

CHAPTER 8
SMALL BUSINESS DEVELOPMENT FUND

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§8101. Introduction. The purpose of these regulations is to establish standards and criteria for the Guam Economic Development Authority (hereinafter referred to as "GEDA") to administer the Small Business Development Fund established in Title 12 Guam Code Annotated (hereinafter referred to as "GCA") Chapter 54, enacted by Public Law 21-42. These regulations are promulgated pursuant to Title 12 GCA §54107.

§8102. Definitions. The following definitions shall apply for the purposes of these regulations:

(a) *Administrator* shall mean the administrator of GEDA as defined in Title 12 GCA §50101.

(b) *Assets* shall mean anything having commercial or exchange value owned by the recipient or potential recipient.

(c) *Bank* shall mean any lending institution, including a commercial bank, savings and loan association, commercial finance company, or other bona fide lender willing to participate with GEDA in the making of loans.

(d) *Board* shall mean the Board of Directors of GEDA as defined in Title 12 GCA §50105.

(e) *Bona Fide Resident* shall mean a person whose residence is in the Territory of Guam and the Board shall take into account the following factors when determining whether or not an individual is a bona fide resident:

(i) Location of the individual's primary residence.

(ii) Where the individual pays taxes.

(iii) Whether or not the individual votes in elections in the Territory of Guam.

(iv) If the individual is married and has children, where their spouse and children reside.

(v) How long the individual has been within the Territory of Guam.

(vi) Whether or not the individual earns their livelihood in the Territory of Guam.

(vii) The intent of the individual as evidenced by affirmative conduct and actions.

(f) *Borrower* shall mean the person, firm, partnership, corporation, association, or business trust, and the persons in concert therewith, to whom a loan has been made.

(g) *Collateral* shall mean the property and/or assets that are pledged as security for the satisfaction of a debt.

(h) *Common Stock* in a corporation which has no preference in the matter of dividends or assets and represents the residual ownership of the corporation.

(i) *Corporation* shall mean a voluntary association, formed under the laws of the Territory of Guam, of three or more Persons to transact business as set out in 18 GCA §1101.

(j) *Cumulative Dividend* shall mean dividends which if not paid pursuant to an agreement, the aggregate thereof must be paid at some subsequent date.

(k) *Desired Industries* shall mean industries deemed beneficial and economically favorable for the Territory of Guam by the board.

(l) *Dividends* shall mean the distribution of corporate earnings to shareholders.

(m) *Economically Favorable* shall mean beneficial to the local economy with the potential of positive economic growth and is in the sole discretion of the board.

(n) *Equity Agreement* shall mean a contract between GEDA and the recipient, which is the legally binding document containing all necessary terms and

conditions with respect to GEDA's equity participation in the business of recipient.

(o) *Equity Participation* shall mean the investment of GEDA funds in return for an ownership interest in the recipient corporation.

(p) *GEDA* shall mean the Guam Economic Development Authority as defined in Title 12 §50101.

(q) *Guarantor* shall mean one who contractually becomes secondarily liable for another's debt or performance.

(r) *Guaranty Loan* shall mean a loan made by a private lender or federal facility with GEDA as a guarantor.

(s) *Immediate Family* shall mean parents, children, siblings and grand parents.

(t) *Joint Participation Loan* shall mean a loan in which GEDA and a bank lend money for a singular purpose to the recipient in conjunction with each other.

(u) *Loan Agreement* shall mean the legally binding mutual understanding between GEDA and the recipient which sets out the terms and conditions of the loan as approved.

(v) *Local Business* shall mean either:

(i) A business which is licensed to do business and is operating within the Territory of Guam; and meets all of the following requirements:

(A) At least sixty percent (60%) is owned by bona fide residents;

(B) The management consists of at least sixty percent (60%) bona fide residents;

(C) If the business is a Corporation, at least sixty percent (60%) of its directors are bona fide residents; or

(ii) Those businesses registered to do business in the Territory of Guam with a current business loans and which have been in continuous operation since August 18, 1982.

(w) *Local Products* shall mean goods and/or services produced and/or provided by local businesses.

(x) *Person* shall mean one or more individuals, corporations, partnerships, or joint ventures.

(y) *Preferred Stock* shall mean a long-term ownership interest that pays Dividends at a specified rate and agreed time, and that has preference over common stock in the payment of dividends and the liquidation of assets.

(z) *Project* shall mean a planned activity with a specific goal that shall be accomplished by the completion of such activity, and which will occur in the reasonably foreseeable future.

(aa) *Project Costs* shall mean the total anticipated budget necessary to complete the recipient's project.

(bb) *Qualified Small Business* shall mean any business entity registered and licensed by the laws of the Territory of Guam to do business within the Territory of Guam for a profit and which is either (1) not a dominant business in its field, or (2) is a pioneer in its field.

(cc) *Recipient* shall mean that Person, entity, or corporation to which either a loan or Equity Participation has been approved by GEDA and is forthcoming.

(dd) *Residence* shall mean physical presence and occupation of a dwelling unit with the intent to remain on a permanent rather than temporary basis.

(ee) *SBDF* shall mean the Small Business Development Fund which is administered by GEDA and maintained in accordance with Title 12 GCA §§54101, 54102, and 54103.

(ff) *SBDF Loan Review Committee* shall mean a designated group of individuals within GEDA, chaired by a member of the Board which shall be responsible for reviewing all loan requests prior to submission of such requests to the Administrator and the Board. The chairperson shall be appointed by the Board and the members shall be appointed by the Administrator.

(gg) *SBDF Equity Review Committee* shall mean a designated group of individuals within GEDA, chaired by a member of the board which shall be responsible for reviewing all equity participant requests prior to submission of such requests to the administrator and the board. The chairperson shall be appointed by the board and the members shall be appointed by the administration.

§8103. Eligibility. In order to be eligible for either a loan or equity participation, the following requirements must be met:

(a) The Board shall authorize loans or equity participation only to Persons engaged, or about to engage in a desired industry and currently performing one or more of the following activities:

- (i) The creation of new employment;
- (ii) The promotion of local products into foreign markets;
- (iii) The replacement of imports;
- (iv) The reduction of consumer prices; or
- (v) The creation of facilities or services vitally needed by the people of the Territory of Guam.

(b) The board must find that the activities of the applicant are economically favorable.

(c) An applicant for either a loan or Equity Participation must be licensed to do business within the Territory of Guam. If the applicant is a corporation, it must be formed under the laws of the Territory of Guam. If the applicant is a sole proprietorship or partnership it must be registered with the Department of Revenue and Taxation on Guam.

(d) An applicant for a loan from the SBDF must be both a local business and a qualified small business.

(e) An applicant for Equity Participation must either be a corporation or agree to take on the corporate form should their application be accepted. Furthermore, the applicant corporation must be a Qualified Small Business as defined in §2(aa), above.

(f) An export trading company is eligible to receive assistance in the form of Equity Participation

by GEDA, so long as it satisfies the requirements of 11 GCA Chapter 26, and maintains its headquarters within the Territory of Guam.

§8104. Parameters for Loans by GEDA. (a) The minimum loan from the SBDF shall be Twenty-Five Thousand Dollars (\$25,000).

(b) SBDF loans shall be limited to the following types of loans:

(i) **Joint Participation Loans.** GEDA may be a co-lender with a bank in a joint participation loan. The percentage of GEDA's participation and other terms shall be determined on a case by case basis.

(ii) **Guaranty Loans.** The maximum guaranty loan shall be ninety percent (90%) of the total loan, and the minimum guaranty loan shall be ten percent (10%) of the total loan.

(iii) **Direct Loan.** Where a loan through a bank cannot be negotiated, a direct loan from GEDA may be considered; provided that (1) financing through a Bank or outside source is not otherwise available under reasonable terms, and (2) that funds are available in the SBDF Program. In addition, the following requirements must be met:

(A) Proof that the borrower has been declined the requested loan from at least three (3) Banks. The declaration shall (1) confirm that the Bank has performed due diligence on the credit request (2) include the date and amount of the requested loan, and (3) provide the reasons why the loan cannot be made.

(B) The bank declinations must contain the date, amount, terms requested, reason for the declination, and be signed by an authorized official of such bank.

(C) If a declination is due to the fact that the amount is in excess of that Bank's lending limit, then a refusal from another Bank whose lending capacity, or policy, is adequate to cover the loan applied for must be obtained.

(D) The declination of a Bank to make a direct loan will be acceptable as proof that required credit is not available.

(E) The Bank declinations shall not be considered the only test of unavailability of credit. Where in, the Board's determining credit is otherwise available on reasonable terms from sources other than Banks, the credit applied for shall not be granted.

(c) Interest shall be charged on all loans authorized by the Board. However, all finance charges to the borrower, including interest, points, and/or guarantee fees, shall not at any time exceed four hundred (400) basis points above the New York Money Center prime rate (as reported in the Wall Street journal as the "domestic rate") on the date of closing. All loan interest rates and other finance charges shall be set by the board as set forth in these rules:

(d) The term of the loan shall be set by the Board and the Bank in the case of Joint Participation Loans and Guaranty Loans. The Board shall set the term of Direct Loans. However, in no event shall any term exceed twenty-five years.

(e) Collateral shall be required for the security of the indebtedness as determined by and in the discretion of the Board.

(f) Except as set forth above, all the terms and conditions of each loan shall be set by the board and shall take into consideration the type of project involved and standard loan covenants.

§8105. Parameters for Equity Participation by GEDA.

The investment by GEDA into any business shall be on such terms and conditions as are adopted by the Board and shall include or be subject to the following:

(a) The maximum level of Equity participation that GEDA is authorized to invest for purposes of this program shall be no more than ninety percent (90%) of the recipient's total assets.

(b) GEDA's Equity Participation shall be limited to the purchase of either Common Stock or specially authorized Preferred Stock with such rights and conditions as are designated by the Board such as: (1) cumulative voting; (2) restrictions on transfer; (3) preemptive rights or any other combination; or (4) other terms or conditions that may deemed appropriate by the Board.

(c) In any Equity Participation, the Board may require that the Recipient adopt a resolution restricting bonuses, increasing employee salaries, requiring approval of a business plan or a change in management or any other limitations which may affect the Recipient's ability to pay Dividends or protect GEDA's Equity Participation.

(d) In any equity participation, the Board may require certain terms, conditions, and/or changes in corporate structure which may include, but are not limited to: mandatory periodic dividends, a stock redemption schedule, cumulative dividends, the creation of a special class of preferred stock, prerequisite of GEDA consent to amendment of the Articles of Incorporation, power to terminate and wind-up the business of recipient upon the occurrence of certain events, restrictions on the issuance of dividends, GEDA designated directors, a limit on the number of directors or require subordination of shareholder debt to GEDA's interest.

§8106. Requirements to be Included in Every Equity Agreement. Every Equity Agreement shall include the following requirements:

(a) If the Recipient is an entity other than a Corporation, it must incorporate under the laws of the Territory of Guam.

(b) The Recipient shall be required to furnish GEDA with written quarterly reports beginning with the first quarter after the date of the Equity Participation Agreement. Said reports shall include, but not be limited to, financial data (balance sheet and income statement aging of accounts receivable and accounts payable), employment data, and payroll data. The Board shall have the power to request an independent C.P.A. audit from time to time as the Board may deem necessary.

(c) In no case may Recipient's business be leased, sold, or transferred without GEDA's written consent.

(d) In no event shall a substantial portion of the property or Assets of a Recipient's business be transferred, or leased other than in the ordinary course of business, without GEDA's prior written consent.

(e) In no event shall there be a change in the identity or mix of the shareholders which control a Recipient or in the shareholders of any parent corporate shareholder of Recipient, without GEDA's prior written consent.

(f) Any recipient business shall be required to purchase all of their necessary goods and services which it procures from others, from Local Businesses, provided that the good or service is available from a Local Business.

§8107. Application Requirements for Assistance. (a)

Each Person applying for assistance from the SBDF Program shall complete and submit an application with supporting documents. Such application shall include the following:

(i) A detailed description of the Project for financing of the applicant, why it is eligible, as well as verification of such eligibility under Section 3. and 3.b, above;

(ii) A detailed summary and explanation of how and why the activities of the applicant will benefit the local economy;

(iii) A Statement of the applicant's commitment and ability either to pay the loan or to meet the Dividend requirements of the Preferred Stock;

(iv) Information and documentation sufficient to enable the Board to make each of the specific findings required by Section 10, below;

(v) Any other information as may be required by GEDA.

(b) All applications for a loan or Equity Participation, shall be reviewed first by the applicable Review Committee, then by the Administrator who shall review each application. The Administrator shall have the authority to reject any application which does not comply with the requirements of these regulations. The administrator shall report all such rejections to the Board.

§8108. Fees. (a) There shall be assessed to each applicant a non-refundable fee of Two Hundred Fifty Dollars (\$250.00) per application, plus any and all out-of-pocket costs of GEDA including, but not limited to attorneys and accountant fees.

(b) The Administrator shall have the authority to reduce or increase the application fee based upon evidence of such circumstances as undue hardship, complexity of the application, or other reasonable cause.

(c) The Board shall establish such loan and guaranty fees as it, in its sole discretion, deems appropriate.

(d) All guaranty fees or commitment fees shall be non-refundable. However, if a loan is not disbursed, the Board shall have the discretion to return all or part of the fees.

(e) There shall be no prepayment penalty fee on any loan.

(f) In all Joint Participation Loans and Direct Loans there shall be a late payment penalty on loan installment payments to be set by the Board.

(g) No broker or Borrower's representative shall charge or collect any contingent fee for any services performed in connection with a GEDA loan or Equity Participation, unless the amount of such fee is approved by GEDA and bears a necessary and reasonable relationship to the services actually performed, or relates to expenses which are deemed by the applicant and GEDA to have been necessary in connection with the application. There shall be no placement or finders fees, no fees for the use or attempted use of influence in obtaining or trying to obtain a GEDA loan or Equity Participation, nor fees based upon a percentage of the approved loan or Equity Participation.

§8109. Ineligible Applications. (a) No assistance shall be given to any applicant if the direct or indirect result of such assistance would mean that the loan or Equity Participation proceeds would be applied to any of the following:

(i) The payment of delinquent withholding taxes, gross receipt taxes, income taxes, social security taxes, or real property taxes;

(ii) The promotion or establishment of any business determined by the Board not to be in the public interest.

(iii) As a contribution for any illegal purpose;

(iv) To provide financing for the sole purpose of speculation in any kind of property, real or Personal, tangible or intangible;

(v) For the acquisition of real property to be used solely for re-sale;

(vi) To applicants not doing business in the Territory of Guam.

(vii) For such other purposes as the Board shall, from time to time, determine to be contrary to good economic or social policy.

(b) It shall be deemed a conflict of interest, and therefore impermissible, to authorize any loan or Equity Participation to a GEDA employee or Director, or their immediate families, or to any business where any such Person owns more than a ten percent (10%) or a controlling interest therein. In addition, no officer, Mayor, Assistant Mayor, Director, Deputy Director of the Executive Branch, or employee of the Office of the Governor, including Governor and Lieutenant Governor, no Legislator and no Judge shall receive assistance from through the SBDF Program. This prohibition continues to apply for one year after any such person leaves public office.

§8110. Board Approval. Before making its final approval with respect to either a loan or Equity Participation, the Board shall consider and make specific findings on the following:

(a) The impact of the applicant's proposed activities upon established businesses and markets in the Territory of Guam;

(b) The financial risks facing the applicant and GEDA to undertake the proposed activities;

(c) The location of the proposed activities; and,

(d) The importance of the proposed activities to the economy of the Territory of Guam.

§8111. Sunshine Law Provision. For the purposes the "Sunshine Act of 1987," Guam Public Law 19-5, §136, a "Public Writing" shall be defined as set out in Section 6751(c) of such Act but shall specifically exclude market studies, business plans made in conjunction with an application for assistance whether or not prepared by the applicant, GEDA, or a third party; and financial information of the applicant in which one would reasonably attach a proprietary interest.