



OFFICE OF THE PUBLIC AUDITOR

RECOMMENDATIONS FOR CHANGES TO EXISTING PROCUREMENT LAWS

The following are recommendations for changes to *existing* procurement laws and procurement regulations which will have direct impact on the procurement appeals process, but which are *not* addressed by the promulgation of the Proposed Rules of Procedure for Procurement Appeals. Many of these are required due to the passage of P.L. 28-68.¹

1. In the event of recusal or disqualification of the Public Auditor, an appellant has no other recourse for appeal but to go directly to the Superior Court of Guam. Potential conflicts exist under the following situations between the role as Public Auditor and the role as Appeal adjudicator:

- Appeal of procurement actions where purchasing agency is the Public Auditor.
- Issues arising during Public Auditor performance audits or investigation of specific procurement actions pursuant to hotline tips.
- Instances where Public Auditor is legislatively designated as observer or otherwise, in outsourcing/procurement/privatization efforts of various agencies.

[NOTE: Several options the legislature could consider in addressing this matter include:

- The Administrative Adjudication Law provides in 5 G.C.A. §9222 that if the disqualification of an agency member would prevent the existence of a quorum qualified to act in the particular case, an agency member shall not withdraw voluntarily or be subject to disqualification. The Legislature could similarly restrict the Public Auditor from withdrawing or being subject to disqualification.
- In the alternative, the Legislature could provide that the hearing officer in place of the Public Auditor make the decision. This option is problematic where the Hearing Officer and Legal Counsel positions are merged, as the Public Auditor conflict, if not strictly personal, might extend to the legal counsel of the office.
- As a third option, when the conflict extends to the procurement appeals hearing officer, the matter could be forwarded by the Public Auditor to the panel of hearing officers established pursuant to 4 GCA 4101.1(f). The hearing officer

appointed to the case from the panel shall act in place and stead of the Public Auditor and hearing officer in regards to that matter on appeal and shall render the decision.]

2. 5 GCA §5245 is amended to read:

§5245. Finality of Determinations. The determinations required by §§ 5211(f), 5212(a), 5212(g), 5214, 5215, 5216(e), 5230(a), 5232(c), 5235, 5236 and 5237(b) of this Chapter are final and conclusive unless they are clearly erroneous, arbitrary, capricious or contrary to law or are appealed to the Public Auditor.

3. 5 GCA §5426(e) is amended to read:

(e) Finality of Decision. A decision under Subsections (c) or (f) of this Section shall be final and conclusive, unless fraudulent, or an appeal is taken to the Public Auditor in accordance with ~~§ 5706~~ §5705 of this Chapter.

4. 5 G.C.A. §5480(d) is amended to read:

(d) Limited Finality for Administrative Determinations. In any judicial action under this Section, 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 §§ 5245, ~~5705 and 5706~~ 5703, and 5704 of this Chapter.

5. 5 GCA §5707(a) is amended to read:

(a) Appeal. Any person receiving an adverse decision, the ~~Territory~~ government of Guam, or both may appeal from a decision by the Public Auditor to the Superior Court of Guam as provided in ~~Article D of Chapter 9~~ Part D of Article 9 of this Chapter.

6. 5 GCA § 5703 is amended to read:

§5703. Rules of Procedure.

The Public Auditor shall adopt rules of procedure which, to the fullest extent possible, will provide for the expeditious resolution of controversies in accordance with the requirements of this Chapter.

The Public Auditor shall have the authority to appoint a hearing officer, who shall take written, oral or otherwise presented testimony, evaluate such testimony and make recommendations to the Public Auditor.

~~The Public Auditor may adopt Small Claims Procedures for the resolution of controversies involving claims of less than Twenty five Thousand Dollars (\$25,000).~~

[NOTE: This amendment is required to address conflict with §5703, "The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam".]

7. 5 G.C.A. §5708 is amended to read:

§ 5708. Discontinuance of Contractor's Appeal. After notice of an appeal to the Public Auditor has been filed by the Chief Procurement Officer, the Director of Public Works or the head of a Purchasing Agency, a contractor may not discontinue such appeal without prejudice, except as authorized by the Public Auditor.

an appeal may be dismissed by the appellant without order of the Public Auditor (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or agency report or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise authorized by the Public Auditor, said dismissal shall be with prejudice and shall preclude further filing of an action based upon or including the same claim.

[NOTE: This amendment is required to address confusing language and to clarify voluntary dismissals.]

8. 2 GAR 9101.1 is hereby amended to read:

'9101.1 Finality. A decision of the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency may be appealed by the protestor, to the Public Auditor within fifteen (15) days after receipt by the protestor of the notice of decision.

A decision of the Public Auditor is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with '9103 and '9108.

SOURCE: Added to comply with 5 GCA '5425(f). Amended to comply with '5425(e) and P.L. 28-68.

9. 2 GAR 9102(h) is hereby amended to read:

(h) Decision. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:

- (1) State the reasons for the actions taken; and
- (2) Inform the debarred or suspended person involved of its rights to administrative or judicial review as provided in these regulations.

10. 2 GAR 9103(d)(2) is hereby amended to read:

(2) **Final Decision.** The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

- (a) a description of the controversy;
- (b) a reference to pertinent contract provisions;
- (c) a statement of the factual areas of agreement or disagreement;
- (d) a statement of the Procurement Officer's decision, with supporting rationale;
- (e) a paragraph substantially as follows:

“This is the final decision of the Procurement Officer. You may obtain administrative review of this decision by appealing with the Public Auditor and subsequent judicial review of this decision by bringing an action in the Superior Court of Guam.”

11. 2 GAR § 9103(g) is hereby amended to read:

(g) Disputes Clause. Language substantially similar to the following clause shall be inserted in all territorial government contracts:

“DISPUTES

- (1) All controversies between the territory government of Guam and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Procurement Officer in writing, within 60 days after written request by the contractor for a final decision

concerning the controversy; provided, however, that if the Procurement Officer does not issue a written decision, within 60 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(2) The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or:

(i) The contractor appeals said decision to the Public Auditor or thereafter brings an action seeking judicial review of the decision in the Superior Court of Guam.

(4) The contractor shall comply with any decision of the Procurement Officer and proceed diligently with performance of this contract pending final resolution by the Superior Court of Guam of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of the contract by the territory; provided, however, that in any event the contractor shall proceed diligently with the performance of the contract where the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency has made a written determination that continuation of work under the contract is essential to the public health and safety.”

¹ Recommendations for additional changes to procurement laws that would *not* directly affect the appeals process can be found in the May 30, 2006, letter of Attorney Sandra Cruz, also attached hereto.

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May 30, 2006

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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.

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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

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(I)(1) of the Procurement Regulations (Selection of the Best Qualified Offerors). For example:

2 GAR § 3114(I) 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.

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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.¹

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

¹ 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.

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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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