John Thos. Brown
General Counsel
545 Chalan Machaute (Route 8 @ Biang St), Maite, Guam 96910
Mail to: P.O. Box 7, Hagåtña, Guam 96932
Ph: 477-7293; Fax: 472-6153
jngoz@ozemail.com.au

PROCUREMENT APPEAL

In the Appeal of	NOTICE OF APPEAL
TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	DOCKET NO. OPA-PA-08-012

APPELLANT INFORMATION

Name: Town House Department Stores, Inc., dba Island Business Systems & Supplies ("IBSS")

Mailing Address: P.O. Box 7, Hagåtña, Guam 96932

Business Address: 545 Chalan Machaute (Route 8 @ Biang St), Maite, Guam 96910

Daytime Contact No.: Raul Del Valle, Acting General Manager (671) 477-7454

APPEAL INFORMATION

Purchasing Agency: Guam General Services Agency ("GSA")

Number/Description of Procurement:
Request for Price Quotation
Multi-function Copiers (total 9 machines)

Requisition #s: 0808000: 47, 48, 49, 50, 51, 52
RFQ #s: 080022: 41, 49, 51, 52, 55 & 56
All Dated: 5/15/2008

The decision being appealed is a denial of IBSS' Protest by GSA, which denial is dated September 9, 2008, delivered to Appellant September 11, 2008[1].

Appeal is made from protest of method, solicitation or award, of date May 20, 2008[2], received by GSA May 21, 2008.

Names of competing bidders, offerors, or contractors known to Appellant:

> Appellant has no knowledge of the identity of any other prospective bidders but has reason to believe, based on the Xerox brand name or equal specifications, that Xerox Corporation is intended to a "competing" bidder.

STATEMENT OF GROUNDS FOR APPEAL

A. FACTUAL CONTEXT and CHRONOLOGY:

As indicated above, on May 15, 2008, GSA issued a Request for Quotations for the purchase of 9 copiers.

On May 21, IBSS protested the RFQ on the several grounds, principally that the RFQ is not an appropriate method of source selection and that the specifications for the copiers were unduly restrictive and improperly developed, all as more fully stated in the letter of Procurement Protest.

IBSS also noted that it was drawing an impression the the RFQ "is simply a subterfuge to bypass Guam Procurement Law and Regulation and purchase these Xerox products directly from Federal GSA FSSP". IBSS objected to any such purchase without "a fair and proper procurement, with fair and proper specifications, under competitive sealed bids, fairly evaluated".

On June 16, 2008, the Guam Attorney General's Office issued a Legal Memorandum Opinion regarding the Legality of Purchasing through Federal GSA Contracts, which concluded that GSA could, indeed should, bypass competitive sealed bidding methods of source selection.

---

[1] Copy of which is attached hereto.

[2] Copy of which is attached hereto.

Since GSA did not respond to the RFQ Protest, on August 25, 2008, IBSS noticed a Request for Decision on Protest to GSA[3].

On September 3, 2008, at GSA CPO's instigation, IBSS legal counsel met with the CPO, though nothing was then resolved.

On September 8, 2008, having not received the response from GSA that was expected, IBSS noticed a letter reminding GSA that it was still awaiting a response.[4]

B. GPSS' RESPONSE TO PROTEST

:

On September 11, 2008, Appellant was served GSA's notice of decision to deny the protest.

GSA CPO further advised, "[u]pon receipt of this letter you are notified that GSA will continue with the procurement process." Appellant questions whether GSA ever stayed such process, at least prior in time to Appellant's Request for Decision on Protest, in contempt and violation of 5 GCA §5425(g). Appellant is concerned that, although the Decision denying the protest is dated September 9, and was not served until after 5:00 p.m. September 11, that action is being taken to conclude the process before Appellant is given the time allowed to appeal that Decision.

GSA's CPO further advised Appellant that, although IBSS refused to provide price quotations in response to the RFQ, deciding instead to protest that procedure, GSA had, without IBSS' knowledge, consent or acquiescence, obtained prices from GPA which IBSS had bid in an independent competitive sealed bid, and that, in spite of IBSS' refusal to provide prices pursuant to the RFQ, GSA would look to that other sealed bid "to determine if the GSA Federal Contract is less than ten percent (10%) than from other contractors". IBSS disputes that it is an "other contractor" within the meaning of 5 GCA §5122 because it refused to take part in that solicitation.

GSA's response that Appellant's protest was without merit is based wholly and without elaboration on an opinion of the Guam Attorney General dated June 16, 2008, to the effect that GSA need not, indeed could not (due to "imcompatibility"), engage in a competitive bidding process to purchase directly from the Federal GSA Supply Schedule, also known as the Federal Supply Schedule Program ("FSSP") and could rely on GSA's own authority to "adopt operational procedures governing the internal functions of the procurement operations", which operational procedures the opinion also reviewed and approved.

---

[3] Copy of which is attached hereto.

[4] Copy of which is attached thereto.

A copy of that opinion is attached hereto as part of GSA's notice rejecting IBSS' protest, and is referred to herein as the "AG opinion" or simply, "the opinion."

C. LAW and ARGUMENT:

This Appeal rests squarely on the argument, as developed in the AG opinion, that there is an implied exception in Guam procurement law and regulation from all the usual specified methods of source selection, and in particular the preferred competitive sealed bidding method, that enables GSA to directly purchase from the FSSP under "procedures" GSA has itself drawn up.

It appears from the introductory comments of the AG opinion that the opinion was issued in response to criticism from GSA's external auditors arising from the audit reports for fiscal year 2006. The opinion does not recite that it was issued in respect of Appellant's protest even though at the time of Appellant's protest the opinion did not exist.[5]

The AG opinion has provided GSA with its sanctimonious blessing to continue to purchase directly from contracting vendors under the FSSP, but IBSS finds the opinion to be more holey that holy.[6]

The AG's opinion is "if the local GSA office procures through the Federal GSA in accordance with the standard operating procedure adopted [by local GSA], then competitive sealed bidding is not required." (Opinion, Conclusion, page 9.)

---

[5] In October 2007, IBSS legal counsel wrote to GSA's CPO, in connection with a dispute regarding copier purchases at GPSS, asking directly "can you explain any agreement that Guam GSA has that would allow GPSS to by-pass the procurement process...." The CPO declined to respond to the question. This letter is part of the records of the Procurement Appeals files in OPA-PA-08-003 and 08-011.

[6] No disrespect intended to the Attorney General, but this is not the first procurement opinion to come from that office which is uncritically deferential to GSA procurement practices. An AG opinion in 1989, for instance, approved a GSA/Xerox blanket purchase agreement on the broad notion that the CPO has some power to determine contract provisions, even though the BPA *on its face* violated several essential requirements regarding the proper use of BPAs, including the price limitation, the requirement for multiple quotes and the requirement that the vendor must affirm that the prices quoted under the BPA were the best and lowest prices offered to any customer. (See 2 GAR §3112.1 generally, with particular reference to §3112.12(e) and (h), and §3112.13(b), (c), and (d).) In spite of such violations, and others, and without any specific reference to the contents of the BPA, the opinion concluded that the BPA conformed "to the statutes and rules governing procurements." The referenced 1989 opinion is part of the records in Procurement Appeals OPA-PA-08-003 and 08-011.

This conclusion is based on a failure to appreciate the nature of the FSSP[7] and the government's intended use of it, compounded by ignoring the difference between methods of source selection and sources of supplies, and is wrong in its assumption that competitive sealed bidding is inconsistent with an assessment of whether the FSSP price is the lowest price available (taking into account the 10% preference for other suppliers required by 5 GCA §5122). Finally, the GSA is without the power to make the procurement regulations that the opinion condones.

The arguments taking issue with the AG opinion are as follow, and are more fully discussed thereafter.

1. The FSSP purchasing practice is not a method of source selection but simply a source, constituting an unregulated sole source contracting process

2. 5 GCA § 5122 is not and does not authorize a procurement method and does not create an exception to competitive sealed bidding method of source selection

3. GSA does not have the power to adopt FSSP procurement rules

4. GSA's FSSP purchasing process violates the policy and regulations requiring competitive specifications

5. The local preference policy implicit in §5122 is not incompatible with the competitive sealed bid method of source selection

DISCUSSION:

1. The FSSP purchasing practice is not a *method* of source selection but simply a *source*, constituting an unregulated sole source contracting process

The foundational misconception in the AG's opinion is not understanding the nature of the FSSP and how GSA uses it.

The FSSP is simply a *source* of supply, it is *not* a self-executing *method* of selecting the source.

[7] See USGSA website concerning the GSA Schedules and the Federal Supplies Purchase Program ("FSSP") at http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8106&contentType=GSA_OVERVIEW

For Guam purchasing purposes, the FSSP is merely a *list* of supplies of every kind, brand and description, containing "*over 11 million* commercial supplies (products) and services that can be ordered *directly from GSA Schedule contractors*".[8] The GSA Schedule contractors are the vendors approved to list their designated products in the FSSP.

The FSSP is nothing more than a Sears Roebuck Catalogue on steroids, but for Guam purposes it might better be analogized to K-Mart or Amazon.com. K-Mart and Amazon are sources of supply, not a method of source selection. GSA can no more go to K-Mart or Amazon to buy whatever it wants in complete disregard of the competition requirements of the procurement laws than it can go to the FSSP and buy whatever it wants.

There is no rule that says, if you buy an item from National Office Supply you have to go through a competitive bidding or other authorized method of source selection, *but those rules don't apply* if you go buy it from K-Mart. To even suggest that there is such a rule is ridiculous on its face, but that is the functional equivalent when the AG opines that GSA can purchase from FSSP without regard to the competition requirements clearly set out in procurement law and regulation.

The way GSA uses the FSSP is by requisitioning an item, and then going to the FSSP to purchase the item after a half-hearted lure set out for any local supplier willing to go head to head with the FSSP purchasing powers (the US Government is the largest buying office in America and has considerable clout in obtaining the lowest prices on offer).

The RFQ that began this Appeal typifies the way GSA uses the FSSP. First, GovGuam decides to purchase a Xerox brand item. It identifies the item on the FSSP list and buys it unless there is a local supplier willing to supply that particular item at a price within 10% of the FSSP price[9]. It specifies the item down to the brand and model it wants without any reference to or regard for the many solicitation and specification requirements that the item must normally, under applicable procurement law and regulation, meet.

This use of the FSSP is in essence sole source procurement, which is also an authorized method of source selection *when* effected according to its requirements. But the GSA FSSP purchasing is not conducted pursuant to the regulations applicable to the sole source method of source selection and the GSA FSSP "procedure" contain none of the restrictions, conditions and

---

[8] Id. Italics added.

[9] To qualify to get on the FSSP list, the vendor must guarantee to the US government that its price for that item is the lowest price offered to any customer. This is similar to the requirement under blanket purchase agreements in 2 GAR §3112.12(g)(3). When, as in many cases, the vendor is the original manufacturer and not a middle man distributor, the price can be uncommercially low for any non-manufacturer supplier, even a supplier of the same item, to compete against.

accountability requirements of the sole source method of source selection. When the GSA FSSP purchasing procedure is measured against the standards and requirements of sole source procurement, it is an improper procurement.[10]

It must be appreciated that the FSSP contains almost every conceivable major brand of copier available to the market, but if GovGuam buys through the FSSP, its procedures allow, indeed facilitate, a sole source procurement of a particular brand item in complete immunity from the many competitive requirements of the procurement laws and regulations.

That is because one does not purchase "a copier" from the FSSP, one must purchase a *particular* copier from a *particular* vendor. Thus, GSA *could* purchase a Sharp, Hewlett-Packard, Minolta, Ricoh, Canon or any other of many brands of copiers that are available through the FSSP, but its records will show that over the years GSA has only chosen to purchase Xerox brand copiers.[11] This practice is clearly at odds with the policy requirement that procurement must foster competition.[12]

The FSSP is, then, not a method of *selecting* a particular source, it is a method of *purchasing from* a particular source; it is a way to accomplish a sole source procurement without the very carefully prescribed conditions of competition and competitive specifications that the law and regulations require.[13] It may be a convenient way to get the lowest sourced price on an item, but it does nothing to assure that the method for choosing that sourced item is subjected to competitive requirements that the law desires[14] and requires.

---

[10] "Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular item does not justify a sole source procurement if there is more than on potential bidder or offeror for that item." (2 GAR §3112(b)). When sole source is inappropriate, competitive sealed bidding must be used.

[11] Compare this practice with the competition enhancing requirements that purchasing agencies spread around their purchasing requirements to various vendors under blanket purchase agreements (2 GAR § 3112.12(e)).

[12] 5 GCA §§ 5001(b)(4) and (6).

[13] 5 GCA §5214 requires, as one condition, that "there is only one source for the required supply, service or construction *item*." See more generally 2 GAR § 3112.

[14] See, 5 GCA §§ 5001(b)(6). (7) and (8).

2. §5122 is not and does not *authorize* a procurement *method* and does not create an exception to the competitive sealed bidding method

The opinion states that §5122 *authorizes* another sort of procurement method.[15] Nonsense.

§5122 is a short statute and easily read: "The General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) than from other contractors."

It does not *mention* or describe a procurement *method.* It does not proclaim itself to be an exception to the competitive sealed bidding method. It merely places a limitation on GovGuam's eligibility under Federal law to purchase from FSSP if there is another contractor from whom GSA could acquire the supply at a price within 10% of the FSSP price.[16] It does not grant any authority to purchase from the FSSP, it *limits* any such ability.

The whole basis of the AG opinion that purchases by way of the FSSP need not be conducted by competitive sealed bidding rests on its insistence that §5122 is the source of authority and impetus to create another method of source selection.[17]

And this insistence rests on the argument that such authority is implicit in the *"unless other wise authorized by law"* language in 5 GCA § 5210(a)[18], which mandates competitive sealed bidding except when the other specific methods of source selection spelled out in subsequent sections are applicable, "unless other wise authorized by law".

The opinion insists that every word in a statute is to be given effect and meaning and from that suggests that the phrase must have independent force of law. Yes, this is one rule of statutory

---

[15] The opinion says, "one would have to conclude that any other valid law in existence authorizing another sort of procurement method or creating a type of exception would also legitimately preclude the use of the competitive sealed bidding method." (At page 5)

[16] As noted above, IBSS objects to being considered such a contractor for purposes of comparing its prices submitted in respect of an independent competitive sealed bidding process when, as it did here, it objected to the very use of the RFQ and refused to tender any price.

[17] The opinion states, "we may consider that 5 GCA 5122 [authorizes] procurement through the Federal GSA", in an extracted part of a sentence on page 5.

[18] 5 GCA §5210 prescribes "Methods of Source Selection". §5210(a) provides: "Unless other wise authorized by law, all territorial contracts shall be awarded by competitive sealed bidding, pursuant to § 5211 of this Article, except for the procurement of professional services and except as provided in [sections 5212, 5213, 5214, 5215, 5216, or 5217]."

construction, but, first, there is a difference from giving meaning to a phrase and giving it independent force of law. And second, like so many other such rules of construction, there are countervailing rules. In this case, that countervailing rule is "superfluity does not vitiate".[19]

One easy way to judge whether language must be given effect or is mere superfluity is to consider the whole clause without the contentious phrase. Would §5210(a) have any different meaning without the "unless otherwise authorized" clause? Arguably, no. No law can be enacted which prevents a later, overriding law, so the phrase is redundant when judged against later law.

The only possible situation where this phrase might be a useful and meaningful addition is where a law is not intended to have implicit repealer effect over prior law.

But §5122 and §5210(a), with its "unless otherwise authorized" phrase, were both enacted at the same time, in the same Public Law 16-124, which originally adopted, as a comprehensive, integrated act, the Guam Procurement Act[20].

Why would the Legislature, in one integrated bill adopting the first *comprehensive* Guam law on procurement[21], specifically list the exceptions of methods of source selection it expressly intended to authorize, as it did in §5210, yet by broad and ambiguous reference, "intend" to include another undefined "exception" placed elsewhere in the same Act?

Without denying the possibility of that (lawyers can argue most things), it takes a great leap into the unknown to reach such a conclusion, and there should be some corroborating evidence of that need or intent, which is absent here. There is no compelling argument here that this "unless otherwise authorized" language must be read to refer to §5122.

Having very carefully and comprehensively created law and regulation specifically setting out a

---

[19] 20 GCA § 15129, which recognizes that legal drafting is not immune from superfluous language, and where it can be shown or reasonably interpreted as mere superfluity, it does not vitiate, or take away from, the plain meaning of the rest of the language.

[20] See Section 1, PL 16-124, particularly the official Note and Comment. The official comment instructs that "Official Comments to the Model Procurement Code are a part of the Legislative History of this title" and the Model Regulations associated with that model code "must be examined" in implementing regulations under the Guam Procurement Act. §5122 was not part of the Model Procurement Code.

[21] See Comment to 5 GCA §5001: "[P]rocurement law under Executive Order 65-12A on Guam is vague and leaves much to administrative direction. At least, this Act will regularize and centralize procurement on Guam ...."

variety of specific procurement *methods*, it must be assumed that *if* the Guam Legislature had intended to create a separate procurement *method* for purchasing from the Federal government in the same comprehensive procurement legislation adopted by PL 16-124, it would have done so with the same specificity and care.

Other evidence that the Procurement Act did *not* intend, under the "unless otherwise authorized" language, to adopt any *method* of source selection not mentioned in the competitive sealed bidding requirement is found in the regulations.

For instance, in the excepted small purchase method of source selection, the regulations state, **"[i]f these *methods* are not used, the other *methods* of source selection provided in 5 GCA §5210 (Methods of Source Selection) of the Guam Procurement Act and these Regulations shall apply."** (2 GAR § 3111(b)(1).) Thus, any item whose price is between $500 and $15,000 **must** be conducted *by competitive sealed bid* unless one of the other specific *methods* is applicable, §5122 notwithstanding.

This is an important point and bears reiterating: any item whose price is between $500 and $15,000 **must** be conducted *by competitive sealed bid* unless one of the other specific *methods* is applicable. This very specifically creates no exception for §5122. It makes it clear that the Procurement Act intended no general exclusion in the "unless otherwise authorized" phrase for treating §5122 as an alternative method of source selection.

Likewise, the small purchase method regulation states, "[i]f the supply, service, or construction item is available from only one business, the sole source procurement *method* set forth in §3112 (Sole Source Procurement) of these regulations **shall** be used even if the procurement is a small purchase...." (§3111(b)(4).) The very purpose of FSSP purchasing is to acquire an item of supply from only one business. This regulation rejects the argument (which the AG opinion should have considered but did not) that the FSSP can be used as an alternative to the sole source method of source selection. In doing so, it rejects the notion that §5122 is an authorized method of source selection.

Furthermore, *as the opinion very carefully details*, **the specific eligibility for GovGuam to be able to purchase from the FSSP is granted, not in the local Guam law of §5122, but in *Federal* legislation**[22].

§5122 is actually nothing more than a local law *limiting* that **Federally granted eligibility**, preventing any purchase of supplies by GSA from the Federal government "when the cost to the

[22] See the AG's discussion of this Federal legislation at page 4 of the opinion.

[Guam] General Services Agency is less by ten percent (10%) than from other contractors".[23]

The opinion would have us *incorporate* Federal into Guam law under the broad language of "unless other wise authorized by law", and this is a complete nonsense.

When the Guam Legislature passes local law that includes the phrase, "unless otherwise authorized by law" (as it often does), it means unless otherwise authorized by a law that *it* has authorized, or common law applicable as Guam local law.

The "unless otherwise authorized" language was not intended to reference any statutory law or regulation of another jurisdiction. Since the only law providing eligibility to GovGuam to purchase from the FSSP is found in the law of another jurisdiction, that law cannot give rise to an implied method of procurement under Guam law.

3. GSA does not have the power to adopt FSSP procurement rules

Contrary to the AG conclusions, the procedures adopted by GSA are not duly authorized by the limited power given it.

First, the "unless other wise authorized *by law*" phrase upon which the AG's opinion is based refers to other "law". The method by which GSA is authorized to purchase from the FSSP is a *procedure* adopted by GSA, accepting solely for purposes of argument that there is any such authority.

Laws are "authorized" by the Legislature. The phrase upon which the opinion relies does not say "unless authorized by a procedure authorized by law", but the opinion jumps to that conclusion.

It is important to bear in mind that what is involved here is the creation of an alternative method of source selection other than competitive sealed bidding. The relevant statute requires the competitive sealed bidding method of source selection, *except* for such other approved methods of source selection *or*, in the language of the prefatory phrase, "unless other wise authorized by law". Thus, the alternative *method* must be authorized *by law*.

The opinion lands on 5 GCA §5113, which authorizes GSA to adopt *internal operational* procedures and cites that as the authority for the alternative method of source selection, but that

[23] It is generally regarded that this statute creates a form of "local" preference, but the statute is written more broadly than that. Compare to 5 GCA § 5008.

is a secondary, derivative source (*at best*), not a direct source. The "unless authorized by law" language and context of 5 GCA § 5210(a) indicates it is intended to refer directly to the alternative methods specified in that section or authorized by law, not to some other authority to adopt certain prescribed procedures.

The opinion points out that Guam law empowers Guam GSA to adopt certain operational *procedures*. There is, of course, no authority for GSA to adopt or authorize any *law,* or regulation for that matter.

This is not mere pedantic semantics. The law itself is very careful to grant authority, where it deems appropriate, to the executive Policy Office to promulgate "procurement regulations"[24].

The authority granted to GSA does not even rise to the authority of *regulation,* being merely "procedures"[25].

If there is an alternate exception under §5122 to the express exceptions for alternate methods of source selection detailed in §5210(a) (which is an argument only accepted here for purposes of analysis), it can only be one found in *law*, **not** in *regulation* or in internal operating *procedures*.

But even assuming for purposes of argument that the phrase is intended to refer indirectly to procedures authorized by lawful authority, the opinion misses the mark.

The opinion suggests that where the Policy Office has not acted to adopt regulations concerning procurement from FSSP, then GSA can adopt it own procurement rules under its power to adopt operational procedures governing its internal functions of procurement operations. The opinion adds, that when the Policy Office is given notice of the adopted GSA procurement procedures and does nothing to change them, then they carry even more force[26], implying silence can substitute for otherwise required administrative procedures.

---

[24] See, e.g., §§5130(a), 5131.

[25] See specific grant of power regarding "small purchase procedures" in 5 GCA § 5213, and compare that to the power regarding "regulations promulgated by the Policy Office in 5 GCA 5214. The power regarding small purchase "*operational procedures*" was then delegated to the GSA by the *regulations* promulgated by the Policy Office in 2 GAR §3111(e), as further discussed below. It is critical to pay attention to these distinctions.

[26] Opinion, page 8.

Wrong. The power granted to the Policy Office to promulgate *"procurement"*[27] regulations is not shared with GSA. The Policy Office is very plainly and singularly charged with promulgating "procurement regulations"[28] .

The GSA FSSP purchase procedures for soliciting bidders, soliciting pricing, comparing pricing, awarding purchase authority through the Hawaii Federal GSA office and in general doing all things associated with filling a "requisition" from a buying agency can only be characterized as procurement regulation.

Compare the language of the statutes cited above where powers *are* granted. The Policy Office is granted the power to promulgate procurement *regulations*, and GSA is granted the power to adopt operational *procedures* governing its internal functions. These are not the same thing, and are not intended to be interchangeable terms. Only the Policy Office has the power to promulgate "procurement regulations", and **this power cannot be delegated to GSA.**[29]

The AG's opinion condones the GSA FSSP procurement procedures as a proper exercise of its power to adopt "operational procedures governing the internal functions of [GSA's] procurement operations"[30], but GSA cannot infringe on nor usurp the power reserved to the Policy Office to promulgate procurement regulations.

There is further evidence in the law and regulations that GSA is not intended to have powers arising to the functional level of procurement regulation.Consider the procurement regulations of Guam Memorial Hospital.

26 GAR §16204 is to the effect that the GMH Board of Trustees has the power to adopt "operational procedures governing the internal functions of their procurement operations" if recommended by the Hospital Administrator and Supply Manager. This is the *very same*

---

[27] "*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, serve 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).) This language clearly includes any purchase from the FSSP, which must therefore fall under the purview of *procurement regulation.*

[28] 5 GCA § 5102.

[29] 5 GCA § 5130(b): "The Policy Office shall not delegate its power to promulgate regulations." As such, it is error to assume GSA would otherwise acquire such powers by implication or default.

[30] Opinion, page 7, argument 5.

language used to describe GSA's power. Does this mean that GMH is *also* empowered to adopt procurement regulations?

If either or both of GSA and/or GMHA adopt their own procurement methods for dealing with FSSP purchases (or anything else for that matter), that would violate the policy[31] and requirement[32] that procurement regulations be uniform throughout GovGuam. Such strong policy considerations rule out any implied authority to share the powers of the Policy Office.

If Policy Office powers are to be wielded, it must wield them itself, regardless whether it has notice of actions taken by GSA with intent to wield such power and regardless if it is silent in the face of such action.

As further evidence that the regulations do not intend to make any general grant of procurement regulation power to GSA, compare the provisions for small purchases, 2 GAR §3111, as noted in the discussion further above.

Regulation §3111(c) involves purchases of items priced between $500 and $15,000, and §3111(e) involves the purchase of items $500 or less.

Subsection (c) of the *regulation specifies particular procedures* to be followed for purchases of items priced from $500 to $15,000, but subsection (e) makes a specific grant of power to the GSA Chief Procurement Officer to "adopt *operational procedures* for making small purchases" under $500 (with the admonition that such "operational procurators (sic)[33] shall provide for obtaining adequate and reasonable competition ...").

This careful and discriminate use of the terms "regulation" and "procedures" in the small purchase procurement law and regulation evidences that the Guam Procurement Act recognizes that GSA does not have a broad power to implement law or regulation by way of adopting operational procedures[34], and that the legislation only grants the power to adopt operational *procedures* in respect of procurement *regulation* only in the specific and limited cases the legislation deems appropriate.

---

[31] 5 GCA § 5125.

[32] 5 GCA § 5131.

[33] Probably meant to say "procedures", since that is the term used in Model Procurement Code R3-204.05, which is the model for the Guam Procurement Act and regulations.

[34] Which is the gist of the opinion's argument, i.e., that the GSA procedures can give effect to 5 GCA §5122.

This limited power is not extended by the express language of 5 GCA §5113, which allows GSA to "adopt operational procedures governing the internal functions of [its] procurement functions." The power is not, as the AG opinion intimates, a power to adopt "operational procedures of its procurement functions". A plain reading of that statute makes it clear that the "procurement functions" refers to GSA's internal functions, not to procurement regulation more broadly. Thus, GSA is authorized to adopt procedures relative to matters such as the form of solicitations, the place and timing of lodging and opening bids and proposals, specifying what agency personnel must be present and the like.

On its face, and in the plain language of the law, the power given to GSA to adopt operational procedures is limited to those procedures governing its internal functions. If GSA were, by implication, empowered to adopt any practice it sees fit to effect a new method of source selection under the power to govern its internal functions, it would then have the power to re-write the carefully delineated, prioritized and specific methods of source selection specified in the law and regulation, which, of course, is a nonsense. There is no such power.

If GSA feels that there is some kind of void in the procurement framework that needs to be filled to create a specific procurement method of source selection to facilitate FSSP purchases, apart from the existing methods of source selection, it must seek those changes from the Legislature and Policy Office; it does not have the power to promulgate any such rule itself. As this analysis suggests below, there are however ways, within the existing laws and regulations, that do facilitate consideration of FSSP purchases within the rubric of competitive sealed bidding, that do not recall any amended or new legislation or regulation.

4. GSA's FSSP purchasing process violates the policy and regulations requiring competitive specifications

To underscore the policy lapse in condoning purchases of items off the FSSP without regard to the established methods of source selection authorized in the procurement regulations, one must consider, as the opinion failed to do[35], the requirements for drawing up the specifications[36] for the

[35] Notwithstanding its emphasis on the requirement that GSA's adopted procedures must be "consistent with the provisions of the Guam Procurement Act and the Guam Procurement Regulations", at page 8 of the opinion.

[36] See, 5 GCA § 5260: "... Specification means any description of the physical or functional characteristics, or of the nature of a supply, service or construction item..." Also, § 5265: "All specifications shall seek to promote overall economy for the purposes intended and

item intended to be "requisitioned" in the first place.

2 GAR, Div. 4, Chpt. 4, §4101 *et seq.* set out the requirements for drafting specifications, and they are incompatible with the practice of GSA to identify a brand product, confirm it on the FSSP, and then purchase it. That practice puts the cart before the carabao.

GSA does not, for instance, determine that it has a need for certain copier functions and draw up specifications for a product that will meet its needs, then solicit products from vendors who can supply copiers that meet that need and specification. The GSA FSSP practice jumps straight to the conclusion that it wants a Xerox brand product of a particular nomenclature, then goes to the FSSP list and purchases it, in violation of both the specifications requirements as well as the sole source procurement requirements. It simply bypasses all the requirements for a studied needs assessment followed by drawing up specifications meeting those needs, then placing a solicitation to acquire product meeting the specifications.

This practice is illustrated in the GSA RFQ for 9 copiers issued May 15, 2008. The specifications simply regurgitate the Xerox specifications right down to the Xerox model nomenclature, then adds the bare statement "or equal". It is clear that what GSA wishes to requisition is that particular brand product, and adding the "or equal" language, without more, fails to provide the appropriate – and required – guidance, both to evaluators as well as the bidders.

The purpose of having specifications drawn conforming to the regulations is similar to the broader policies of the overall procurement law: to foster fair and open competition to meet the territory's economic and other essential requirements. The specific purpose to have specifications at all, and the requirements for implementing them, is cast aside when an agency determines, in the first instance, to purchase a specific item off the FSSP.

The essential purposes and requirements of having proper specifications, as spelled out in the regulations, are as follows:

> **The purpose of a specification is <u>to serve as a basis for obtaining a supply item</u>** adequate and suitable for the territory's needs in a cost effective manner. (§ 4102(a)(1))[37]

---

encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive."

[37] This makes it clear than *any* acquisition of an item of supply, by whatever method, must have a specification as the basis for obtaining the item. This makes perfect sense: the government must be able to identify its needs. The specification, of course, must meet all the other requirements for *drafting* the specification to make sure it is "adequate and suitable for the territory's needs in a cost effective manner".

Specifications shall emphasize the principal functional or performance needs and criteria. (§ 4102(a)(2))

It is the general policy of this territory to procure **standard commercial products** whenever practicable. In developing specifications, accepted commercial standards shall be used and unique requirements shall be avoided to the extent practicable. (§ 4102(a)(3))

A specification shall not include any solicitation or contract term or condition such as a requirement for time of delivery, payment, liquidated damages, to the extent feasible. (§ 4103(b)(1)(c)) [38]

Since use of a **brand name specification is restrictive**, it may be used only when the purchasing officer makes a written determination that only the identified brand name *item* will satisfy the territory's needs. (§ 4103(b)(2)(c); note that the subdivisions of this section are not easily sequenced.)

Whenever **brand name or equal** specifications are used, the procurement officer must make the written determination that no specification for a common or general use item is available, and time does not permit the preparation of another form of specification (*not including a brand name specification*), and either the nature of the product or the territory's requirements makes use of a brand name or equal specification suitable or use of the brand name or equal specification is in the territory's best interest. **Furthermore, whenever a brand name or equal specification is used, the specifications must designate three or as many different brands as are practicable as "or equal" references**. Still more, the specifications shall include a description of the *particular* design, functional or performance characteristics of the brand name product which are required, unless such *essential* characteristics of the brand name product are commonly known in the trade or industry. And even then, the brand name or equal specification must explain that the use of a brand name is for the purpose of *describing* the standard of quality, performance and characteristics desired and is not intended to limit or restrict competition to the brand name product. (§ 4103(b)(2)(b))

---

[38] By contrast, and contradictory to this requirement, the GSA FSSP purchasing procedures state, "5. All delivery, warranty and other terms are pre-negotiated under the federal contract." These "pre-negotiated" terms are set by the contracting vendor and, as such, are unduly restrictive. As this regulation states, they should not be part of any specification, nor should they be part of any competitive solicitation because they are by definition restrictive, imposed by a competitor vendor and render any other commercial terms non-responsive.

All specifications shall seek to promote overall economy and encourage competition in satisfying the territory's needs, and shall not be unduly restrictive. (§ 4106)

All specifications shall be written in such manner as to describe the requirements to be met *without having* ***the effect*** *of exclusively requiring a* ***proprietary*** *supply item*, or procurement from a sole source, unless no other manner of description will suffice, and in that event, a written determination shall be made that it is not practicable to use a less *descriptive* specification. (§ 4106(a))

Specifications contained in **any** invitation for bids or proposals "for the procurement of supplies" ***shall identify the person responsible for drafting*** **the specifications and** any persons, technical literature *or* ***manufacturer's brochures*** relied upon by the responsible person drafting the specifications. (§4108)

Specifications shall **not include requirements which unnecessarily restrict competition** and shall *only* include the *essential* physical characteristics and functions required to meet GovGuam's *minimum* needs. (§ 4109(a))

Purchase descriptions shall **not specify a product having features which are peculiar to the products of one manufacturer** *unless* it has been *determined in writing by the Director* of the using agency that those particular features are essential *and* specifying the reason that similar products lacking those features would not meet minimum requirements for the item. (§ 4109(b))

Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies to be procured *without including restrictions* which do not *significantly* affect the requirements or characteristics. (§ 4109(c))

These regulations evince a clear policy in favor of first identifying the territory's minimum and essential requirements, then choosing commercially standard specifications that meet those needs in a manner which enlists the greatest degree of competition amongst vendors of such items. The GSA FSSP purchasing process, which is designed to first identify a particular brand product that may or may not address the territory's minimum and essential needs, and then secure it through the FSSP without any substantive competitive process involving local vendors, is the antithesis of this policy.

The AG's opinion gives no consideration to the interplay between the requirement for non-restrictive specifications and the procurement process, but condones the GSA purchase method

that pays no notice whatsoever to those requirements[39]. The result is that the AG places her office's imprimatur on a method of GSA purchasing practice that fails the essential substantive and procedural due process requirements of procurement policy, law and regulation, in violation of the consistency requirements spelled out in 2 GAR §2104(b)..

5. The local preference policy implicit in§ 5122 is *not* incompatible with the competitive sealed bid method of source selection

The AG opinion only analyzed whether §5122 was compatible with competitive sealed bidding, not whether it is incompatible with the sole source method, to which FSSP purchases are analogous, nor whether the FSSP purchasing process is compatible with the requirement for drafting competitive specifications before purchasing *any* item. Those are significant failings both in the analysis as well as in the approved structure of the adopted GSA procedures.

Recall also, that any purchase of an item that costs more than $500 but less than $15,000 **must** be purchased by way of competitive sealed bidding or other method specifically mentioned in 5 GCA §5210, pursuant to 2 GAR §3111(b)(1), as mentioned in argument number 2 above. This regulation either rules out any use of FSSP procedures for any such item, or it belies any argument that the competitive sealed bidding method is by implication incompatible with an FSSP purchase of such an item. Most likely it is the latter.

Even if competitive sealed bidding is not required for FSSP purchases, which is only accepted here for argument's sake, the very nature of the purchase fits the precise description of sole source method of procurement (i.e., "there is only one source for the required supply ... item") , and the provisions of that method ought to be employed before resorting to any method not specifically authorized by statute[40], but the opinion doesn't even consider that alternative.

The opinion goes off the rails, however, when it tries to argue how competitive sealed bidding procedures are incompatible with §5122. First, its analysis is based on a specious assumption,

---

[39] By not addressing the requirement of providing specifications in accordance with the procurement law and regulations in the GSA FSSP purchasing procedures, it is hard to see how the opinion could ever conclude that the procedure is "*reasonably calculated*" (at page 8) to achieve an authorized procurement method consistent with the Guam Procurement Act.

[40] Comment 1 to Model Code Act §3-201,which is the analogous provision to 5 GCA §5210(a), states: "With competitive sealed bidding as a starting point ..., procurement officials are able to choose an *appropriate source selection method to the circumstances of each procurement.*

and, second, even if it was, for the sake of argument, incompatible with competitive sealed bidding, the appropriate starting point for identifying an alternative procedure would be, rather than creating something from whole cloth, to look to and apply the analogous statutorily authorized method of source selection most closely matching the FSSP purchasing practices, which is the sole source method.

The opinion considers that §5122 is incompatible with competitive sealed bidding because, it says, "the competitive sealed bidding process was not intended for use in acquiring prices for comparison against" FSSP prices.

In fact, the procurement law and regulation make it perfectly clear that the competitive sealed bidding process is the preferred method to obtain the lowest responsive bid from a responsible bidder.[41] It is a process whose very rigor brings out ("acquires") the lowest competitive price when the bids are opened and compared[42].

The opinion finds competitive sealed bidding incompatible because it *assumes*, without any substantiation, that the process will only be a price *comparison* process, not a bid award process, contrary to the genius of the competitive sealed bidding process. If competitive sealed bidding is not a price comparison process[43], what is it?

This assumption assumes a process, but not one specified in the regulations or law. It assumes that the preferred FSSP item will first be solicited by a bid, but once the bids are opened and the prices disclosed and compared, the solicitation must be cancelled, and then re-bid to those low bidders whose prices have already been disclosed in the bid opening, if any of the bid prices are

---

[41] Other Comments to the Model Procurement Act,§3-201 (Id), state, "Procurement officials should recognize the flexibility that the Code offers them when using the competitive sealed bidding method.... The purpose of this part is to provide procurement officials with adequate authority to conduct procurement transaction by fair and open competition under varying market conditions.... Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically."

[42] Going so far as to determine one award when there are low tie bids in a manner that will discourage low tie bids, such as simply "drawing lots" (2 GAR § 3109(o)), which could be regarded as a form of anticompetitive practices (e.g., 2 GAR §3126).

[43] See 2 GAR §3109(n), with particular reference to (n)(1) and (n)(2) and having due regard to that part of (n)(3) that warns, "[t]he acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids."

within or below 10% of the FSSP price![44]

That is a tortuous and ineffective way to implement §5122 in any way consistent with competitive sealed bidding and the many policies and preferences it is meant and designed to advance.

The usual method of statutory construction is to determine if there is any rational way to reconcile facially inconsistent provisions (if there is inconsistency in this case, which again is only assumed here for sake of argument), not to conjure some hypothetical and tortured reasoning by which the provisions might be considered irreconcilably conflicted. The AG opinion in this instance took the latter course.

A more compatible and consistent way (and §5122 *should* be construed in a way that is compatible and consistent with other law and regulation rather than in a way that requires resort to new, and questionably based, procedures), could be to issue an IFB for an item, competitively specified, and to identify an FSSP item that GSA wishes to requisition that will be responsive to the specification.[45]

The purchasing agency would "bid in" the FSSP item[46], which, for fairness sake[47], should be

---

[44] The opinion says, "if the ... procedure shows that the [FSSP] price was not at least 10% less than the prices quoted by the three local vendors, then the local GSA must issue an invitation to bid".

[45] Since the FSSP item is by definition a brand name item, to provide fairness to other bidders, the specifications should identify at least 3 other commercial products determined to be competitive to the FSSP product by analogy to 2 GAR § 4103(b)(2)(b) mentioned *supra*.

[46] Some might suggest that this casts the buying agency in a conflicting role, but its desires are already fully disclosed in the existing process, and must be as the AG opinion agrees at page 6, argument 4. There is no good faith utility in conducting a veiled competition to achieve a result the government desires in the first instance, so disclosure is the best policy, even though it is not required by the GSA FSSP procedures. Alternatively, the buying agency could contact the FSSP contractor to determine its willingness to provide the item, which is the functional effect of coordinating through the Hawaii Federal GSA office in the first step of the GSA FSSP procedures, and encourage the contractor to place a bid at the FSSP price. Given the professed desires of the buying agency in the first instance, this alternative step seems to have little substantive effect to distance the buying agency from its desired goal, so ought not be necessary provided adequate disclosure is given in the first instance as first noted.

[47] The AG opinion rightfully expresses concern that the process is fair. See, e.g., at page 4 and again at page 6.

announced in the IFB. When the bids are opened, the lowest responsive bid[48] from all responsible bidders would then be determined, making due allowance for the 10% preference mandated by §5122 by grossing up, for low bid determination purposes, the price of any FSSP bid item by ten percent over its FSSP price.[49] There is no rational reason to then re-bid.

This would further competition, invite the lowest price savings to the government, be open to the FSSP contractors, be fair to all other bidders, be consistent with the Guam Procurement Act and Regulations, and satisfy all the other procurement policy considerations *as well as §5122*, without having to invent a new process under scanty if any supportive legal basis. It would even satisfy the requirement, expressed in the AG opinion, that "the government must have a genuine intent to carry out all the steps of the sealed bid procedure to the end resulting in an award to the lowest bidder"[50].

Apart from the fact that §5122 can so easily be made compatible and consistent with existing authorized methods of source selection, if another method were to be constructed, it should contain all the competitive requirements applicable to the sole source method as well as all the requirements applicable to the drafting of the specifications for the item to be solicited found in 2 GAR, Div. 4, Chpt. 4, §4101 *et seq*. The GSA procedures condoned by the AG opinion fall far short of these requirements and the policies they are meant to advance. As such they violate the substantive due process essentials the law and regulations require, and are invalid for that reason as well.

---

[48] Bear in mind that the FSSP does not contain the lowest price for every *type* of product, only the lowest price for the specific *manufacturer's* products, and there should be no restriction against another FSSP contractor bidding its FSSP product at its FSSP price if it is competitive; however, in that event, §5122 would have the effect that neither FSSP contracting vendor/bidder would have the 10% advantage over the "other" suppliers, and all "other" bidders would have that advantage over all FSSP bidders.

[49] This is a simple and objectively determined mathematical exercise: For purposes of determining the lowest bid, the FSSP price would be increased by 10%. If it is determined to be the lowest bidder after taking into account the 10% "gross-up", the actual award price would be the FSSP price.

[50] Opinion, page 6.

STATEMENT SPECIFYING RULING REQUESTED

Appellant respectfully requests that the Public Auditor rule that FSSP purchases must be conducted by the competitive sealed bidding method of source selection unless another method specifically identified in 5 GCA §5120(a) is applicable. Appellant requests that if GSA has already entered any award or contract to procure any item of copier specified in the protested RFQ, that such award or contract be terminated, at least pending final Decision in this matter, including any further appeal allowed herefrom. Appellant requests that GSA be prevented from using any pricing information sourced from independent means to "compare" FSSP prices of contractors who do not respond to requests for price quotations. Appellant requests, if the Public Auditor determines that GSA is authorized to adopt procedural requirements implement purchases from FSSP otherwise that as specifically provided in 5 GCA §5210(a), that the Public Auditor reserve jurisdiction to determine that such procedures are consistent in all respects with the policies and requirements of the Guam Procurement Act and Regulations.

SUPPORTING EXHIBITS, EVIDENCE, OR DOCUMENTS

With reference to all the matters submitted in the original Appeal as incorporated above, and reserving the right to provide further written material as it may be considered relevant or come to hand, there are attached hereto the following supporting materials:

Copies of:

1. IBSS Procurement Protest, dated 20 May 2008.

2. IBSS Request for Decision on Protest, dated 25 August 2008.

3. IBSS letter of reminder re Request for Decision on Protest, dated 8 September 2008.

4. GSA letter denying Protest dated September 9, 2008, together with Attorney General Opinion

/// continued...

VERIFICATION AND DECLARATION RE COURT ACTION

The undersigned party does hereby verify, to the best of information and belief, the facts stated and confirms that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. The undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 12th day of SEPTEMBER 2008

APPELLANT, Town House Department Stores, Inc., dba Island Business Systems & Supplies

By: _____

Raul Del Valle, Acting General Manager-IBSS
authorized representative for Appellant
PO Box 7, Hagåtña, Guam 96932
PH: (671)- 477-7454
Fx: - 477-7660
for Appellant

Legal Representative:

_____

John Thos. Brown
General Counsel for Appellant
PO Box 7, Hagåtña, Guam 96932
PH: (671) - 477-7293
Fx: - 472-6153

Attachment 1. IBSS Procurement Protest, dated 20 May 2008.

JOHN THOS. BROWN
ATTORNEY AT LAW *

GENERAL COUNSEL
Jones & Guerrero Co. Inc. (Guam, USA)
Its divisions, subsidiaries and affiliates‡
J&G Corporate Office
545 Chalan Machaute, (Rte 8 @ Biang St.), Maite, Guam 96910

Telephone: +1-671-477-7293
Fax: +1-671-472-6153
email: jngoz@ozemail.com.au
Mobile/Cell phone: +1-671-483-5960
POSTAL: GPO Box 7, Hagåtña, Guam 96932

20 May, 2008

Ms. Claudia S. Acfalle, Chief Procurement Officer
Guam General Services Agency
Department of Administration, Government of Guam
148 Route 1 Marine Drive
Piti, Guam 96925

RE: PROCUREMENT PROTEST
Request for Price Quotation
Multi-function Copiers (total 9 machines)
Requisition #s: 0808000: 47, 48, 49, 50, 51, 52
RFQ #s: 080022: 41, 49, 51, 52, 55 & 56
All Dated: 5/15/2008

GENERAL SERVICES AGENCY
148 Route 1
Marine Drive
Piti, Guam 96925
MAY 21 2008

Dear Ms. Acfalle,

IBSS hereby objects to and protests the above referenced Requests for Price Quotation for 9 copier machines[1]. IBSS (Island Business Systems and Supplies), a division of Town House Department Stores, Inc., a J&G affiliate, is a locally owned and operated Canon imaging products representative, offering multifunction copier products and services.

This protest is based on several arguments, including method of source selection and improperly required specifications.

First, the request for price quotation ("RFQ") is a method of source selection that is not appropriate for competitively sealed bids. Competitive sealed bidding is

---

[1] 5 GCA § 5425 gives "any ... prospective bidder ... who has been aggrieved in connection with the method of source selection, solicitation or award of a contract" the right to "protest to the head of a purchasing agency."

* Admitted to Practice: California, Guam and Commonwealth of Northern Mariana Islands, USA [Inactive in NSW, Australia]*

‡ Micronesian Brokers, Inc. (Guam and CNMI)/Aquarius Beach Towers, (Saipan, CNMI)/Livno Holdings PTY LTD (A.C.N. 003 585 331)/Domino Stud of Kentucky, Inc./Austpac Container Line PTY LTD (A.C.N. 003 485 489)/ Austpac Transportation Services Pty Ltd (A.C.N. 003 453 950)/Townhouse, Inc. (Saipan, CNMI)/ IBSS (Guam and Saipan)

J&G Sydney Office: 189 Kent St., Ste 4, Lvl 2, Sydney; G.P.O. Box 3539, Sydney, NSW, Australia 2001
Ph: + 61-2-9241-1877; Fx: + 61-2-9241-2588

the preferred method of procuring supplies. (5 GCA § 5210(a); 2 GAR § 3109(b).)

Requests for price *quotations* is allowed for "small purchase" source selection and is not sanctioned for use in any other competitive method of source selection.[2]

This procurement method is limited, however, to contracts for the procurement of supplies that are less than $15,000. Any procurement above that figure requires competitive sealed bids and an Invitation for Bids, *not* an RFQ. The instant RFQ for 9 machines will, in aggregate as well as in respect of most of the various components, exceed that limitation.

In her report, OPA 04-05, the Public Auditor gave an extensive explanation of the substantive and procedural limitations to small purchase procurement. (See, http://www.guamopa.org/docs/OPA0405.pdf.) Surely GSA has not forgotten that the Public Auditor was highly critical of GSA's improper reliance on the Small Purchase method of source selection for the purchase of supplies, including specifically copiers, in that Report? IBSS takes no delight in having to remind GSA of such criticism. As nettlesome as this protest must be for GSA, it is irksome for IBSS.

The Public Auditor, in the report referenced, disapproved of "artificially divided" purchases: "such practices resulted in large purchases that should have required competitive sealed bidding and/or publication".[3]

Second, the specifications are overly restrictive.

It must be emphasized that the subject of this bid is copier machines: multifunction copier machines. These are essentially commercial commodities, not nuclear submarines, produced by many manufacturers whose products are found throughout government offices and private businesses across the world – and Guam.[4] These are commonly purchased for routine use throughout GovGuam, and generic (i.e., non-manufacturer-specific) specifications have been

---

[2] The only references in all of the Guam Procurement Regulations to obtaining price "quotations" from businesses, as opposed to, e.g., bids or proposals, is in 2 GAR §§ 3111(c)(1) [Small Purchases], and 3113 [Emergency Procurement].

[3] Cf., 5 GCA § 5213: "[P]rocurement requirements shall not be artificially divided so as to constitute a small purchase under this Section."

[4] In OPA Audit Report 04-05 noted above, the Public Auditor took notice that "There are other vendors offering copier machine lease and maintenance" (other than Xerox). (See the Report, at page 16.)

utilized by some agencies, thereby generating more competitive bidding and savings to the Public Purse.

The Procurement Regulations favor the use of common specifications for supplies, such as these copiers, which are used by several using agencies[5], yet time and again, such as here, the specifications wheel is re-invented and always, it seems, to look like a Xerox made one.

IBSS risks being labeled a "serial protester", but it must object to the perceived proclivity of GovGuam agencies to procure Xerox products to the exclusion of other commercially standard competitive copier products.[6] Some departments within GovGuam have learned to broaden the scope of their copier specifications to align with the requirements of the Guam Procurement Law and Regulation, such as the Judiciary and the AG's office, yet others continue the errors of the past, seemingly unable or unwilling to learn the lessons from the past.

In the instant RFQ, each machine is identified by the Xerox nomenclature (with "or equal" appended much as an afterthought, without any indication of how "equal" is meant to be measured) and then described in precise Xerox specifications. The unqualified "or equal" appendage makes it unfairly unclear if or which of those specifications are to be strictly adhered to or to be fairly evaluated based on the broader equivalent commercial standards available in non-Xerox machines.

The multiple specifications did not describe which among them were the salient technical requirements or principal functional or performance needs.

2 GAR § 4109 ("Salient Features") provides:

> (a) Specifications shall *not include requirements*, such as but not limited to restrictive dimensions, weights or materials, *which unnecessarily restrict competition*, and *shall include only the essential physical characteristics and functions required to meet the government of Guam's minimum needs.*
>
> (b) *Purchase descriptions shall not specify a product having features which are peculiar to the products of one manufacturer*, producer or

---

[5] See, 2 GAR § 4103(b)(2)(a)(i).

[6] Recall that the Public Auditor conducted three in-depth audits of GSA purchasing practices in 2004, and, in every one, Xerox copiers featured as having been improperly procured by GSA.

distributor unless it has been determined in writing by the Director of the using agency that those particular features are essential to the requirements **and specifying the reason that similar products lacking those features would not meet *minium requirements* for the item.**

(c) Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies or services to be procured *without including restrictions which do not significantly affect the technical requirements or performance characteristics.*

Has GSA made the written determination required in subsection(b) above? If so, please provide a copy to me with your response to this protest.

2 GAR § 4102(a) ("General Purposes and Policies") provides:

(1) Purpose. The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the territory's needs in a cost effective manner, taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs. It is the policy of the territory that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of *clearly describing the territory's requirements.*[7]

(2) Use of Functional or Performance Descriptions. Specification **shall, to the extent practicable, emphasize functional or performance criteria** *while limiting design or other detailed physical descriptions* to those necessary to meet the needs of the territory. To facilitate the use of such criteria, using agencies **shall endeavor to include as a part of their purchase requisitions the principal** functional or performance needs to be met.....

(3) Preference for Commercially Available Products. *It is the general policy of this territory to procure standard commercial products* whenever practicable. In developing specifications, accepted commercial

---

[7] IBSS asserts that the territory cannot "require" a specific machine without clearly describing its reasonably justifiable underlying needs and usages; that is, it cannot simply assert "we need this machine" without more.

standards [8] shall be used and *unique requirements shall be avoided*, to the extent practicable.

The specifications further violate the Guam Procurement Regulations dealing with brand name[9] and "or equal" specifications. The Procuring Agency cannot blithely paper over an effective sole source procurement by simply adding "or equal" without more.

Specifying one manufacturer's product and adding "or equal" makes it unclear to bidders *and the evaluators* which and to what extent any deviation from the manufacturer's standards are still within the realm of commercial standards, with the sword of "non-responsive" hanging over the hapless head of any game competitor.[10]

Thus, the Regulations try to avoid and restrict the use of brand name and or equivalent specifications.[11]

To effect adequate competition in brand name bid specifications[12], and guide

---

[8] Not Xerox' standards, but broad *commercial standards*. Each manufacturer distinguishes its products in ways that deviate in some way from its rivals, as well as from other products within its own product line-up, without significantly affecting performance and outcomes, and when you define the specifications to favor one manufacturer you are by definition making the commercially standard products of another manufacturer non-responsive.

[9] In her GSA Audit Report 04-14, at page 7, the Public Auditor said, "This practice of specifying a "brand name" should be discouraged because it inherently prohibits competition and violates Guam procurement regulations, which require that all specifications shall seek to promote overall economy, encourage competition, and shall not be unduly restrictive in satisfying the Territory's needs."

[10] 2 GAR § 4103(b)(2)(b)(iv) generally requires that "brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required". The specifications here complained of fail this requirement.

[11] See 2 GAR § 4103(b)(2)(b) generally. As well, 2 GAR § 4106, requiring specifications that encourage competition, and § 4108, which requires that IFBs and RFPs disclose the identity the person responsible for drafting the specifications and the any other persons, literature or brochures relied upon. IBSS will insist on compliance with this disclosure requirement.

[12] Note that a "brand name" *specification* in a bid or RFP is not the same thing as a Sole Source *method of source selection*, therefore, it should not be used to masquerade as a Sole Source procurement. Note, also, that even a Sole Source procurement requires an *a priori* determination that there is only one source for the required supply. The Public Auditor canvassed the essentials of the Sole Source method of source selection in her audit of GSA published as Public Report 04-14

bidders trying to "guess" what kind of latitude is implied by the "or equal" specification and thereby allowed in deviating from the exact brand name specifications, apart from and in addition to specifying the salient features as mentioned above, the Procurement Regulations require that:

> "Brand name or equal specifications shall seek to *designate three or as many different brands as are practicable as "or equal" references* and shall further state that substantially equivalent products to those designated will be considered for award." (2 GAR § 4103(b)(2)(b)(iii).)

The specifications here complained of violate that very essential requirement to provide referent equivalence benchmarks from competitive machines.

Furthermore, when brand name or equal specifications are used,

> "the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics and is not intended to restrict competition." (2 GAR § 4103(b)(2)(b)(iv).)

Where is that in the solicitation?

There are findings that must be made and written determinations recorded in the procurement record before an agency can use brand name specifications; see, generally, 2 GAR § 4103((c) but particularly:

> "(i) Use. Since use of a brand name specification is restrictive, it may be used only when the Procurement Officer ... makes *a written determination* that only the identified brand name item or items will satisfy the territory's needs."

Have you made such a determination? Bear in mind, a determination is a deliberative, evaluative process resulting in a judgment, not a bare, unsubstantiated, arbitrary conclusion. If you have made such a determination, please provide me with a copy of it in your response to this protest.

IBSS also protests the condition that suppliers "must provide GSA Pricing and GSA Terms and Conditions". This is, apparently, in reference to Federal GSA prices, terms and conditions applicable to the Federal Supply Schedules Program ("FSSP").

(http://www.guamopa.org/docs/OPA0414.pdf).

What must be born in mind is that the FSSP is only a *source* of supply of equipment, it is not a *method* of source selection. The FSSP provides a catalogue of contracted vendors of thousands of various kinds of equipment and services. In it there are multiple offerings from contractors for copiers and multifunction devices, including Canon and other major manufacturers of commercially standard[13] copier products. When has GovGuam ever purchased any copier other than Xerox under that program?

Mere eligibility for access to these vendors does not justify, under Guam Law and Regulation, a sole source (or other) method of selection of Xerox, or any other brand product. There is no exemption from competitive bidding requirements in Guam law for use of the FSSP.

The requirement in the RFQ to include FSSP GSA pricing, terms and conditions is unduly restrictive to competition. The FSSP is dominated by large, mainland suppliers. There is an arduous, arcane and restrictive procedure to even qualify a supplier to be accepted to the supply list and to maintain a presence on it, as any such contracted vendor must be prepared to service the needs of the whole Federal government.[14]

Requiring potential vendors or bidders to be drawn only from that list (which is the consequence of and functional equivalent to requiring all vendors/bidders to offer pricing, terms and conditions applicable to it) essentially knocks out local Guam suppliers from being responsive to the solicitation for what is, after all, a *commercially standard product* otherwise easily and competitively available on Guam.

The inclusion of FSSP GSA terms and conditions runs counter to the admonition of the Procurement Regulations that contractual terms and conditions should not be included in product specifications.[15]

As perhaps suggested above, IBSS draws the impression that this RFQ is simply a subterfuge to bypass Guam Procurement Law and Regulation and purchase these Xerox products directly from the Federal GSA FSSP. By insisting that

---

[13] Note 2 GAR § 4102(a)(3): "It is the general policy of this territory to procure standard commercial products whenever practicable."

[14] For instance, note this marketing pitch from Huron Consultant Group, one of many such professionals seeking business from prospective FSSP vendors:
http://www.huronconsultinggroup.com/service.aspx?serviceId=831

[15] See, 2 GAR § 4103(b)(1)(b).

GSA abide by Guam law and regulation, IBSS is not taking the adamant position that GSA cannot avail itself of its eligibility to participate in that program.

IBSS suggests that, to comply with Guam law and regulation[16], it will be necessary to first conduct a fair and proper procurement, with fair and proper specifications, under competitive sealed bids, fairly evaluated.

IBSS sees no reason why the IFB could not contain a provision that it will consider the Xerox (or any other named vendor under the FSSP) product to be considered as bid in the solicitation, which product's bid shall be upon the price, terms and conditions of the FSSP, *provided that* the terms, conditions and specifications of the IFB are not skewed to prejudice the FSSP product and curtail effective competition from local or other suppliers of commercially standard and competitive products. In such a case, the product specifications and the terms and conditions of the procurement would not be dictated by the narrow ones found in the FSSP, thereby rectifying GSA's improper insistence on "GSA Pricing and GSA Terms and Conditions" in the instant RFQ.

IBSS respectfully protests the referenced Request for Quotes for the reasons discussed above, and awaits your decision or other attempt to resolve this dispute by mutual agreement[17].

Respectfully submitted,

John Thos. Brown
General Counsel
for IBSSS

---

[16] Including the policy to encourage the patronage of local suppliers under the dictates of 5 GCA § 5122: "The [Guam] General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) that from other contractors."

[17] 5 GCA § 5425(c).

Attachment 2. IBSS Request for Decision on Protest, dated 25 August 2008.

JOHN THOS. BROWN
ATTORNEY AT LAW *

GENERAL COUNSEL
Jones & Guerrero Co. Inc. (Guam, USA)
Its divisions, subsidiaries and affiliates‡
J&G Corporate Office
545 Chalan Machaute, (Rte 8 @ Biang St.), Maite, Guam 96910

Telephone: +1-671-477-7293
Fax: +1-671-472-6153
email: jngoz@ozemail.com.au
Mobile/Cell phone: +1-671-483-5960
POSTAL: GPO Box 7, Hagåtña, Guam 96932

25 August, 2008

Ms. Claudia S. Acfalle, Chief Procurement Officer
Guam General Services Agency
Department of Administration, Government of Guam
148 Route 1 Marine Drive
Piti, Guam 96925

RE: REQUEST FOR DECISION ON PROTEST
Request for Price Quotation
Multi-function Copiers (total 9 machines)
Requisition #s: 0808000: 47, 48, 49, 50, 51, 52
RFQ #s: 080022: 41, 49, 51, 52, 55 & 56
All Dated: 5/15/2008

Dear Ms. Acfalle,

On May 21, 2008, I, on behalf of Island Business Systems and Supplies ("IBSS") caused to be delivered to you a Procurement Protest in respect of the referenced RFQ. A copy of that protest is attached.

You have not seen fit to acknowledge or respond to this Protest in any manner[1].

IBSS does hereby formally request that you render your final decision on the protest or immediately advise why you feel you are exempt from producing a decision on or otherwise responding to procurement protests in general or this one in particular.

I draw your attention to a recent Decision of the Public Auditor involving the

[1] 5 GCA§ 5425(c) requires that the decision be issued "promptly". 2 GAR § 9101(g)(1) requires a decision on a protest to be made "as expeditiously as possible".

* Admitted to Practice: California, Guam and Commonwealth of Northern Mariana Islands, USA [Inactive in NSW, Australia]*

‡ Micronesian Brokers, Inc. (Guam and CNMI)/Aquarius Beach Towers, (Saipan, CNMI)/Livno Holdings PTY LTD (A.C.N. 003 585 331)/Domino Stud of Kentucky, Inc./Austpac Container Line PTY LTD (A.C.N. 003 485 489)/ Austpac Transportation Services Pty Ltd (A.C.N. 003 453 950)/Townhouse, Inc. (Saipan, CNMI)/ IBSS (Guam and Saipan)

J&G Sydney Office: 189 Kent St., Ste 4, Lvl 2, Sydney; G.P.O. Box 3539, Sydney, NSW, Australia 2001
Ph: + 61-2-9241-1877; Fx: + 61-2-9241-2588

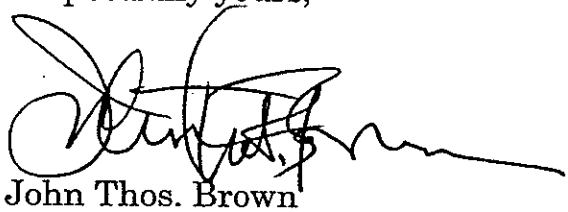
failure of GPSS to respond to a procurement protest.[2] In that Decision, the Public Auditor held:

> "The Public Auditor holds that GPSS' failure to produce a decision on IBSS' December 4, 2007 protest is a violation of 5 G.C.A. §5425(c) and (d) and 2 G.A.R., Div.4, Chpa. 9, §9101(g) and a bad faith act that violates 5 G.C.A. §5003 and undermines the integrity of the procurement process and the Public Auditor has the authority to compel the Superintendent of GPSS to produce the decision."

At the very least, if you have, in consequence of the IBSS referenced protest, cancelled the referenced RFQ, common courtesy and the relevant law and regulation oblige you to notify IBSS of that fact, when it occurred and any other relevant details, and the reasons for it, in response to the procurement protest.

And, if you have indeed cancelled the RFQ, we would ask what have you done to otherwise make arrangements for the solicitation of the obviously needed equipment? IBSS is and remains a prospective bidder for any such equipment.

Respectfully yours,



John Thos. Brown
General Counsel
for IBSSS

---

[2] IN THE APPEAL OF IBSS (vs. GPSS) OPA-PA-08-003, http://www.guamopa.org/docs/procurement_appeals/Decision_08_003.pdf

Attachment 3.

IBSS letter of reminder re Request for Decision on Protest, dated 8 September 2008.

JOHN THOS. BROWN
ATTORNEY AT LAW *

GENERAL COUNSEL
Jones & Guerrero Co. Inc. (Guam, USA)
Its divisions, subsidiaries and affiliates‡
J&G Corporate Office
545 Chalan Machaute, (Rte 8 @ Biang St.), Maite, Guam 96910

Telephone: +1-671-477-7293
Fax: +1-671-472-6153
email: jngoz@ozemail.com.au
Mobile/Cell phone: +1-671-483-5960
POSTAL: GPO Box 7, Hagåtña, Guam 96932

COPY

8 September, 2008

GOVT OF GUAM
RECEIVED
2008 SEP -8 PM 3:19

Ms. Claudia S. Acfalle, Chief Procurement Officer
Guam General Services Agency
Department of Administration, Government of Guam
148 Route 1 Marine Drive
Piti, Guam 96925

RE: REQUEST FOR DECISION ON PROTEST
RFQ #s: 080022: 41, 49, 51, 52, 55 & 56
All Dated: 5/15/2008

Dear Ms. Acfalle,

Last Wednesday, September 3rd, you summonsed me to your office to cordially discuss this matter. While we did not reach any resolution of the dispute, we did exchange the information that you have stayed the referenced procurement and you advised that you were in possession of an Attorney General Opinion that allowed you to conduct purchases from the Federal GSA price list (the "FSSP" - Federal Supplies Purchase Program) according to your own internally adopted procedures, contrary to the assertions in the Protest. You would not provide me with a copy of the opinion, telling me you would attach it to your response, which you indicated would come the next day.

I have not heard from you whether you will accept or deny IBSS' protest or seek other resolution of it, and I remind you I am awaiting your due response.

Respectfully yours,

John Thos. Brown
General Counsel (for IBSS)

* Admitted to Practice: California, Guam and Commonwealth of Northern Mariana Islands, USA [Inactive in NSW, Australia]*

‡ Micronesian Brokers, Inc. (Guam and CNMI)/Aquarius Beach Towers, (Saipan, CNMI)/Livno Holdings PTY LTD (A.C.N. 003 585 331)/Domino Stud of Kentucky, Inc./Austpac Container Line PTY LTD (A.C.N. 003 485 489)/ Austpac Transportation Services Pty Ltd (A.C.N. 003 453 950)/Townhouse, Inc. (Saipan, CNMI)/ IBSS (Guam and Saipan)

J&G Sydney Office: 189 Kent St., Ste 4, Lvl 2, Sydney; G.P.O. Box 3539, Sydney, NSW, Australia 2001
Ph: + 61-2-9241-1877; Fx: + 61-2-9241-2588

Attachment 4.

GSA letter denying Protest dated September 9, 2008, together with Attorney General Opinion

Felix P. Camacho
Governor

Lourdes M. Perez
Director
Department of Administration

GENERAL SERVICES AGENCY
(Ahensian Setbision Hinirat)
Department of Administration
Government of Guam
148 Route 1 Marine Drive, Piti, Guam 96915
Tel: (671) 475-1707 thru 1729 • Fax Nos: (671) 472-4217/475-1727/475-1716

Michael W. Cruz
Lt. Governor

Joseph C. Manibusan
Deputy Director
Department of Administratio

September 9, 2008

John Thos. Brown
Attorney At Law
General Counsel
Jones & Guerrero Co., Inc. (Guam USA)
J & G Corporate Office
545 Chalan Machaute (Rte 8 @Biang St.)
Maite, Guam 96910

Re: Protest – Request for Price Quotation
(Multi-function Copiers)

Dear Mr. Brown:

Buenas Yan Hafa Adai! This is to acknowledge receipt of your protest letter dated May 20, 2008 protesting request for price quotations for requisition numbers #0808000: 47 through 52 and #080022: 41, 49, 51, 52, 55 & 56.

Based on my factual evaluation the protest is without merit based on the following:

Issue:

The request for price quotation ("RFQ") is a method of source selection that is not appropriate for competitively sealed bids. Competitive sealed bidding, utilized by some agencies, thereby generating, more competitive bidding and savings to the Public Purse.

Response:

The intent of the General Services Agency (GSA) is to procure copier machines through the Federal GSA prices, terms and conditions applicable to the Federal Supply Schedules Program ("FSSP"), which provides: ***5 GCA §5122 U.S. Government. The General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) than from other contractors.*** Attached is a copy of an opinion issued by the Office of the Attorney General regarding the legality of purchasing through the Federal GSA Contracts.

On 18 April 2008 the Guam Power Authority issued an invitation for bid solicitation number GPA-032-08 for Document Management Service Lease (Copier Machines). Two (2) machines are identical to the copier machines that GSA is soliciting, in which Island Business Systems and Supplies (IBSS) participated.

The GSA requested for copies of the bid solicitation and abstract for GPA-032-08 and also received price quotation through the request for quotation process from another vendor which will also be used to determine if the GSA Federal Contract is less than ten percent (10%) than from other contractors. Upon receipt of this letter you are notified that GSA will continue with the procurement process.

Therefore, based on the opinion issued by the Office of the Attorney General on June 16, 2008 Ref: GSA-07-1084, and the procedure set forth by the Chief Procurement Officer it is the determination of this office that proper procurement procedures were followed in accordance to procurement rules and regulations and statutes as required.

Upon receipt of this notice it is our determination that your protest is without merit. You are therefore, notified of our determination and that you have a right to seek administrative review.

CLAUDIA S. ACFALLE
Chief Procurement Officer

cc: Attorney General, Office of the Attorney General

Alicia G. Limtiaco
Attorney General

Alberto E. Tolentino
Chief Deputy Attorney General

Office of the Attorney General

June 16, 2008

LEGAL MEMORANDUM **Ref: GSA 07-1084**

TO: Chief Procurement Officer, General Services Agency

FROM: Attorney General

SUBJECT: Legality of Purchasing through Federal GSA Contracts

You have requested an opinion regarding the following question:

ISSUE: When supplies needed by the government of Guam are available under a Federal General Services Administration (Federal GSA) contract, may the government of Guam General Services Agency (local GSA) use the Federal GSA contract to make the purchase without first going through a competitive sealed bid process?

ANSWER: See discussion and conclusion.

STATEMENT OF FACTS:

The local GSA has been using Federal GSA contracts for many years to acquire supplies when supplies needed by a government of Guam agency are available under a Federal GSA contract. This practice has been called into question by the government's external auditors Deloitte & Touche LLP ("Deloitte") in the Government of Guam Single Audit Reports for the Year Ended September 30, 2006 ("FY06 Audit").

For example, in the FY06 Audit's Schedule of Findings and Questioned Costs for grant money from the U.S. Department of Homeland Security, Finding No. 06-30 indicated that of 34 procurement transactions audited, the local GSA used informal quotes for nine of them even though the nine transactions "did not meet the small purchase threshold of $14,999". However, according to the local GSA, these nine transactions were undertaken as Federal GSA contract purchases and not put out to bid, and were documented accordingly. The transaction amounts ranged from $25,695 to $313,562.

The criteria against which Deloitte measured the nine transactions was indicated in the FY06 Audit on page 67 as:

In accordance with applicable procurement requirements, the grantee will maintain records sufficient to detail the significant history of a procurement. These records will include a rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. Furthermore, in accordance with the applicable local procurement law, the following requirements apply:

- The Guam General Services Agency shall procure from the United States only when the cost is ten percent less than procuring from other contractors.
- The Guam General Services Agency shall use competitive sealed bidding when the procurement exceeds the small purchase threshold of $14,999.

In response to the FY06 Audit's Finding No. 06-30, the local GSA wrote to Deloitte on May 31, 2007 justifying the nine transactions as procurement from companies with Federal GSA contracts. However, Deloitte has subsequently indicated that its position on the questioned costs remains unchanged.

In making the purchases questioned in the FY06 Audit under Federal GSA contracts, the local GSA relied upon an Attorney General opinion issued on August 21, 1991 (Ref. No. GSA 91-1358). The opinion discussed, among other laws, the only Federal law directly addressing the subject found in the Organic Act of Guam. The Federal law stated:

> **§1423l. Purchase through GSA.** The Territorial and local governments of Guam are authorized to make purchases through the General Services Administration.

48 U.S.C. §1423l. The opinion concluded at page 2:

> Clearly, if a local business has the sole distributorship of an item that has a federal GSA contract and wishes to offer that contract to Guam's GSA, it can do so and would not violate the procurement laws if Guam GSA directs the purchase through the federal GSA.

The request from the local GSA for the present opinion cites 5 GCA §5122 which provides:

> **§5122. U.S. Government.** The General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) than from other contractors.

The instant memorandum will revisit the same question analyzed in the prior opinion, and asked once again by the local GSA.

DISCUSSION:

1. <u>In 1993, 48 U.S.C. §1423l cited in the prior Attorney General opinion was omitted and replaced by 48 U.S.C. §1469e</u>.

According to the notes to §1423l, this section was enacted as part of a series of annual appropriations to the U.S. Department of Interior and was never a part of the Organic Act of Guam, nor was it originally enacted as a part of Title 48 of the U. S. Code. The first enactment

of this language was in the General Appropriations Act of 1951 in the chapter on the U.S. Department of Interior, and was part of an appropriation to the Office of the Secretary. The enactment read:

> For expenses necessary for the administration of Territories and possessions under the jurisdiction of the Department of the Interior, including expenses of the Offices of the Governors of Alaska, Hawaii, and Guam, and the Government of the Virgin Islands, including the agricultural station; compensation and mileage of members of the legislatures in Alaska and Hawaii; compensation of members of the Supreme Court and the legislature in Guam; care of insane as authorized by law for Alaska (48 U.S.C. 46-50); grants to the Virgin Islands and Guam, in addition to current local revenues, for support of governmental functions; personal services, household equipment and furnishings, and utilities necessary in the operation of the several Governors' houses; and personal services in the District of Columbia; $3,392,180; *Provided*, That the territorial and local governments of the Virgin Islands and Guam are authorized to make purchases for their public institutions through the General Services Administration. [Emphasis added.]

General Appropriations Act of 1951, Ch. VII, Title I, §101, 64 Stat. 694 (Sept. 6, 1950), 82nd Cong., 2nd Sess., 1950 U.S. Code Cong. & Admin News, 763.

Subsequent to the first enactment in September of 1950, similar language appeared in annual appropriations to the Department of Interior every fiscal year up to 1992. At some point in time, apparently, the Federal Office of the Law Revision Counsel saw fit to place the language in Title 48 of the U. S. Code in the chapters of each of the territories administered by the Department of the Interior and affected by the enactment. For Guam, that became 48 U.S. C. §1423l.

By the last inclusion of the language in an appropriations act in 1992, the pertinent language had changed to read:

> *Provided,* That the territorial and local governments herein provided for are authorized to make purchases through the General Services Administration;

Department of Interior & Related Agencies Appropriations Act of 1993, U.S. Pub. L. 102-381, Title I, 106 Stat. 1392 (Oct. 5, 1992).

In any event, in 1993, the Office of the Law Revision Counsel omitted §1423l from the U. S. Code because Congress enacted another law in Title 48 in Chapter 10 on the general provisions applicable to the territories. The new law, still in effect today, reads:

> **§1469e. Insular Government Purchases.** The Governments of American Samoa, Guam, the Northern Mariana Islands, the Trust Territory of the Pacific Islands and the Virgin Islands are authorized to make purchases through the General Services Administration.

The legislative history of §1469e indicates that the "provision would codify a long standing Federal Government policy which has been enacted annually in the legislation to provide

appropriations for the Department of Interior and related agencies." S. Rep. No. 243, 102th Cong. (1992).

Thus, Congress clearly intended Guam to have the authority to purchase through the Federal GSA system, such that Congress consistently ever since 1950 included the authority to do so in an appropriations act to the Department of Interior, finally codifying the policy in 1992 for Guam and the other territories as 48 U.S.C. §1469e.

2. 48 U.S.C. §1469e permits Guam to use the Federal Supply Schedule Program but does not make its use mandatory, and therefore, Guam may legitimately impose limitations on use of the Program.

The language from the two appropriations acts quoted above and 48 U.S.C. §1469e do not require Guam or the other territories to purchase through the Federal GSA contract system, known as the Federal Supply Schedule Program. This is in contrast to some Federal agencies which are required to use the program as their primary source of supplies. Those agencies are identified directly in the supply schedules. *See* 48 C.F.R. §38.101(b). Agencies not identified as mandatory users may use the system if they wish to, but are not required to. *See* 48 C.F.R. §38.101(c).

Given the permissive tone of the language granting authority to the territories in §1469e, the governments of the territories must fall into the non-mandatory category of users.

Thus, the Guam Legislature could decide how or when the government would use the Federal Supply Schedules, or to place restrictions or limitations on the use thereof.

Furthermore, the Federal Acquisition Regulations indicate that:

> Orders placed under a Federal Supply Schedule contract ... must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.

48 C.F.R. §8.404(c)(3). Therefore, the 10% differential mentioned in 5 GCA §5122 is a legitimate limitation on use of Federal supply contracts by the government of Guam, and the government of Guam must first comply with any requirements imposed by the local procurement laws.

3. Competitive sealed bidding is the primary procedure for procurement by the government of Guam, but 5 GCA §5210 lists exceptions and recognizes that other laws may have the effect of creating an exception.

What is not clear from 5 GCA §5122 is how the 10% differential is to be determined.

Regarding competitive sealed bidding, the Guam Procurement Law provides:

> **§5210. Methods of Source Selection.** (a) Unless other wise [sic] authorized by law, all territorial contracts shall be awarded by competitive sealed bidding, pursuant

to §5211 of this Article, except for the procurement of professional services and except as provided in:

(1) Section 5212 of this Article; [Repealed section]

(2) Section 5213 of this Article;

(3) Section 5214 of this Article;

(4) Section 5215 of this Article;

(5) Section 5216 of this Article for services specified in §5212 of this Chapter; or

(6) Section 5217 of this Article. [Emphasis added.]

5 GCA §5210(a). Thus, competitive sealed bidding is made the primary procedure for government procurement with the exceptions noted in §5210. The listed exceptions are for small purchases (5 GCA §5213); sole source purchases (5 GCA §5214); emergency purchases (5 GCA §5215); purchases of services specified in 5 GCA §5121 (5 GCA §5216); and purchases from nonprofit corporations (5 GCA §5217). The services specified in 5 GCA §5121 are for "accountants, physicians, lawyers, dentists, licensed nurses, other licensed health professionals, and other professionals", commonly referred to collectively as professional services.

Omitted from the listed exceptions of §5210(a) is procurement from the Federal GSA. However, the competitive sealed bidding statute includes at its beginning the phrase "unless other wise [sic] authorized by law". We cannot assume that just because the Legislature listed exceptions to the competitive sealed bidding procedure that the phrase "unless other wise [sic] authorized by law" is meaningless. The rules of statutory construction require that every word, sentence and phrase in a statute be given effect and meaning, and that no word be considered mere surplusage. *Hechtman v. Nations Title Insurance of N.Y.*, 840 So.2d 993, 996 (Fla. 2003).

Giving the phrase its full meaning, one would have to conclude that any other valid law in existence authorizing another sort of procurement method or creating a type of exception would also legitimately preclude the use of the competitive sealed bidding method. Thus, we may consider that 5 GCA §5122, authorizing procurement through the Federal GSA, is one such other valid law excepting procurement via competitive sealed bidding if the effect of §5122 is indeed to except it from any competitive procedure.

However, again we note that in 5 GCA §5122, the Legislature did not state expressly how the comparison of prices was to be accomplished, nor state that procurement through the Federal Supply Schedules was exempted from competitive sealed bidding. In contrast, the Legislature in the case of procurement from nonprofit corporations, one of the exceptions listed in §5210, specifically stated that competition was not required. Section 5217 of 5 GCA provides:

§5217. Procurement from Nonprofit Corporations. A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers. . . . [Emphasis added.]

Thus, there is a genuine question as to whether the local GSA was meant to forego competitive sealed bidding altogether when procuring from the Federal GSA. After all, §5122 requires some sort of price comparison to satisfy the 10% differential and competitive sealed bidding is certainly one way of obtaining prices for comparison.

4. The competitive sealed bidding process was not intended for use in acquiring prices for comparison against Federal GSA contract prices.

To suggest that competitive sealed bidding must be used is to also suggest that the competitive sealed bidding process can be cancelled once it has been used as the vehicle to acquire prices for comparison purposes, assuming the 10% price differential is met. However, if the local GSA knows from the outset of the competitive sealed bidding process that it merely wishes to compare bid prices with the Federal GSA contract price and then cancel the bid process if the 10% differential is met, then to not make this disclosure from the outset of the process would be to practice a deceit upon those submitting bids in earnest with the hope of winning the bid.

Therefore, GSA would have to issue the invitation to bid giving full disclosure that the supply is available through a Federal GSA contract and GSA must also disclose the possibility of cancelling the solicitation after the bids have been opened and the prices compared against the Federal GSA price. This is in keeping with the statutory procurement policy that the government ensure the fair and equitable treatment of all bidders at all times. 5 GCA §5001(b)(4). However, for obvious reasons, these disclosures would probably have the effect of discouraging bidders from placing bids.

An examination of the government's procurement rules show that the competitive sealed bidding process was not intended for use to compare prices. This intent is evident in the rule pertaining to cancellation of invitations to bid. Section 3115(b) at 2 GAR Division 4 states the policy on cancellation as:

> **(b) Policy.** Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only. The solicitation shall give the status of funding for the procurement.
>
> Preparing and distributing a solicitation requires the expenditure of government time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the territory's best interest. [Emphasis added.]

Section 3115(b) sets the parameters for when competitive sealed bidding may or may not be used by indicating that there must be a "valid" procurement. We take this to mean that the government must have a genuine intent to carry out all the steps of the sealed bid procedure to the end resulting in an award to the lowest bidder. Otherwise, the government should not begin the process at all. If GSA is searching for information only, or does not intend to fully carry out the solicitation for any other reason, then GSA must use some other form of procedure such as an invitation to solicit interest or invitation to solicit information or a request for quotation.

Section 3115(b) also makes clear the reason why an invitation to bid should not be issued unless there is an intent, from the outset, to carry it through the very end. Time is used and money is spent to conduct or participate in a competitive sealed bidding process, both by the government and by the bidders, much more than for an invitation to solicit information or a request for quotation. The government incurs the costs of writing the specifications, preparing the invitation to bid packages, and advertising in a newspaper of general circulation. The bidders incur the costs of analyzing and researching the bid requirements, negotiating with subcontractors, putting a bid together, and acquiring a bid bond. These costs will always be more than for a streamlined process to acquire prices for mere comparison purposes.

Section 3115 then goes on to give examples of what are considered cogent and compelling reasons for cancellation. The list of reasons includes:

> (i) the supplies, services, or construction being procured are no longer required;
>
> (ii) ambiguous or otherwise inadequate specifications were part of the solicitation;
>
> (iii) the solicitation did not provide for consideration of all factors o[f] significance to the territory;
>
> (iv) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
>
> (v) all otherwise acceptable bids or proposals received are clearly unreasonable prices; or
>
> (vi) there is reason to believe that the bids or proposals may not have been inadequately arrived at in open competition, may have been collusive, and may have been submitted in bad faith.

2 GAR Division 4, 3115(d). This list of cogent and compelling reasons suggests that cancellation is appropriate only when GSA becomes aware of a fact after the solicitation process begins, or when a new fact arises after the process begins. However, if GSA is aware from the outset that cancellation is possible or imminent, then competitive sealed bidding is simply not the procedure anticipated by these procurement laws, even if full disclosure is given concerning GSA's intent to possibly cancel.

5. GSA has the authority to adopt standard operating procedures and GSA adopted a procedure reasonably calculated to determine whether a 10% differential exists.

The rules, which are promulgated by the Policy Office, do not expand upon how to find the 10% differential. In fact, the rules do not even mention procurement through the Federal GSA.

However, 5 GCA §5113 gives the Chief Procurement Officer the power to "adopt operational procedures governing the internal functions of [GSA's] procurement operations." This section was fleshed out and incorporated in the rules at 2 GAR Division 4 §2104(b) as follows:

> Consistent with the provisions of the Guam Procurement Act and the Guam Procurement Regulations, the Chief Procurement Officer . . . may adopt operational procedures governing the internal functions of their procurement operations, a copy shall be provided to the Policy Office. [Emphasis added.]

Because the rules do not make any decisions regarding the 10% differential, the manner of finding the differential was left to the Chief Procurement Officer as an "operational procedure" of GSA's procurement functions, and the Chief Procurement Officer had every right to adopt a procedure therefor in order to make the statute authorizing procurement through the Federal GSA a functional one. In doing so, the Chief Procurement Officer would be consistent with both the procurement statutes and rules which left the question open to interpretation and gave GSA the authority to decide how to handle the procedure.

Furthermore, the Chief Procurement Officer is required by §2104(b) to provide the Policy Office with a copy of any standard operating procedure adopted; thus giving the Policy Office an opportunity to consider the procedure adopted and have it changed if any part of it was disagreeable.

Presumably in accordance therewith, the Chief Procurement Officer established a standard operating procedure for its buyers to use, a copy of which is attached to this memorandum as Attachment A.

The steps of the standard operating procedure, simplified and restated, are as follows:

1. The buyer shall inquire through the Federal GSA office in Hawaii whether the Federal GSA has a contract for the type of supplies or equipment desired. If available through the Federal GSA, then the buyer shall request the contract number and all other pertinent information.

2. After receipt of the information from the Federal GSA, the buyer shall issue a request for quotation to at least three (3) local vendors in order to calculate the 10% differential required by 5 GCA §5122.

3. The buyer shall then prepare an abstract with the information obtained from the three local vendors and compare the local prices against the Federal GSA contract price to see if the Federal GSA contract price is at least 10% less than the three local vendors.

4. If the 10% differential exists, then the supplies or equipment shall be obtained through the Federal GSA contract.

Not stated in the standard operating procedure, but implied therein and confirmed by the Chief Procurement Officer, is that if the abstract shows a 10% differential does not exist, then the local GSA must begin a competitive bid process for the supplies or equipment needed.

On its face, this procedure is reasonably calculated, and therefore a sufficient means, to acquire the figures which are needed for comparison purposes only, and a practical way to prevent the inappropriate use of the competitive bidding process and also to prevent the inappropriate

cancellation of such bidding process once begun. Certainly, it is not the only means to acquire prices for comparison purposes, but it was the means chosen by the local GSA in accordance with the authority granted to it to adopt operational procedures.

CONCLUSION:

The Chief Procurement Officer had the authority to adopt standard operating procedures for determining that a 10% difference exists between the Federal GSA contractor's price and the prices of local vendors. Therefore, if the local GSA office procures through the Federal GSA in accordance with the standard operating procedure adopted, then competitive sealed bidding is not required. However, if the abstract prepared in accordance with the procedure shows that the Federal GSA contractor's price was not at least 10% less than the prices quoted by the three local vendors, then the local GSA must issue an invitation to bid.

DEBORAH RIVERA
Assistant Attorney General

Attachment (1)

cc: Director, Department of Administration
Public Auditor of Guam
Deloitte & Touche LLP

PURCHASING FROM GSA FEDERAL SUPPLY CONTRACT

PROCEDURE

If a Buyer receives a requisition and the item being requested is for supplies, services or equipment, it may be purchased through the federal contract without the bidding procedure. The following steps shall be followed:

1. The Buyer shall inquire through GSA Federal in Hawaii by fax or by phone if they have the type of supplies, services or equipment in their contract. If so, request for the contract number and under what Federal Supply Contract number.

2. Upon receipt of the requested information from GSA Federal, the Buyer will then issue a request for quotation to at least three (3) local vendors in order to calculate the 10% as stated by the 5GCA. The buyer will then prepare an abstract and make their determination whether to process thru bidding or purchase thru the Federal Supply Contract depending on the outcome of the calculation.

3. If it is listed on the Federal Supply Contract and the local vendors provided a quote exceeding the 10% requirement a purchase order shall be prepared indicating the description, the quantity and the amount, etc. to Federal Supply Contract.

4. A purchase order shall be processed through the GSA Federal in Hawaii.

5. All the delivery, warranty and other terms are pre-negotiated under the federal contract.

6. The Buyer shall make appropriate follow ups with GSA Federal to keep up-to-date with the status of the order.

7. If the order is an equipment or vehicle, it still gets cleared through DPW before final acceptance.

Attachment A