

## Therese Terlaje

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**From:** Dana Gutierrez Reyes [DReyes@mmstlaw.com]  
**Sent:** Tuesday, May 30, 2006 10:04 AM  
**To:** tterlaje@guamopa.org  
**Cc:** Sandra Cruz  
**Subject:** Procurement Code cites

Hi, Therese.

We discussed two statutory sections that have incorrect citations.

The first is at 5 GCA §5426(e). This section incorrectly states that an appeal is taken to the Public Auditor in accordance with §5706. The correct cite should be to §5705.

The second one is at 5 GCA §5707(a). This section incorrectly states that an appeal of the OPA's decision to the Superior Court is taken as provided in "Article D of Chapter 9 of the Chapter." We looked together and could not identify this citation. The cite, we assume, is to Part D, §§5480 and 5481.

It would help if this was corrected.

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May 30, 2006

**VIA EMAIL TTERLAJE@GUAMOPA.ORG**

Therese Terlaje, Esq.  
OFFICE OF THE PUBLIC AUDITOR  
Pacific News Bldg. Suite 401  
238 Archbishop Flores Street  
Hagatna, Guam 96910

**Re: Proposed Amendments to Procurement Law and Procurement Regulations**

Dear Therese:

Here are my comments regarding proposed changes or amendments to the Guam Procurement Law and its accompanying Regulations. These comments are based on our law firm's experience and represent actual issues that have arisen in the context of government procurement.

1. **The Conflict Between the Procurement Law and Regulations Regarding When the Public May Inspect and Copy the Procurement Record Needs to Be Resolved.**

Frequently, conflicts arise with regard to the interrelation between the Procurement Law and the Sunshine Reform Act of 1999. Questions raised often concern what procurement documents in the custody and control of a government agency are open for public inspection, and at what point in time during the procurement process may the documents be released. Many times, confusion results because of inconsistencies in terminology used, as well as the fact that the specific sections of the relevant statutes authorizing the release of public documents are literally scattered all over the place.

It is important, therefore, that any amendment to the Procurement Law and Regulations clarify *when* procurement documents may be released to the public (e.g. before or after an award; before or after a decision to make an award), as well as *what* documents can be released (e.g. evaluation worksheets and reports, price and cost data, etc.).

This is especially important if a bid protest has been filed. The only way that a protesting bidder can determine if the protest has any merit is if he is given access to the procurement file.

**A. Example 1: Inspection of the Registrar of Proposals.**

To illustrate this point, the Procurement Law says that the Procurement Regulations shall not require that an award of a contract be made before inspection and copying of records are permitted:

**5 GCA § 5252. Rules for Procurement Records.** The rules promulgated pursuant to § 5251 of this Chapter shall: \*\*\*\*\*

(f) not require that the record be complete or that the procurement award be made before inspection and copying are permitted.

Section 5252(f) above clearly implies that public inspection of procurement records can be made *at any time*, and that an agency cannot wait until after an award has been made before permitting inspection or copying.

In contrast, however, 2 GAR § 3114(h)(1) provides that when proposals are received in response to an RFP, a Register of Proposals shall be established which includes certain identifying information about the offeror. The Registrar of Proposals "*shall be made available for public inspection after the award of the contract.*" This requirement of waiting until after an award has been made before public inspection will be permitted directly conflicts with § 5252(f) of the Procurement Law.

**B. Example 2: Inspection of Evaluation Worksheets.**

Perhaps the document most frequently requested by the public is the set of evaluation worksheets and reports prepared after responses to an RFP or to a multi-step competitive bid

Therese Terlaje, Esq.  
May 30, 2006  
Page 3

are received. The release of RFP evaluation worksheets used for public inspection is governed by 2 GAR § 3114(m). Under § 3114(m), the evaluation worksheets may only be released at the conclusion of negotiations and after an award of the contract has been made:

**2 GAR § 3114(m). Memorandum of Evaluation and Negotiation.**

At the conclusion of negotiations resulting in the award of the contract, the head of the agency conducting the procurement or a designee of such officer shall prepare a memorandum setting forth the basis of award including:

- (1) how the evaluation factors stated in the Request for Proposals were applied to determine the best qualified offerors; and
- (2) the principal elements of the negotiations including the significant considerations relating to price and the other terms of the contract. . . . (Emphasis added).

As in the Example 1 above, the requirement of waiting until after an award has been made before public inspection can be had of the evaluation worksheets is in direct conflict with 5 GCA § 5252(f) which provides that a procurement award need not be made before inspection and copying are permitted.

When faced with a conflict between a statute and a regulation, the statute prevails. In the two examples given, and based upon 5 GCA § 5252(f), a person seeking to inspect and copy the Registrar of Proposals for an RFP or the evaluation worksheets would be legally entitled to insist that inspection be permitted before the contract was awarded.

Obviously, there may be situations existing which would justify waiting until after an award is made public inspection can be permitted of certain documents. The task is to identify those situations and to amend the Procurement Law and Regulations so that they are in accord. At a minimum, however, access to the procurement should be made available to a protesting bidder.

2. **The Policy and Procedures for Breaking a Tie in the Procurement Process Should be Firmly Established.**

A. **Invitation to Bid.**

Under 2 GAR § 3109(o)(2), when a tie occurs between two or more the equally eligible bidders to an ITB, the award of the ITB is made by a drawing by lot. In order to ensure fairness in the process, new language should be added to § 3109(o)(2) to provide for witnesses to the drawing. This is similar to the Federal Acquisition Regulations ("FAR") [48 CFR § 14.408-6]. The following is a proposed amendment to § 3109(o)(2):

**2 GAR § 3109(o). Low Tie Bids. \*\*\*\***

**(2) Award.** Award shall not be made by drawing lots, except as set forth below or by dividing business among identical bidders. In the discretion of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids and a written determination is made so stating, award may be made by drawing lots. *The award made by a drawing by lot between the two or more bidders who remain equally eligible. If time permits, the bidders involved shall be given an opportunity to attend the drawing. The drawing shall be witnessed by at least three persons, and the contract file shall contain the names and addresses of the witnesses and the person supervising the drawing.*

B. **Request for Proposals.**

Unlike the ITB process, no procedure at all is provided to break a tie arising between offerors to an RFP. Generally, after the "short list" is determined, the agency begins negotiating with the top ranking offeror. It is the unwritten practice of the government of Guam that if two or more offerors are equally ranked, then the procurement officer exercises his discretion and begins negotiations with the offeror of his choice.

Because an RFP is used to procure personal service contracts, the agency's discretion is a very important consideration. This factor, however, needs to be made clear in order to avoid complaints from other offerors about bias, discrimination, or unfair treatment. It is therefore recommended that additional language be added to § 3114(l)(1) of the Procurement Regulations (Selection of the Best Qualified Offerors). For example:

**2 GAR § 3114(l) Negotiation and Award of Contract.**

(1) **General.** The head of the agency conducting the procurement or a designee of such officer shall negotiate a contract with the best qualified offeror for the required services at compensation determined in writing to be fair and reasonable. *In the event that two or more offerors are equally qualified or ranked, the officer, in his discretion, shall negotiate with the offeror whose proposal is determined to be the best overall in order to obtain the most advantageous contract for the agency.*

**3. There Needs to Be a Formal Procedure for Distributing Amendments to an RFP.**

A formal procedure for the distribution of amendments to an RFP needs to be stated in the Procurement Regulations. Currently, only amendments to an ITB are provided for.

Specifically, the distribution of an amendment to an ITB is governed by 2 GAR § 3109(i)(2) and 2 GAR § 3109(t). Under § 3109(i)(2), amendments to an ITB are sent to all prospective bidders known to have received an ITB. After the unpriced technical offers responding to an ITB are received, subsequent amendments are distributed only to those bidders who submitted an offer. 2 GAR § 3109(t)(2).

Because there is no stated procedure for the distribution of amendments to RFPs, government agencies generally amend an RFP by following the ITB amendment procedure. Nothing, however, obligates an agency to do this. As a result, instances have arisen where an RFP was amended, but the offeror was not informed of the amendment. Closing the RFP amendment loophole will avoid similar situations in the future.

4. **The Procurement Law Should Clearly State the Parties Authorized to Enter into Procurement Contracts on Behalf of the Government of Guam.**

Guam law (5 GCA § 22601) provides generally that, “*All contracts, after approval of the Attorney General, be submitted to the Governor for his signature.*” Section 22601 further provides, “*All contracts of whatever nature shall be executed upon the approval of the Governor.*”

Section 22601 was enacted in 1952 by the 1st Guam Legislature as part of Public Law 1-88. Thirty years later, when the Guam Procurement Law was enacted by the 16th Guam Legislature as Public Law 16-124, included in the new Procurement Law was 5 GCA § 5121 (Authority to Contract for Certain Services and Approval of Contracts).

Under Section 5121, Government of Guam agencies acting through their respective Chief Procurement Officers are empowered with the authority to execute procurement contracts on behalf of their agencies without the Governor’s signature. For example, unless an agency is specifically prohibited from procuring the professional services of accountants, physicians, lawyers, etc., the agency may contract on its own behalf for such services. Additionally, where the Chief Procurement Officer of an agency is authorized to procure services and supplies for an agency, the Procurement Officer may execute all contracts for the government of Guam. 5 GCA § 5121(c).

The Compiler’s Comment to § 5121 reveals that the Guam Legislature recognized that neither the Governor nor the Attorney General sign routine purchase orders (which are contracts). According to the Comment, although the Governor and the Attorney General may review a contract, they are not, and should not, be legally obligated to personally sign each and every contract or purchase order involving the Government of Guam.<sup>1</sup>

Thus, although it has become the practice that procurement contracts for services or supplies generally do not require either the signature of the Governor or the Attorney General, an apparent inconsistency nevertheless exists between § 5121 and the § 22601 requirement that “all contracts of whatever nature” are not executed until signed by the Governor. In order to avoid any further confusion on this issue, § 5121 should be amended to state the identity of

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<sup>1</sup> The Governor’s signature is required, however, for all emergency procurements. 5 GCA § 5215; 2 GAR § 3113.

the parties authorized to enter into procurement contracts, as well as to list the signatures that are necessary to validly execute a procurement contract.

**5. Additional New Definitions Should Be Added to the Procurement Regulations.**

It is suggested that the Procurement Regulations may benefit from the definition of additional key words and terms.

For example, the Regulations provide at § 3119(c)(1) that in choosing the type of contract to be utilized in a procurement, the objective is to select a contract type that will obtain the “best value in needed supplies, services, or construction in the time required and at the lowest cost or price to the territory.” The term “*best value*” is not defined. As a consequence, the determination of what constitutes the best value for Guam is left to the subjective opinion of the individual procurement officer. In order to provide guidance, the definition of “best value” as contained in the Federal Acquisition Regulations is submitted:

*Best value* means the expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement. [Source: 48 CFR § 2.101]

Suggested definitions for additional words and terms that are used throughout the Procurement Regulations are:

*Prime contract* means a contract or contractual action entered into by the Government of Guam and its agencies for the purpose of obtaining supplies, materials, equipment, or services of any kind.

*Prime Contractor* means a person who has entered into a prime contract with the Government of Guam and its agencies.

*Prime Contractor employee* means any officer, partner, employee, or agent of a prime contractor.



Therese Terlaje, Esq.  
May 30, 2006  
Page 8

*Subcontract* means a contract or contractual action entered into by a prime contractor or subcontractor for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

*Subcontractor* (1) means any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; and (2) includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

[Source: 48 CFR § 3.502-1].

6. **The Numbering of Section § 9106 of the Procurement Regulations Needs to Be Corrected.**

The numbering of the sub-subsections of 2 GAR § 9106 (Ratification, Termination, or Cancellation of Contract to Comply with the Law) contains a typographic error and needs to be corrected.

As presently written, § 9106 contains two different §§ 9106(1)(a) and (1)(b). The problem can be corrected by adding a new subsection § 9106(2) in front of the paragraph which begins, "This Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA § 4137. . ."

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Therese Terlaje, Esq.  
May 30, 2006  
Page 9

### CONCLUSION

While the comments and suggestions contained in this letter are not intended to be either exhaustive or conclusive, we believe that they highlight several of the more glaring deficiencies of the current procurement process. It is in the public interest that government procurement be conducted in a manner that provides for public accountability, efficient delivery of services at a reasonable cost, and prevention of unwarranted Government expense. Clear consistency within and between the Procurement Law and the Procurement Regulations is the first step in accomplishing this goal.

Kind regards,

/s/

SANDRA CRUZ



Rec'd  
5/23/06  
2:57 PM

*Senator Antonio R. Unpingco*  
*Committee on Tourism, Maritime, Military and Veterans Affairs*

May 22, 2006

Honorable Doris Flores Brooks, Public Auditor  
Office of the Public Auditor  
Suite 401, Pacific News Building  
Hagatña, GU 96910

Dear Ms. Brooks: *Doris*

Submitted for your review and information is a suggested amendment to the proposed Rules of Procedure for Procurement Appeals.

**"12102. Jurisdiction of the Public Auditor; Exhaustion of Remedies.**

- (a) The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. Notwithstanding §5245 of this Chapter, no prior determination shall be final or conclusive on the Public Auditor or upon any appeal from the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by any employee of the government of Guam, including any employee of any autonomous agency or public corporation, that has been identified by either an Interested Party or the affected agency as having some involvement with the issue before the Public Audit. Any employee who knowingly refuses to attend, provide testimony, or produce requested documents shall be held in contempt and shall be subject to appropriate action(s). The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5."

Please note that a bill to address the same proposed change in statute will also be introduced.

*Senseramente,*

ANTONIO R. UNPINGCO

**Therese Terlaje**

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**From:** Sergio Quenga [sergio@guamsupremecourt.com]  
**Sent:** Friday, May 26, 2006 10:24 AM  
**To:** 'Therese Terlaje'  
**Cc:** 'Larry Roberto'  
**Subject:** Procurement Appeals Procedures

Therese:

This is to respond to your letter of May 16, 2006 requesting comment on the draft procurement appeals rules. Because the authority of the Compiler of Laws is limited (see e.g. 1 GCA Chap 16), our response here is primarily limited to a format and non-substantive review of the draft rules and amendments.

We have no objection to the format of the draft rules as a new Chapter 12 of Division 4 of Title 2 of the GARR. This appears to be the proper placement for the new chapter. The paragraph and section format of the draft rules is proper. Upon codification of the rules, we will identify source comments as those inserted by the rule drafters. Annotations and comments by the Compiler's office (if any) will be appropriately identified as well.

You may want to consider indicating PL 28-68 as well as 5 GCA 5425 in the source comment to the amendment to 2 GAR 9101.1.

You may want to consider clarifying the amendments to 2 GAR 9103 so that it is clear judicial review must be subsequent to administrative review.

If you have any questions, please call us.

Serge Quenga  
Compiler of Laws

5/30/2006

Douglas B. Moylan  
Attorney General



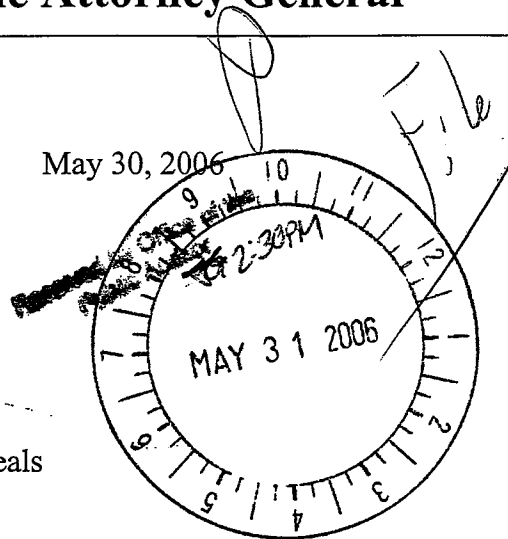
Joseph A. Guthrie  
Deputy  
Solicitors Division

## Office of the Attorney General

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VIA e-MAIL

Therese M. Terlaje, Esq.  
Hearing Officer for Procurement Appeals  
Office of the Public Auditor  
Suite 401 Pacific News Building  
238 Archbishop Flores Street  
Hagåtña, Guam 96910



**RE: Proposed Procurement Regulations re Procurement Appeals to the Public Auditor**

Dear Ms. Terlaje:

I apologize for my last minute submittal of suggested revisions to the well thought out and drafted proposed rules and regulations re appeals to the Public Auditor.

My concerns have to do with certain matters involving the integrity of the procurement process involving multi-step sealed bidding where proposals are submitted by more than one offeror determined to be qualified and compensation cannot be agreed upon with the best qualified offeror who submits timely a protest following formal termination of negotiations with such protest denied followed by timely appeal to your office.

Proposed §12103(b) provides:

(b) *Interested Party* means an actual or prospective bidder, offeror, or contractor that (1) may be aggrieved by the solicitation or award of a contract, by the protest, or by the Appeal, and who filed a protest or Appeal or (2) who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.

I would delete proposed §12103(b)(2).

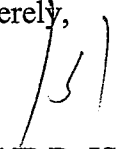
My concern is to avoid revelation to interested parties encompassed by (b)(2), that is, next in line offerors, of the details of negotiations with higher evaluated offerors thus giving next in line offerors undue advantage thereby destroying an otherwise level playing field.

Along that same line, I would delete the last sentence of proposed §12104(c)(2) which requires the procurement officer to furnish copies of the appeal documents to interested parties on request since such documents, especially as defined by proposed §12104(b)(5), might well contain negotiation details giving undue advantage.

Also, please compare proposed §12104(c)(2) with proposed §12106. When time comes for proposed §12106, the cat's already out of the bag.

Thank you for your consideration.

Sincerely,



PHILIP D. ISAAC  
Assistant Attorney General

## Administrator

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From: vrenacia@guam.uog.edu  
Sent: Wednesday, May 31, 2006 11:44 AM  
To: OPA Web Site  
Subject: OPA Web Site Procurement Appeals Testimonials

OPA Web Site Procurement Appeals Testimonials

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Name.....: Victorina M.Y. Renacia  
E-mail.....: vrenacia@guam.uog.edu  
Phone.....: 735-2992  
Location.....: University of Guam  
Testimonials.....:  
Madam Public Auditor,

Thank you for allowing me the opportunity to submit testimony on the proposed Rules of Procedure for Procurement Appeals. I believe the approval and enactment of these rules will benefit, enhance and streamline procurement matters to a measureable degree. In that respect I support the approval of these rules.

I have one comment concerning the five (5) working days' timeline for an Agency Report in answer to the Appeal. As this is the agency's first response to the appeal, and a detailed report is mandated, I believe that a more reasonable time for response would be ten (10) working days. This first response from the agency sets the tone for the agency's position and informs the Public Auditor and Hearing Officer of the agency's stance. I would therefore recommend that a longer time for response be considered, so as to ensure that the agency has submitted a thorough and complete report. A ten (10)-day response time is a reasonable and fair

compromise in which an agency must respond to the appeal.

Thank you for your consideration.

Vicki Renacia

University of Guam Legal Counsel

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### Client Information

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Remote Address: 67.98.167.21  
User Agent: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.1; SV1; .NET CLR 1.1.4322)  
Country: US - United States

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**Testimony submitted by:**

Director, Department of Administration/Chief Procurement Officer  
May 31, 2006

- 12102.(a) Should be amended to read: The Public Auditor shall have the power to review and determine **whether there were substantial evidence to uphold the determination made by the Chief Procurement Officer, Director, Public Works, or the head of a Purchasing Agency.**
- 12104.(a) Second sentence shall be deleted because the agency cannot prevent an appellant to file an appeal with the Office of the Public Auditor. Second sentence does not make sense.
- (b) This is a question. Is the failure to do the minimum in the form and filing of an appeal grounds for automatic denial of the appeal? (i.e., labeling the envelope "Appeal")
- (c) (3) Should be amended to read: The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall submit to the Public Auditor a **complete copy of the procurement file relevant to the appeal within five (5) working days of receiving notice of an Appeal.**
- (4) Shall be deleted already stated on item #3
- (6) Should be amended to read: The Public Auditor shall, upon request, make available **after a decision have been made by the Office of the Public Auditor,** to any Interested Party information bearing.....
- (8) Shall be deleted. Why should the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency file an appeal?





## CONSOLIDATED COMMISSION ON UTILITIES

Guam Power Authority • Guam Waterworks Authority  
P.O. BOX 2977 • Agaña, Guam 96932

Doris F. Brooks  
Suite 401 Pacific News Building  
238 Archbishop Flores Street  
Hagatna, Guam, 96910

June 6, 2006

RE: Written Testimony of Anthony R. Camacho Esq., on behalf of the Guam Power Authority and Guam Waterworks Authority supporting the passage of the Proposed Rules of Procedure for Procurement Appeals with amendments.

Dear Mrs. Brooks,

On behalf of my clients, the Guam Power Authority (GPA) and the Guam Waterworks Authority (GWA), I want to thank you and your staff for preparing the proposed Rules of Procedure for Procurement Appeals. The implementation of these rules will result in the resolution of many procurement protests at the administrative level in less time and with less cost to private parties and GPA and GWA. GPA and GWA support the passage of the proposed Rules of Procedure with the following amendments which are necessary to ensure that GPA and GWA's due process and equal protection rights, mandated by Guam's Organic Act, are preserved:

1. Section 12102(a): This section should be harmonized with 5 G.C.A. §5480(d) and 5 G.C.A. §5425 which give limited finality to certain procurement decisions and which allow waiver of sovereign immunity if these decision are clearly erroneous, arbitrary, capricious, or contrary to law. The following should be inserted as Section 12102(a):

(i) Limited Finality for Administrative Determinations: In any appeal heard by the Public Auditor, the factual or legal determinations made by employees, agents, or other persons appointed by the Territory concerning the following determinations shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law:

(1) Correction or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes made in accordance with 5 G.C.A. §5211(f).

(2) A written determination requiring bid security for supplies or services totaling fewer than twenty-five-thousand dollars (\$25,000) made in accordance with 5 G.C.A. §5212(a).

(3) A determination that bid security can be released because delivery of supplies or services by the successful bidder is complete made in accordance with 5 G.C.A. §5212(g).

(4) A written determination that sole source procurement is justified because there is only one source for the required supply, service, or construction item made in accordance with 5 G.C.A. §5214.

(5) A written determination that there exists a threat to public health, welfare, or safety under emergency conditions justifying the use of emergency procurement, made in accordance with 5 G.C.A. §5215.

(6) A written determination that an offeror is the best qualified, based on evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable, made in accordance with 5 G.C.A. §5216(e) (Competitive Selection Procedures for Services in 5 G.C.A. §5121).

(7) A written determination of non-responsibility made in accordance with 5 G.C.A. §5230(a).

(8) A determination that a contractor shall not be required to submit cost or pricing data made in accordance with 5 G.C.A. §5232(c).

(9) A determination of the type of contract to be used to procure supplies and services made in accordance with 5 G.C.A. §5235.

(10) A written determination approving a proposed contractor's accounting system, made in accordance with 5 G.C.A. §5236.

(11) A written determination to use a multi-year contract made in accordance with 5 G.C.A. §5237(b).

2. Section 12104(c)(2): This section must be revised to specify that the non-protesting bidders or offerors, who are included in the definition of "interested parties," should communicate directly with the Office of the Public Auditor regarding the status of the appeal, and for the ongoing procurement matter that is the subject of the appeal, they should contact the designated procurement officer concerning matters that pertain solely to the solicitation. The last sentence of the section should be amended as follows:

"...The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall furnish copies of the Appeal Documents to such parties on request with instruction to communicate further directly with the Public Auditor

concerning the status of the appeal, and that, concerning matters solely regarding the protested procurement action, the non-protesting bidders or offerors shall direct such inquiries to the designated procurement officer."

3. Section 12104(c)(3): The word "Detailed Agency Report," should be changed to "Answer" because this will be the Government's Answer to the Appeal filed by the protesting bidder or offeror. Further, the time limit of five (5) working days for the Government Agency to file the answer is too short a period for GPA and GWA to adequately respond to an appeal and such short time period unduly prejudices GPA and GWA because the protesting bidder and offeror has, pursuant to 5 G.C.A. §5481, to prepare a procurement protest appeal, and has, pursuant to 5 G.C.A. §5705(b) and §5706(b) respectively, sixty (60) days to prepare an appeal to a debarment or suspension or a breach of contract controversy. In fact, in Section 12104(c)(4) of the proposed rules, the protesting bidder would ten (10) days to file a rebuttal to the Government Agency's answer that must be filed five (5) days after an appeal. Thus, the Government should have at least the same amount of time to answer the appeal as the protesting bidder or offeror had to prepare their appeal which is fourteen (14) days for procurement protests, and at least sixty (60) days for debarments and suspensions and breach of contract controversies.

4. Section 12104(c)(4): The term "interested parties" should be deleted from this section and replaced by the term "protesting bidder or offeror." As written, this will allow the non-protesting bidders and offerors to file rebuttals to the Government Agencies response and take an active part in the procurement appeal despite not filing a timely protest as required by 5 G.C.A. Sec. 5481. Thus, the non-protesting bidders and offerors must not be allowed to file rebuttals because they do not have standing to participate in the appeal proceedings unless they are called as witnesses by the Office of the Public Auditor or one of the parties.

5. Section 12107(b): This rule is too vague and may allow for *ex parte* communications between the Office of the Public Auditor and the parties to an appeal. This section should be amended as follows:

(b) Nothing in this rule shall prevent the OPA staff from entertaining questions or complaints that are not related to pending appeals. Should such question or complaints be made regarding a pending appeal, OPA staff must report such communications to all the parties in the pending appeal.

6. Section 12108(a): The first and second sentence should be deleted and replaced by the following sentence: "In all appeals to the Public Auditor a hearing shall be held unless waived by all the parties." This amendment is necessary to fulfill the Organic Act due process rights of the parties which include a right to Notice and a Hearing to adjudicate administrative matters such as procurement protests, debarment and suspensions, and breach of contract controversies.

7. Section 12501(a): The term "interested party/protester" should be deleted and replaced with the term: "protesting bidder or offeror." This amendment is necessary to closely track the language in 5 G.C.A. §5425(g) that gives standing to protest a determination to proceed with a procurement action despite a protest to the protesting bidder and offeror only.

The foregoing are the substantial amendments that GPA and GWA recommend prior to the passage of the proposed rules. GPA and GWA have already stated their non-substantial (i.e. grammatical) corrections to the proposed rules during the oral and written testimony provided by GPA and GWA to the Public Auditor during the May 31, 2006 public hearing for the proposed rules and said proposed amendments are incorporated by reference herein as if fully set forth and GPA and GWA. Thank you for your time and consideration. Please contact me at (671)648-3149 if you have any questions.

Sincerely,



ANTHONY R. CAMACHO, ESQ.  
Staff Attorney for the CCU, GPA, and GWA

## NOTES ON PROCUREMENT APPEAL RULES

12102(a): PA has de novo review. No prior determination shall be final or conclusive. Although this section tracks the language of 5 GCA Sec. 5703 (Jurisdiction of the Public Auditor) the language of this regulation should harmonize existing statutes and by closely tracking the language of Guam Waiver of Sovereign immunity statutes which states that most decisions of Procurement Officers are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

-Should have same language as 5 GCA Sec. 5480(d): Limited Finality for Administrative Determinations. In any judicial action under this section (Waiver of Sovereign Immunity in Connection with Contracts), factual or legal determinations by employees, agents, or other persons appointed by the Territory shall have no finality and shall not be conclusive, notwithstanding any contract provision, or regulation, except to the extent provided in Sections 5245, 5705, 5706.

-5 GCA Sec. 5245: Determinations required by Sections 5211(f) (Correction or withdrawal of bid), 5212(a) (Requirement for Bid Security), 5212(g) (No requirement for Performance Bond), 5214 (Sole Source Procurement Determination), 5215 (Emergency Procurements), 5216(e) (Determination of best qualified professional in competitive selection procedures procurement), 5230(a) (Determination of Non-Responsibility), 5232(c) (Cost or pricing data not required), 5235 (Determination of type of contract used), 5236 (Approval of Contractor's accounting system), and 5237(b) (Determination to use multi-year contract), are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

-5 GCA Sec. 5705: Decision to Suspend or Debar Contractor.

-5 GCA Sec. 5706: Contract or Breach of Contract Controversy

~~12102(b): If action has commenced in court, PA shall not act on the appeal except to notify the parties and decline the matter due to judicial involvement. This section does not apply where a court requests, expects, or otherwise expresses interest in the decision of the PA.~~

close tracks existing  
NRG

12103(b): 4<sup>th</sup> sentence, "or" should be "and"

12104(b)(6): Copy of contract disputes, or debarment action. Contract disputes conflicts with

-Conflicts with 2 GAR Div. 4, Chap. 9, Sec. 9103(d)(2)(e): (CONTRACT DISPUTES) Notice of final decision by procurement officer must include the statement: "You may obtain judicial review of this decision by grining an action in the Superior Court of Guam."

-Conflicts with 2 GAR, Div. 4, Chap. 9, Sec. 9103(g)(3)(i): (MANDATORY CONTRACT DISPUTES CLAUSE) States that decision of the Procurement Officer are final and conclusive unless fraudulent or the contractor brings an action seeking judicial review of the decision in the Superior Court of Guam.

12104(c)(2): Head of purchasing agency shall furnish copies of the appeal documents to interested parties (bidders/offerors) with instructions to communicate further directly with the public auditor.

-Should be revised to specify that they can communicate directly with the PA regarding the status of the appeal. For procurement matters, they are still required to contact the procurement officer for inquiries regarding the solicitation.

12104(c)(3): Head of Purchasing Agency must file a "Detailed Agency Report" (Should be amended to read "Answer") within 5 working days of receiving a notice of appeal.

-Should be at least 14 days for Protested Solicitations and awards because that is what the appellant gets pursuant to 5 GCA Sec. 5481.

-Should be at least 60 days for debarment/suspension proceedings because that is what the appellant gets pursuant to 5 GCA Sec. 5705(b).

-Should be at least 60 days for Contract and Breach of Contract Controversies because that is what the appellant gets pursuant to 5 GCA Sec. 5706(b).

12104(c)(4) Comments on the agency report shall be filed with the PA within 10 days after the PA's receipt of the report. Allows rebuttals by interested parties: Interested parties who did not file an appeal should not have standing in the proceedings and should not be allowed to file rebuttals.

12104(c)(8): After notice of appeal to the PA has been filed by the head of a purchasing agency (This should be revised to read "contractor").

12105(b) (Agency Reports): Copy of appellant's bid. Should be revised to indicate if one was submitted as there could be protest prior to bid submission. Further, some forms of procurement do not allow for the disclosure of bids except for the bidder who is awarded the contract. Some provision must be made to keep these confidential or the integrity of the procurement process will be jeopardized.

12105(d): Copy of the bid abstract must be confidential and not disclosed for certain types of procurements.

12107(b): PA and staff may entertain questions or complaints. Should be revised to add a provision that such questions or complaints, and any opa responses, should be disclosed to other parties in the appeal.

12108(a): Hearing officer will determine whether a hearing is necessary for resolution of the appeal. Due process mandates that a hearing be granted if requested by the parties. It should not be up to the hearing officer to deny a request for a hearing. Should be revised to use the language "waive right to a hearing" if the parties want to submit on their appeal and answer without a hearing.

12108(d) (Hearing Proceedings): The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer.

-Deference should be given to an agency's interpretation of the law if it is reasonable. *Chevron v. NRDC*, 487 U.S. 837.

12108(h) (Disclosure) All documents produced or submitted at the hearing or in support of the Appeal shall be subject to disclosure in accordance with Freedom of Information Law. Should exclude documents that are prohibited from disclosure for pending procurement actions.

12109(h)(1): Sanction of refusing to allow a disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence. Should be revised to read: "Sanction of Dismissal of claims or defenses."

12501(a) Any Interested Party/Protestor may protest a determination by head of purchasing agency, made pursuant to 5 GCA Sec. 5425(g): This is too expansive and allows non-parties with no standing to file such a protest. The statute limits such 2 day notice to protestors only and not all interested parties.