

(Emphasis added.)

Our office has previously addressed the Council's legislative authority vested to it in Section 9-13 of the Charter. In said opinions, we explained that the County Council is responsible for providing an independent audit and for designating the auditor while the Council Chairman is responsible for negotiating the written contract.¹

All contracts, however, must be reviewed by the Department of the Corporation Counsel and signed by the Mayor and Director of Finance:

"Before execution, all written contracts to which the county is a party shall be approved by the corporation counsel as to form and legality.

¹ See June 29, 1983 and March 25, 1986 opinions attached hereto as Exhibit "1".

All such contracts shall be signed by the mayor, and any such contract which provides for expenditure of county funds shall also be signed by the director of finance. Contracts involving financial obligations of the county shall also be certified by the director of finance as to the availability of funds in the amounts and for the purposes set forth therein."

Section 9-18, Charter.

Accordingly, the Council is authorized to enter into such a contract and ratify said contract and take action; and include in said contract, the requirement in Section 9-13 of the Charter, that "[t]he audit shall include both financial accountability and adequacy of the financial and accounting system." "The council by ratification finally determines and thus fulfills the duty imposed by law."² In fact the validity of Section 9-13 of the Charter is common as many statutes in many states provide for the preparation and publication of reports and statements of the financial condition of the municipality.³

A review of the current contract documents, including the Request For Proposal ("RFP") and the Contract to Provide Financial Audit of the County of Maui for the Years Ending June 30, 2011, June 30, 2012, and June 30, 2013 (Contract No. C4823), specifically, require compliance with Section 9-13 of the Charter, including addressing the financial accountability and adequacy of the financial and accounting systems.⁴ Equally as important, a review of the prepared Comprehensive Annual Financial Report ("CAFR") Reports and the Single Audit Reports have sections that discuss the same as well.⁵ It is well-worth noting, and as mentioned in your request, the County of Maui's CAFR Reports have been awarded Certificate of Achievements from the Government

² See §10.41 McQuillan Mun Corp (3rd Ed) footnotes omitted.

³ See §39.10 McQuillin Mun Corp (3rd Ed).

⁴ See e.g., RFP at pp. 1-2 ; see also, Contract No. C4823 et seq.

⁵ See copies of CAFR Reports and Single Audit Reports from Fiscal Year 2005 through Fiscal Year 2010. Said reports are public documents and may be viewed on the County website at www.mauicounty.gov under Finance Department's Documents.

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Finance Officers Association ("GFOA") of the United States and Canada for the last 27 years.⁶ To receive the GFOA Certificate of Achievement, the government entity must publish an easily readable and efficiently organized CAFR whose contents conform to program standards and satisfy both *generally accepted accounting principles and applicable legal requirements.* (*Emphasis added.*) It is evident that the County of Maui ensures that GFOA standards are being adhered to and continue to conform to the Certificate of Achievement Program requirements.⁷

A review of state and federal case law reveal not only that challenges to government audits and investigations are typically without merit and dismissed for lack of subject matter jurisdiction and/or via summary judgment;⁸ but, also, that the use of discretionary legislative function of the County's management in employing a certified public accountant or firm to prepare the County's Comprehensive Annual Financial Report ("CAFR") which is conducted in accordance with "Government Auditing Standards" ("GAGAS") generally accepted in the United States, is a relevant, reliable and meets the standards for admissibility of expert testimony in a court of law.⁹

⁶ Id. at p. 23 of FY2010 CAFR Report: Certificate of Achievement for Excellence in Financial Reporting.

⁷ See CAFR 2010, specifically letter from Director of Finance, Letter of Transmittal dated December 15, 2010 at pp. 11-12.

⁸ In United States v. Sun Microsystems, Inc., 2008 WL 4756170 (E.D. Ark.) (the Court explained that governmental decisions to investigate and conduct audits are discretionary functions; and that the government choosing to utilize the GAGAS standards requires substantial judgement or choice, and that the GAGAS advise that auditors should be objective and that they should be free from the appearance of bias, and said audit standards involve public policy); see also, Department of the Auditor General v. State Employee Retirement System, 860A.2d 206 (2004) (the Court explained that the government has the legal authority to conduct audits).

⁹ See e.g., United States v. Hall, 2006 WL 3694478 (E.D. Tenn). The court ruled that the government's use of the GAGAS standards, demonstrated the soundness of the methodology and accounting methods as a reliable principles, methods, and basis and

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As to your second question, we are of the opinion that auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in "Government Auditing Standards" do satisfy the Charter's requirements.¹⁰

The Government Auditing Standards explain that "the professional standards and guidance contained in the generally accepted government auditing standards ("GAGAS"), provide a framework for conducting high quality government audits and attestation engagements with competence, integrity, objectivity, and independence."¹¹ Said standards are nationally recognized and used by auditors of government entities and entities that receive government awards.¹² It is worth noting that:

"When auditors perform their work in this manner and comply with GAGAS in reporting the results, their work can lead to improved government management, better decision making and oversight, effective and efficient operations, and accountability for resources and results." (Id.)

Accordingly, it is this office's opinion that not only is the County of Maui authorized pursuant to Section 9-13 of the Charter to conduct audits, but the County of Maui is also exercising good public policy and judgment, as to improve government management, by requiring said audits be conducted in accordance with the generally accepted government auditing standards/GAGAS.

satisfies the *Daubert* and Federal Rules of Evidence 702 (admissibility of expert testimony).

¹⁰ Because our office's answer to your second question is that auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in "Government Auditing Standards" do satisfy the Charter's requirements, this memo does not address your questions posed in 2.a. and 2.b.

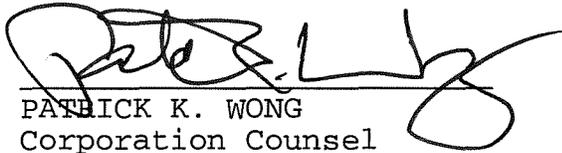
¹¹ See §1.03, Government Auditing Standards attached as Exhibit "2".

¹² See footnotes 4 and 5, *supra*.

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Should you have any questions or concerns, please do not hesitate to contact me.

APPROVED FOR TRANSMITTAL:



PATRICK K. WONG
Corporation Counsel

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Attachments: Exhibits "1" and "2"
xc: Danilo F. Aagsalog, Director of Finance
Sananda K. Baz, Budget Director
Patrick K. Wong, Corporation Counsel
Webpage



DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII 96793
TELEPHONE 244-7740

June 29, 1983

Honorable Goro Hokama, Chairman,
and Members of the Council
County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793

Ladies and Gentlemen:

Re: Audit of Accounts

This is in response to your letter dated May 7, 1983 requesting an opinion whether the mayor can disapprove or reject the audit contract which has been signed by the council chairman. We are of the opinion that the annual audit of accounts is a legislative function which the council chairman implements by executing the audit contract. Execution of the audit contract by the mayor is a ministerial act involving limited discretion.

Section 9-13 of the Maui Charter (1983) directs that the county council shall annually provide for an independent audit:

"Within thirty (30) days after the beginning of each fiscal year, the county council shall provide for an independent audit of the accounts and other evidences of financial transactions of the county and of all operations for which the county is responsible. The audit shall be made by a certified public accountant or firm of certified public accounts, designated by the council, who have no personal interest, direct or indirect, in the fiscal affairs of the county or any of its operations. The audit shall include both financial accountability and adequacy of the

Honorable Goro Hokama, Chairman,
and Members of the Council

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financial and accounting system. If the State makes such an audit, the council may accept it as satisfying the requirements of this section. The scope of the audit shall be in accordance with the terms of a written contract to be signed by the council chairman, which contract shall encourage recommendations for better financial controls and procedures and shall provide for the completion of the audit within a reasonable time after the close of the previous fiscal year." (Emphasis added.)

The county council is responsible for providing an independent audit and for designating the auditor while the council chairman is responsible for negotiating the written contract.

All contracts, however, must be reviewed by the department of the corporation counsel and signed by the mayor and the director of finance:

"Before execution, all written contracts to which the county is a party shall be approved by the corporation counsel as to form and legality. All such contracts shall be signed by the mayor, and any such contract which provides for the expenditure of county funds shall also be signed by the director of finance. Contracts involving financial obligations of the county shall also be certified by the director of finance as to the availability of funds in the amounts and for the purposes set forth therein." Maui Charter § 9-18.

Where the department of the corporation counsel approves the contract as to form and legality and the director of finance certifies as to the availability of funds, the signature by the mayor is ministerial.

"Ministerial functions of municipal corporations are absolute, fixed and certain acts required by law in a given state of facts, and in the performance of which the municipal board or officer exercises no discretion.

Honorable Goro Hokama, Chairman,
and Members of the Council

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* * *

"So the council may authorize the mayor to make a contract which the council alone is authorized to make, and itself afterwards ratify such contract and take action, as in issuing bonds, in pursuance of it. In such case the mayor merely acts as the instrument or amanuensis of the council. It is through him that the contract is made. The council by ratification finally determines and thus fulfills the duty imposed by law." 2 McQuillan Mun Corp (3rd Ed) § 10.41, footnotes omitted.

Very truly yours,

DEPARTMENT OF THE
CORPORATION COUNSEL



GUY ARCHER
Deputy Corporation Counsel

GA:jkm

APPROVED:


Corporation Counsel
County of Maui



DEPARTMENT OF THE CORPORATION COUNSEL

County of Maui
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE 244-7740

March 25, 1986

Honorable Howard S. Kihune, Chairman
Finance Committee
County Council
County of Maui
Wailuku, Maui, Hawaii 96793

Re: Independent Auditor

Dear Chairman Kihune:

This is in response to your request for a legal opinion as to the following issues:

- "1. May the Council designate a CPA firm to be the independent auditor of the County for a particular fiscal year: (a) if the CPA firm is currently a consultant or auditor for the County? (b) if the CPA firm was, in the fiscal year to be audited, a consultant or auditor for the County? (c) if the CPA firm was, prior to the fiscal year to be audited, a consultant or auditor for the County?
2. How can the Council engage an independent auditor to perform annual audits on a multi-year basis? In this regard, please take note of Resolution No. 16 (1965)."

Your first question requires a review of the following language contained in Section 9-13 of the Charter of the County of Maui:

"Section 9-13. Audit of Accounts. . . .
The audit shall be made by a certified public accountant or a firm of certified public

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accountants, designated by the council, who have no personal interest, direct or indirect, in the fiscal affairs of the county or any of its operations. . . ." (Emphasis added)

The apparent intent of the Section 9-13 is to avoid conflicts of interest in the performance of the county audit and to ensure that the audit is performed in an objective manner. Your questions ask us to determine if we deem the situations described as presenting conflicts of interest which would disqualify an auditor because of its "personal interest".

In answer to question 1.(a), we are of the opinion that the Council may designate a particular CPA firm to be the independent auditor for a particular fiscal year, even if at the current time, the firm is performing services for the County as an auditor. We do not believe Section 9-13 of the Charter was intended to prohibit the employment of an particular auditor for two successive years. To lend such an interpretation would ignore the cost-savings advantages resulting from an auditor's familiarity with the County's accounting system and procedures. We find the practice of contracting with an auditing firm for two successive years to be an acceptable practice which does not create a conflict of interest violative of the above-cited provision of the Charter.

We do not, however, express the same opinion as it applies to the situation where the intended auditing firm is currently under contract with the County as a consultant, as we feel there is greater potential for a conflict of interest because of the possible assumption by the firm of conflicting roles. A situation could arise where the intended auditing firm is performing services as a consultant which places it in a position to obtain certain information or knowledge which results in the firms' impaired objectivity in performing the County audit. Moreover, a CPA firm acting as a consultant might be responsible for the establishment and implementation of certain financial practices or procedures. A definite conflict would exist where the firm, acting as an auditor attempts to review the newly implemented procedures recommended by it. Since there is always an inherent danger of conflict when two different roles are assumed concurrently by one person or firm, we are of the opinion

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that such a practice would be contrary to the intent of the Charter provision.

In answer to questions 1.(b) and 1.(c), we again find no clear presence of a conflict under Section 9-13 with respect to the designation of a CPA firm as the independent auditor where the firm had previously performed the county audit. As to the propriety of designating a particular CPA firm as the auditor where the firm had, in a prior year, served as a consultant for the County, an examination of the particular circumstances would be necessary to determine the effect of the previous services on the performance of the audit. The elapsed time from the date of services as a consultant should be given some consideration (e.g., if other auditing firms have reviewed the work of the consultant/intended auditor, objective evaluations and recommendations would have already been received and implemented). So while some caution should be exercised, we do not believe that a firm which has served as a consultant would be forever barred from being awarded the contract for the county audit.

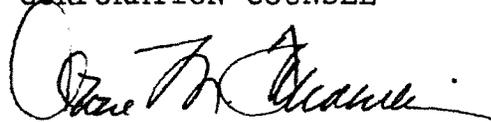
As to your second question, we are of the opinion that it would be possible to engage an independent auditor on a multi-year basis without violating provision (E) of Resolution 16 (1965), pertaining to Water System Revenue Bonds, which requires that an audit of the accounts be performed by an Accountant appointed or employed "from year to year". We believe that this can be accomplished by requesting proposals from CPA firms on a multi-year basis, but reserving the option to renew the audit contract for a succeeding year at the price quoted. By calling for proposals in this manner, an auditing firm would give its price commitment for a subsequent year, with the actual appointment of the auditor to still be made annually in compliance with the above provision.

Honorable Howard S. Kihune, Chairman
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Should you have any questions, please contact this office. Our apologies for the delay in responding to your request.

Very truly yours,

DEPARTMENT OF THE
CORPORATION COUNSEL



ANNE M. TAKABUKI
Deputy Corporation Counsel

AMT:ko

APPROVED:



H. RODGER BETTS
Corporation Counsel
County of Maui

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Chapter 1: Use and Application of GAGAS

Introduction

1.01 Auditing is essential to government accountability to the public. Audits and attestation engagements provide an independent, objective, nonpartisan assessment of the stewardship, performance, or cost of government policies, programs, or operations, depending upon the type and scope of the audit.

1.02 The concept of accountability for use of public resources and government authority is key to our nation's governing processes. Government officials entrusted with public resources are responsible for carrying out public functions legally, effectively, efficiently, economically, ethically, and equitably.¹ Government managers are responsible for providing reliable, useful, and timely information for accountability of government programs and their operations. (See appendix I paragraph A1.08 for additional information on management's responsibility.) Legislators, government officials, and the public need to know whether (1) government manages public resources and uses its authority properly and in compliance with laws and regulations; (2) government programs are achieving their objectives and desired outcomes; (3) government services are provided effectively, efficiently, economically, ethically, and equitably; and (4) government managers are held accountable for their use of public resources.

Purpose and Applicability of GAGAS

1.03 The professional standards and guidance contained in this document, commonly referred to as generally accepted government auditing standards (GAGAS), provide a framework for conducting high quality government audits and attestation engagements with competence, integrity, objectivity, and independence. These standards are for use by auditors² of government entities and entities that receive government awards and audit organizations³ performing GAGAS audits and attestation engagements. GAGAS contain requirements and guidance dealing with ethics, independence, auditors' professional competence and judgment, quality control, the performance of field work, and reporting. Audits and attestation engagements performed under GAGAS provide information used for oversight, accountability, and improvements of government programs and operations. GAGAS contain requirements and guidance to assist auditors in objectively acquiring and evaluating sufficient, appropriate evidence and reporting the results. When auditors perform their work in this manner and comply with GAGAS in reporting the results, their work can lead to improved government management, better decision making and oversight, effective and efficient operations, and accountability for resources and results.

1.04 Laws, regulations, contracts, grant agreements, or policies frequently require audits in accordance with GAGAS. Many auditors and audit organizations also voluntarily choose to perform their work in accordance with GAGAS. The requirements and guidance in this document apply to audits and attestation engagements of government entities, programs, activities, and functions, and of government assistance administered by contractors, nonprofit

EXHIBIT " 2 "