

Section 5.9

BUSINESS DAMAGES

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Section 5.9

BUSINESS DAMAGES

PURPOSE

This section establishes the process the Guam Department of Public Works (Department) must follow when notifying business owners of their rights; accepting business owner offers to settle eligible business damage claims; responding to business owner offers and reviewing business damage estimates.

AUTHORITY

23, CFR, Part 710
49, CFR, Part 24

SCOPE

The principal users of this document are Department of Public Works Office of Right of Way employees and those persons contracted by the Department to perform parcel acquisition functions and the Office of the Attorney General.

REFERENCES

Section 5.2, Negotiation Process
Section 5.4, Fees and Costs
Section 9.3, Right of Way Records Management

FORMS

5.2-2 Offer and Purchase Agreement
5.2-4 Settlement Approval
5.2-2BO Notice to Business Owner

5.9.1 Notification to Business

5.9.1.1 The Department must make a good faith attempt to notify each owner of a business, including lessees who operate a business located on property to be acquired, of his/her rights.

5.9.1.2 Business owner notices must be delivered simultaneous with or after the Department makes a written offer to the fee owner for purchase of the needed property. Business owner notices must not be delivered before the written offer to purchase.

5.9.1.3 The Department or consultant must conduct a detailed, door-to-door survey of each project to accurately identify all businesses operating on property being acquired. The resulting list of businesses must be checked against the records of the Business License Division, Department of Revenue and Taxation to identify any registered agents for those businesses. This check must include all business entities registered with the Business License Division, Department of Revenue and Taxation including, but not limited to, corporations, partnerships, fictitious names, etc. The survey must be current to the date the business owner notice is mailed or personally delivered.

5.9.1.4 Business owner notices will be sent by certified mail return receipt requested, to the address of the registered agent for the business. If the business does not have a registered agent, the notice must be sent by certified mail or by personal delivery to the address of the business located on the property being acquired. Notice to one owner of a multiple ownership business constitutes notice to all owners of the business. Return of the notice as undeliverable by postal authorities will constitute compliance with notice requirements.

Documentation of the business owner's receipt of the notice must be maintained in the Department's official parcel file.

5.9.1.5 Business owner notices will be prepared using **Form No. 5.2-2BO, Notice to Business Owner**. Enclosures must include:

- (A) A copy of the **Real Estate Acquisition Process Brochure** (Attachment to Manual Section 5.2 Negotiation Process).
- (B) Legal description and/or right of way map delineating the parcel on which the business is located;
- (C) Business Owner Questionnaire, and
- (D) A self addressed, stamped envelope.

5.9.1.6 The Department is not required to provide notice to business owners who acquire an interest in the business subsequent to the original notification; to businesses that occupy property after the initial notice is sent to business owners; or to independent contractors. However, if the Department is aware that an independent contractor has an interest in the real property being acquired, notice must be provided.

5.9.1.7 The Department cannot file a condemnation proceeding for acquisition of the fee parcel, or an interest therein, until it has made a good faith effort to notify all businesses located on the parcel of their rights and obligations if filing a claim for business damages.

5.9.2 Business Owner Requests for Records

Upon request by the business owner, or their properly authorized representative, as described in **Section 5.2, Negotiation Process**, the Department must provide copies of those records in the manner described in **Section 5.2 Negotiation Process**.

5.9.3 Business Qualification and Claim Process for Business Damages

5.9.3.1 In order to qualify for business damages, the following criteria must be met:

- (A) The business must hold a real property interest in the property being acquired;
- (B) The acquisition must be a partial acquisition of the real property the business occupies;
- (C) The business must have been in operation on the site for at least five years prior to the Department's acquisition, and
- (D) The damages must result from the acquisition of the property and not from the proposed construction or from activities associated with construction of the project.

5.9.3.2 If the business owner wishes to claim business damages to his/her qualified business, he/she must submit a good faith written offer to settle the business damage claim. The offer should be submitted by certified mail, return receipt requested to the Department. If the business owner's offer is delivered by means other than certified mail, the Department must provide the owner a receipt documenting delivery of the offer. Documentation of the Department's receipt of the owner's offer must be maintained in the Department's official parcel file.

5.9.3.3 The offer must be delivered or postmarked within **180 days** from the business owner's receipt of the notice. However, the Department of Public Works Right of Way Supervisor (DPWRS) may agree to extend the **180 day** time frame upon agreement with the business owner. If the business owner does not submit an offer within **180 days** and no extension is agreed to between the Department and the owner, the owner's claim will be

stricken in condemnation proceedings unless the business owner can show a good faith justification for failing to submit a timely offer. If the court determines that the business owner has made a good faith justification, the court must allow the business owner up to **180 days** to submit an offer to settle his/her business damage claim.

5.9.3.4 If the business owner submits an offer to settle a qualified business damage claim, the offer must include an explanation of the nature, extent, and monetary amount of the business damage. The offer must be prepared by the business owner, a Certified Public Accountant (CPA) or a business damage expert familiar with the nature of the operations of the owner's business. A business damage expert may be any expert knowledgeable about the operations of a particular business hired by the business owner to prepare an offer to settle a business damage claim.

5.9.3.5 The offer to settle a qualified business damage must be accompanied by copies of the business records used to substantiate the owner's good faith offer to settle the business damage claim. Business records include but are not limited to:

- (A) Copies of Territorial income tax returns,
- (B) Territorial income tax withholding statements,
- (C) Miscellaneous Territorial income tax statements,
- (D) Territory sales tax returns,
- (E) Balance sheets,
- (F) Profit and loss statements, and
- (G) Corporate Territorial income tax returns

5.9.3.6 Copies of the business records shall be for the **five years** preceding the notification which are attributable to the business operation on the property being acquired and any other records relied upon by the business owner to substantiate the business damage claim. Failure to submit business records does not automatically invalidate the claim or result in the claim being stricken.

5.9.3.7 All records/information provided by a business owner must be maintained as exempt records by the Department, if the business owner requests in writing such exemption. The Department must retain the request in the Department's official parcel file and maintain the exempt records in accordance with **Section 9.3, Right of Way Records Management**.

5.9.4 Department's Counteroffer for Settlement of Business Damage Claim

5.9.4.1 The DPWRS is responsible for determining the adequacy of business owner records, amounts of any counteroffers and recommending the Department's response to the Director Department of Public Works (DDPW) to a business owner's initial claim. However, the DPWRS may delegate this responsibility in writing.

5.9.4.2 The Department must perform a careful analysis and risk assessment of each business damage claim. Claims must be reviewed by a CPA, the Office of the Attorney General (OAG) attorney or other qualified Department experts. The review should consider the factors described in **Section 5.9.4.4**.

5.9.4.3 It is likely that business owners will limit the records they provide as much as possible. It is the responsibility of the DPWRS, or delegate, after consultation with the Department's experts, to determine and recommend to the DDPW if a counteroffer should be made based on the records provided by the owner. Also, after considering all available information, the DPWRS or delegate shall determine the amount of any counteroffer. If the Department determines that a reasonable counteroffer can be made based on the records originally provided, it should make the counteroffer. Support for the amount of the Department's counteroffer,

which address the factors in **Section 5.9.4.4**, must be maintained in the Department's official parcel file.

5.9.4.4 In reviewing business damage estimates prepared for the Department or the Business Owner, the DPWRS must:

- (A) Determine if the business qualifies for damages pursuant to the criteria contained in **Section 5.9.3.1**;
- (B) Provide that there are no elements of the business damage estimate that are non-compensable under current Territory of Guam eminent domain law;
- (C) Consider the terms or probability of renewal of any applicable lease in calculating the damages;
- (D) Verify that the records included with the business owner's claim substantiate the claim and contain all of the necessary schedules and attachments;
- (E) Provide that the business owner's claim adequately documents the business' use of that portion of the property taken and describes how the denial of the use of the property impacts the business;
- (F) Consider the potential impact of any cures proposed by the Department's appraiser or CPA on the business damage;
- (G) Provide that the coordination required by **Section 5.9.6**, occurs during the review of the business damage estimate with particular emphasis on avoidance of duplication of payments, and
- (H) Provide that proper economic adjustments to the business records are made in accordance with applicable case law and generally accepted accounting principles, so as to normalize the business operations.

5.9.4.5 If the business owner has not provided adequate records to substantiate the claim, the Department must notify the business owner by letter that additional records are needed in order for the Department to make a counteroffer. The letter to the business owner should, to the extent possible identify the needed records; state that "this request is not a rejection or a counteroffer," explain that the Department will provide a counteroffer following receipt of the requested records, and provide the time frame for providing the counteroffer once the records are received. If additional records are requested, the time frame for submitting the Department's counteroffer, after receipt of the records, must be calculated by subtracting the time used by the Department to review the business owner's offer and to request the additional records from the **120 day** response time.

Example: After reviewing the business damage claim, the Department is allowed **30 days** to determine that additional records are needed and to request the records. The business takes **120 days** to provide the records. After reviewing the records, the Department must make its counteroffer within **90 days**.

5.9.4.6 If additional records beyond those provided with the offer are needed, the Department and the business owner may agree on a schedule for the owner to provide those records. This agreement must be in writing and must provide the time frames for delivery of the additional records and, for delivery of the Department's response. A copy of the agreement must be maintained in the Department's official parcel file.

5.9.4.7 If the additional records requested by the Department are not provided by the business owner and it is later determined in a condemnation proceeding that those records are necessary, the Department may make a counteroffer to the business owner within **90 days** after it receives the additional records. This counteroffer will form the basis for determining benefit for calculating attorney fees. However, if the Department does not counteroffer based on its determination that additional records are needed and those records are determined in a later proceeding to be unnecessary in substantiating the business owner's claim, the Department's offer will be

deemed to be zero for calculating benefit. It is the responsibility of the DPWRS or his/her delegate, after consultation with appropriate Attorney General's Office attorney and Department experts, to decide if additional records are needed.

5.9.4.8 Within **120 days** after receipt of a business owner's good faith offer to settle a business damage claim, the Department must accept the offer; reject the offer; or make a counteroffer to settle the damage claim. The Department's response must be delivered by certified mail to the business owner or, if the business owner is represented, the response may be sent by certified mail to the properly authorized representative as described in **Section 5.2, Negotiation Process**, with a copy to the business owner. If the Department rejects the business owner's offer or fails to respond within **120 days**, the Department's offer will be considered to be zero for the purposes of calculating benefit for determining attorney fees. The DPWRS or his/her delegate will recommend the Department's response to the DDPW. Documentation of the business owner's receipt of the Department's response must be maintained in the Department's official parcel file.

5.9.4.9 If an agreement to settle a business damage claim is reached prior to litigation, **Form No. 5.2-2, Offer and Purchase Agreement**, must be completed in compliance with **Section 5.2, Negotiation Process**. Where negotiations with a business owner who is not the owner of the land result in an agreement, a separate purchase agreement for the business damage must be obtained from the business owner. Final Agency Acceptance does not apply to agreements to settle business damage claims.

5.9.4.10 If the Department agrees to settle a business damage claim for an amount greater than the amount of the Department's initial counteroffer, the amount over the counteroffer must be supported by a **Form No. 5.2-4, Settlement Approval**, prepared and approved in accordance with **Section 5.2, Negotiation Process**.

5.9.5 Payment of Business Owner's Fees and Costs

A business owner's fees and costs will be paid in accordance with **Section 5.4, Fees and Costs**.

5.9.6 Coordination

The Department must provide that adequate coordination is established and maintained between the Department's experts as described in **Section 5.9.4.2**, the Department's review appraiser and the OAG assigned attorney during the analysis, risk assessment, negotiations and condemnation action if applicable, for each business damage claim. Prevention of duplication of payments should be one of the primary focuses of this coordination. Once a condemnation suit is filed, all claims and counterclaims for settlement of business damages must be coordinated among the DPWRS, DDPW and the OAG.

HISTORY

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