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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 11-802

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	AMENDMENT TO
)	MOTION TO DISCLOSE
)	PROCUREMENT FILE
TOWN HOUSE DEPARTMENT STORES, INC., dba)	
ISLAND BUSINESS SYSTEMS & SUPPLIES,)	DOCKET NO. OPA-PA-11-002
APPELLANT)	

Appellant IBSS hereby amends its pending Motion to Disclose certain material in the Procurement Record alleged to be proprietary information.

On February 18, 2011, after the filing of the original Motion to Disclose herein, DOE issued a "Supplement to the Procurement Records" for the within Appeal.

Included in it, at Tab 4, is email correspondence from Taling M. Taitano, dated Oct 6, 2010, to, among others, the Superintendent. In the email it is disclosed that DOE maintained two separate files of information regarding pertinent information she deemed important to consult in responding to questions and preparation of the within IFB, No. 022-2010. One was part of the procurement record, and the other characterized as "proprietary information". She said:

"[W]e need to determine where the existing machines are and where the new machines will go. I believe Brian was working off a list provided by Xerox; Albert should have the file which is separate frm the procurement file because of proprietary information."

Appellant asks that OPA require production of such information and de novo make a

determination on what basis the matter is deemed proprietary, and whether such determination is proper. If the information is not proprietary, it should be part of the procurement record DOE is obligated to provide herein.

DOE's failure to heretofore identify the existence of such material, albeit allegedly proprietary, is unjustified. The procurement file is meant to consist of all relevant records, proprietary or otherwise. The fact it may be proprietary does not exempt it from being a part of the procurement record, but may require that the information be segregated so as not to be made publically available:

"Each procurement officer shall maintain a *complete record of each procurement.*" (5 GCA § 5249.) "**The record required by § 5249 of this Chapter is a public record** and, subject to rules promulgated by the Public Auditor, any person may inspect and copy any portion of the record." (5 GCA § 5251.) "The rules promulgated pursuant to § 5251 of this Chapter shall: ... (b) protect the confidentiality of trade secrets." (5 GCA § 5252.)

It must be remembered that the "procurement record" is not simply a record of the solicitation. "Procurement" is much broader than that. As implied by the policy in favor or planned procurement (5 GCA § 5010) and the inclusion of supply management responsibilities under the purview of the Policy Office (Article 8 of the Procurement Act, § 5401 *et seq.*), "procurement" begins at the planning and needs assessment stage and continues right through contract performance, to include management and disposal of all purchased supplies:

"*Procurement* means buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration." (5 GCA § 5030(o).)

Consistent with this paradigm, 2 GAR §§ 3109(1)(2) and (3) requires, in respect of information submitted with a bid, that claims to confidentiality be independently determined:

(1)(2). "The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection 3109(1)(3) of this section. **Material so designated shall accompany the bid** and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential *portion* of the bid.

...

(1)(3). "The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. ... The bids shall be opened to public inspections subject to any continuing prohibition on the confidential data."

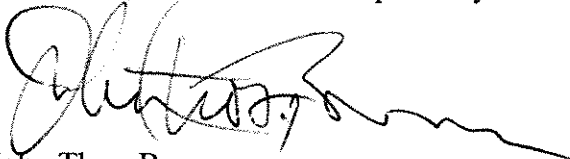
Although not strictly bid information, at least so far as revealed in the email mentioned above,

this suggests that *any* information in the procurement record that is claimed to be confidential should be independently assessed and not blindly accepted (and, of course, if there is no such claim, confidentiality is waived). That, after all, is one of the fundamental purposes of the Procurement Act (5 GCA § 5001(b)(8): “to require public access....”).

The Public Auditor has the power to compel production of documents by any employee of the government of Guam, and to make a de novo determination of any determination made by an agency. (5 GCA § 5703.)

Therefore, Appellant asks the Public Auditor to compel the production of the complete procurement record, including any part of the procurement record that bears on the scope or intent or needs addressed by IFB 022, including specifically the “proprietary information” mentioned in the email mentioned above, and to de novo determine if any information claimed to be proprietary is truly confidential under the Procurement Act, and, if not confidential, make such information public.

Wherefore, this Motion is Respectfully Submitted as hereby Amended,

A handwritten signature in black ink, appearing to read 'John Thos. Brown', with a long horizontal flourish extending to the right.

John Thos. Brown
For Appellant
February 19, 2011