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 PROCUREMENT APPEALS

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BEFORE THE OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEAL

In the Appeal of)	
)	COMMENT ON AGENCY REPORT
TOWN HOUSE DEPARTMENT STORES,)	
INC., dba)	
ISLAND BUSINESS SYSTEMS)	DOCKET NO. OPA-PA 08-012
& SUPPLIES,)	
APPELLANT)	

This Appeal presents a dispute the substance of which is widespread within GovGuam and is capable of repetition, and GSA's Agency Report and prayer for dismissal of this Appeal leaves the door wide open in anticipation of that event. Therefore, Appellant must object to the Report.

The solicitation began with an RFQ (Request for Quotes) for various copy machines. Appellant protested the method of source selection, claiming that the RFQ was an improper way to solicit the supplies sought. Appellant also protested the improper use of brand name or equal specifications, and that in other respects the specifications were unnecessarily restrictive and the solicitation violated the regulations regarding the proper use of specifications.

Appellant noted, in its Protest, that it suspected GSA was using the RFQ as a subterfuge to hide a direct purchase through the Federal GSA (the "FSSP", as described in Appellant's Notice of Appeal). Appellant protested any such direct purchase unless it was conducted by use of the competitive sealed bidding method of source selection.

COPY

In its rejection of Appellant's Protest, GSA affirmed its intent "to procure copier machines through the Federal GSA prices, terms and conditions" under the authority of 5 GCA §5122 and under the cover of an Attorney General opinion issued June 16, 2008, Ref: GSA-07-1084, the gist of which is that competitive sealed bidding is incompatible with purchases from FSSP sources and that 5 GCA §§5122 and 5210(a), in conjunction, authorized an alternative method of source selection, and that GSA has the power and authority to promulgate procurement regulations to implement that alternative method of source selection.

Appellant rebutted those contentions in the Notice of Appeal.

GSA has produced a procurement record previously, and its Agency Report on October 10, 2008.

1. This Appeal presents genuine and compelling substantive issues going beyond the mere acquisition of the copiers sought by the RFQ.

The Agency Report does not address any of the root cause contentions made either in Appellant's Protest, nor in the Notice of Appeal, nor does it qualify or retreat from the assertions made by GSA in its response to the Protest. It simply says that GSA will, in this instance, acquire the machines, which are available from the FSSP, by use of the competitive sealed bid method of source selection, and that the specifications that will be used in that particular solicitation will be non-proprietary, commercial, competitive, etc.

GSA thereby washes its hands of the substantive issues of this Appeal and moves to dismiss the Appeal.

This facile disposition of the matter leaves the dirty work to be done another day. That is unjust and unfair to Appellant and a waste of the resources and prophylactic benefits of the procurement appeal and review process.

If Appellant were satisfied that this issue would not again come 'round to haunt, it *might* be satisfied with the GSA proposed solution¹. The representatives of the AG's office in the matter

¹ Appellant notes that GSA's decision to proceed under competitive sealed bidding is required by the law regarding unsolicited offers, in that the Procurement Record reveals that the Requesting Agency (Rev & Tax) appears to have received offers from Xerox for these same machines, even specifying the divisions within the department for which each machine was intended, information that was not previously revealed in the RFQ, prior to the date of the RFQ. See Tab 6 of the Procurement Record. The Requisitions were dated 5/14/2008. The RFQ was dated 5/15/2008. In Tab 6 there is a "Xerox Proposal" for one model of Xerox copier for the Motor Vehicle division sent by Pam Quinata from Xerox, dated 3/10/08. There is another "Xerox Proposal" for a different machine intended for Accounting, also dated 3/10/08, and a

have been gracious and receptive to the criticism leveled by the Notice of Appeal. But they don't want to deal with it substantively in this Appeal, if any other.

Appellant's complaint in the Protest and Notice of Appeal was that GSA had no right to ever acquire any service or supply from the FSSP other than through one of the methods of source selection specifically mentioned in 5 GCA §5210(a), and GSA's Agency Response very clearly falls far short of responding to or dealing with that complaint.

GSA's Agency Report drills down to dealing *only* with the acquisition of the specific machines identified in the specific protested RFQ². GSA has not committed to hereafter using competitive sealed bidding in place of requests for quotations in the acquisition of multiple copiers, nor in place of GSA's so-called procedures, and assiduously avoids doing so.

The Agency Report offers no retraction of either the GSA FSSP purchase procedures nor GSA's contention that §5122 offers an alternative for GSA to adapt to its purposes in lieu of the methods of source selection specified by §5210(a). The Agency Report offers no revision of the so-called GSA procedures, assuming it has any power to develop them, to assure they abide by the accountability and competitive requirements of the procurement law and regulation.

Nor does the AG resile from its Opinion which gives expression and authority to claims that competitive sealed bidding is incompatible with FSSP purchasing, and that §§5122 and 5210(a) combine to create authority for an alternative method for acquiring supplies from the FSSP, and that GSA is authorized to promulgate procurement regulations to implement such a method without regard to the broader demands for accountability and competition procurement law and regulation require, including the use of competitive specifications.

Unless there is either an admission or a Decision to the contrary, Appellant contends that the objections raised in the Protest and Notice of Appeal remain unresolved, and continue to present a challenge to the integrity of the procurement system. Appellant's basic objections, both in its Protest and in its Appeal, must be addressed today in this Appeal, and not tomorrow and again the next day in further actions.

This is a matter of no small or isolated moment. GSA's attempt to isolate and trivialize this appeal is not well taken. It cannot be in the best interests of the Public Auditor or the Government to deal with these substantive issues repetitively or piecemeal.

third "Xerox Proposal" of same date for another machine for Insurance and Banking. And so on.

² See Declaration of Anita Cruz filed herein October 10, 2008: 4. "GSA is now seeking to respond to the requisition requests of the Department of Revenue and Taxation ... by the competitive sealed bidding method of source selection, and is now developing the competitive bid documents for these requisitions."

For example, the AG Opinion itself noted that GSA's external auditor objected to the propriety of a *multitude* of GSA purchases from FSSP in FY06 that were conducted without competitive sealed bid, ranging in amount between \$25,000 to over \$310,000.

GSA (according to the Opinion) rejected the external auditor's finding on this issue, but the auditor held to its guns. What will or can the external auditor do now that the AG has opined GSA was acting with authority and impunity? This Appeal provides the forum and opportunity for the Public Auditor to provide comprehensive authority and guidance on the subject.

Another example. The procurement officers at GPSS were acting under some apprehension of procurement lore or other understanding that they could "ride on" some kind of agreement with (local) GSA to avoid competitive bidding. This was mentioned in another Procurement Appeal currently pending before the Public Auditor (OPA 08-011), so should readily be noticed in this Appeal³. As mentioned therein and the Notice of Appeal herein, GSA was unforthcoming and disingenuous when Appellant inquired into the nature of any such arrangement by letter to the CPO in October 2007.

As further evidence of the repeated, non-isolated use of RFQs government-wide to perhaps camouflage direct FSSP purchases if not otherwise avoid required competitive sealed bidding, and in disregard of the Public Auditor's GSA Audit Report OPA 0405, Appellant points to other actions within the last year taken separately by the Port of Guam and GIAA.⁴

In the case of PAG, after informal objection to the issue, and the personal involvement of the GSA CPO, and the desire of IBSS to not be seen as always objecting, IBSS elected not to protest that RFQ, but it did formally respond to register its objection to any future use of the RFQ method in circumstances such as the instant case.⁵

In the case of GIAA a month later, IBSS protested the RFQ method of source selection and the restrictive specifications in an RFQ that also sought "GSA pricing and terms" like the present

³ See Notice of Appeal ("first Appeal", OPO-PA 08-003), page 6, and letter to GSA CPO attached as referenced there.

⁴ These actions only concerned copiers. Appellant does not know the full extent of such activity for any other supplies and services, but note the external auditor's report for FY06 mentioned above.

⁵ See letter to Mr. Kenneth T. Tagawa, General Manager, dated November 23, 2007, a copy of which is attached hereto as Exhibit 1.

one.⁶ GIAA never responded to Appellant's Protest and, as far as IBSS knows, the matter died on the vine, which is another way of turning the substance of the protest into a moot issue. But did it really die on the vine? GSA's actions in this Appeal, until the Agency Report at any event, evince a stubborn agency intention to go its own way regardless of Protest.

2. The necessity for a Decision in this Appeal is not made moot by GSA's proposed action to simply abandon the RFQ and conduct a competitive sealed bid for the copiers sought to be acquired by the RFQ.

Appellant contends that, if the matters raised by this Protest and Appeal are not definitively addressed in this Appeal, Appellant will continue to be stuck playing that penny-arcade game of *Whack-A-Mole* as this same issue keeps popping up out of the next hole. And the Public Auditor will be dragged along for the "fun".

Appellant notes that it has expended considerable time, resource and effort to respond in good faith to the RFQ and that the RFQ was issued by GSA under false pretenses.

Appellant responded to the RFQ by Protest, which was totally ignored by GSA until Appellant formally requested a Final Decision on its Protest. It was only then, in that belated response, that GSA revealed that it did, indeed, use the RFQ as cover to conduct a non-competitive FSSP acquisition. Appellant asserts that the failure to disclose that at the very beginning of the RFQ process was an act of bad faith. As the Attorney General's *own* Opinion stated:

"[I]f 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 the 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.*"⁷

Appellant responded to the CPO's demand to appear to discuss the protest, and yet the CPO ultimately denied the Protest, declaring its full intention to proceed with the FSSP purchase under authority of the AG's opinion and in line with its so-called "procedures"⁸.

⁶ See copy of protest letter to Mr. Jesus Q. Torres, Executive Manager dated 10 December 2007, attached hereto as Exhibit 2.

⁷ Opinion, at page 6.

⁸ Which Appellant believes were violated in the event anyway. The procedures require that they be conducted through Hawaii Federal GSA, (procedural numbers 1 and 4) yet, there is no evidence in the Procurement Record that the dealings required were made. In fact, the FSSP

Appellant was then left no choice by the GSA CPO other than to bring this Appeal challenging the foundational aspects of GSA's claim to be able to make direct purchases from FSSP under its own authority. So now GSA wants to sweep this one under the rug and move on.

But move on to what? Appellant should not be prejudiced in this Appeal by allowing GSA to, in this specific instance, agree to acquire the copiers by competitive sealed bid while leaving open the very pregnant possibility that GSA, or PAG or GIAA or other agencies, will again seek to purchase the next copiers, or any other supply it desires, directly from the FSSP in complete disregard of the requirements of the specified methods of source selection the limits of GSA's procedure-making powers.

Given the broader history revealed herein as well as the facts of this case, the deceptive actions of GSA to bring about a purchase from FSSP in violation of its own questionably adopted procedures, and the unmitigated assertions made by the GSA rejection of the Protest and in the AG Opinion, something much more must be required of GSA.

There are bigger issues that GSA, and perhaps the AG, wish to duck by the Agency Report

is set up to require the ordering agency to purchase directly from the vending contractors without any other involvement of the Federal GSA. These issues do not require review if the Public Auditor holds that the GSA procedures are invalid in the first place.

Appellant further would allege that GSA did not even abide by the very FSSP regulations that govern the FSSP, **and it would not be out of line for the Public Auditor to admonish GSA to follow them.** See, for instance, the following pertinent Federal Acquisition Regulations specifically applicable to the FSSP:

8.404(c)(1): "Orders ... [a]re not exempt from the development of acquisition plans...."

8.404(c)(3): "Orders ... [m]ust ... be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service."

8.405-1(b): "[O]rdering activities should attempt to distribute orders among contractors."

8.405-6(a)(2): "[A]n ordering activity must justify its action when restricting consideration ... [t]o an item peculiar to one manufacturer (e.g., a particular brand name, product, or a feature of a product, peculiar to one manufacturer). A brand name item, whether available on one or more schedule contracts, is an item peculiar to one manufacturer. Brand name specifications shall not be used unless the particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs."

response herein, and they should not be allowed to do so. GSA's prayer to dismiss this Appeal should be denied and a Decision should be rendered that fully responds to the issues raised herein.

Finally, Appellant is mindful that should it prevail on this Appeal, GSA must ultimately do what it offers to do herein, but points out that in that event, it will be doing so in a context that is fully consistent with procurement law and regulation.

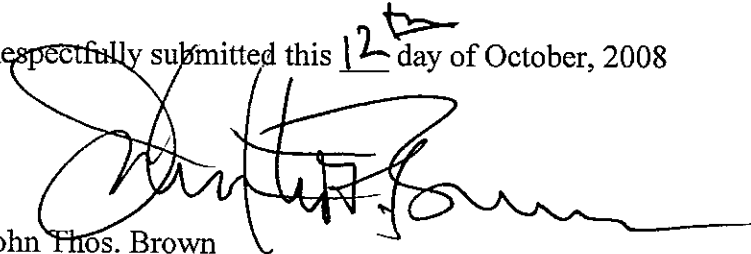
But if this Appeal is dismissed as moot simply because GSA has agreed to conduct that competitive sealed bid, GSA will be left in the position of being able to use its discretion to derail any Protest of a direct FSSP acquisition by abandoning the direct purchase, or, in the absence of Protest, to continue on its merry way of conducting those purchases without regard to the procurement laws and regulations that Appellant contends must be followed to conduct an FSSP purchase. The procurement law does not give GSA or any other purchasing agency, such as GMH (which as Appellant pointed out in its Notice of Appeal has the same procedure making powers as GSA), such unbridled authority and it should not be left with that discretion.

Not only GSA, GIAA, PAG and GPSS, but also GSA's external auditors and all prospective GovGuam bidders must have the confidence that the actions taken by GSA and other purchasing agencies are substantively and procedurally consistent with the Guam procurement laws and regulations, and only a full disposition of the contentions of Appellant's Appeal will provide that confidence.

SUPPLEMENTAL RULING REQUESTED

In light of Procurement Record and Agency Report, Appellant requests that the Public Auditor issue a ruling that there is no method of source selection for the acquisition of supplies or services from FSSP except as specifically identified in 5 GCA §5210(a); that 5 GCA §5122 is not authority for any alternative method of source selection from FSSP beyond the sources specified in 5 GCA §5210(a); and that GSA has no power to promulgate any procurement procedure which would allow it to implement any alternate method of source selection. Appellant also desires any further ruling or guidance that the Public Auditor deems pertinent to address the issues herein, in the interest of articulating the "rules of the game" for the betterment and integrity of the procurement system.

Respectfully submitted this 12th day of October, 2008


John Thos. Brown
General Counsel for Appellant

JOHN THOS. BROWN

ATTORNEY AT LAW *

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November 23, 2007

Kenneth T. Tagawa, General Manager
and Chief Procurement Officer
Port Authority of Guam
1026 Cabras Highway
Piti, Guam 96925

Dear Mr. Tagawa,

This letter is written with reference to a recent PAG "Quote Request" for Port
Wide use of copier machines, order number 6418 OA, Reference No. 8549 ON.

The request was for price quotations for a variety of multi-functional copier machines. The majority of the various individual machines could be expected to exceed \$15,000 per contract. The aggregate value of all the machines being procured in this one Quote Request will likely run well into the six figures.

Island Business Systems and Supplies (IBSS) is a J&G-affiliated company. It is the authorized representative for Canon imaging products and has responded to the request for quotes. It is uncomfortable with the open nature of the information provided by this Request for Quotes, and the appearance of the opportunity presented for competitors to obtain competitively sensitive information before submitting their final bids. IBSS would have preferred a sealed bid method of source selection.

IBSS is not formally protesting the manner of this procurement, but requests that in future PAG examine whether the Small Purchase Request for Quotes method of source selection (2 GAR §3111) is the appropriate method. I am of the opinion that it is certainly not; that a competitive sealed bid procedure is required. (2 GCA §5210(a).)

In her report, OPA 04-05, the Public Auditor gave an extensive explanation of the limitations to small purchase procurement. (See, <http://www.guamopa.org/docs/OPA0405.pdf>.) This procurement method is limited 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,

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

¹ 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)

not a Request for Quotes. She was highly critical of "artificially divided" purchases: "such practices resulted in large purchases that should have required competitive sealed bidding and/or publication".

She pointedly singled out copier machine purchases which, though conducted by the small purchase source selection method, aggregated, across all of GSA, a total value ten times the \$15,000 limit and all made to a single vendor.

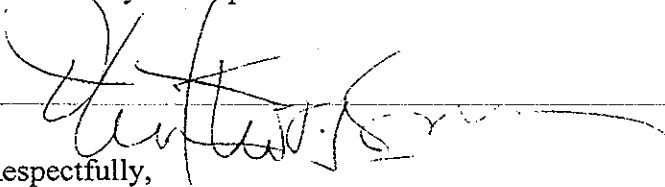
She admonished, "Through proper bidding, the agencies would avoid being in violation of 5 GCA §5213, artificial division of procurement, and would meet 2 GAR §3109(f) requirement of publicizing purchases above \$25,000. It is more beneficial to issue invitations for bids for the following purchases because of the agencies' ongoing requirements for the items being procured.... DPHSS issued 20 POs to vendor X0012204 for the lease of copier machines with total costs of \$123,436."

In specific regard to copier machines, her report summarized:

"During the scope of our audit, vendor X0012204 was issued the most POs for the lease and maintenance of copier machines (Appendix E). In FY 2002, 31 agencies issued a total of 214 POs (\$794,601) to this vendor. In FY 2003, this vendor received a total of 146 POs (\$705,046) from 29 agencies. The top 5 agencies that issued small purchases to this vendor are listed in Table 14 below. There are other vendors offering copier machine lease and maintenance, however, government agencies chose to issue small purchases to vendor X0012204. The aggregate amounts of \$794,601 (FY 2002) and \$750,046 (FY 2003) provide evidence that may suggest a government-wide artificial division of the procurement and circumvention of the competitive sealed bid requirement."

IBSS would not object if PAG withdrew this particular procurement and proceeded properly with competitive sealed bids for the copier machines procurement.

I welcome your response.

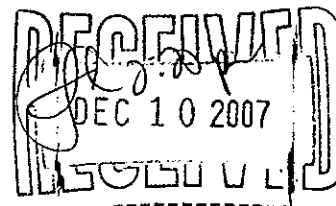


Respectfully,

John Thos. Brown

cc: Mr. Monte Mesa, Chairman
Ms. Marylyne Pecina, Supply Management Administrator
Ms. Claudia S. Acfalle, Chief Procurement Officer, General Services Administration
Mr. Noli C. Cadag, EVP, Jones & Guerrero, Co., Inc.
Mr. Raul Del Valle, Acting General Manager, IBSS

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10 December, 2007

Mr. Jesus Q. Torres, Executive Manager
and to Ms. Annie M. Makepeace, Procurement Officer
Guam International Airport Authority
PO Box 8770
Tamuning, Guam 96931

RE: PROCUREMENT PROTEST
Request for Price Quotation
Multi-function Copiers (total 9 machines)
Requisition Number: Q081240017
RFQ #: RFQ07005399

Dear Mr. Torres and Ms. Makepeace,

IBSS hereby objects to and protests the above referenced Request for Price Quotation for 9 copier machines. 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 copier products and services.

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." This protest is based on several arguments.

First, the request for price quotation is a method of source selection that is not appropriate for competitively sealed bids. Competitive sealed bidding is the preferred method of procuring supplies. (5 GCA § 5210(a); 2 GAR § 3109(b).)

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Requests for price quotations is only allowed for “small purchase” source selection, described in 2 GAR § 3111. In her report, OPA 04-05, the Public Auditor gave an extensive explanation of the limitations to small purchase procurement. (See, <http://www.guamopa.org/docs/OPA0405.pdf>.)

This procurement method is limited to contracts for the procurement of supplies that are less than \$15,000. The instant request for prices for 9 machines will, in aggregate as well as in respect of most if not all components, greatly exceed that limitation.

Any procurement above that figure requires competitive sealed bids and an Invitation for Bids, not a Request for Quotes. The Public Auditor was highly critical of “artificially divided” purchases: “such practices resulted in large purchases that should have required competitive sealed bidding and/or publication”.

The Public Auditor specifically singled out copier machine purchases which, though conducted by the small purchase source selection method, aggregated, across all of GSA, a total value ten times the \$15,000 limit and all made to a single vendor.

She admonished,

“Through proper bidding, the agencies would avoid being in violation of 5 GCA §5213, artificial division of procurement, and would meet 2 GAR §3109(f) requirement of publicizing purchases above \$25,000. It is more beneficial to issue invitations for bids for the following purchases because of the agencies’ ongoing requirements for the items being procured.... DPHSS issued 20 POs to vendor X0012204 for the lease of copier machines with total costs of \$123,436.”

Note that competitive sealed bid procurement requires a minimum of 15 days for bidding time (2 GAR § 3109(d).) The instant Request for Price Quotes was issued December 4th and required a quote submission only 6 days later, December 10th.

IBSS also protests the condition that suppliers “must provide GSA Pricing and GSA Terms and Conditions”. This is an unnecessarily restrictive condition and by its express terms excludes any vendor who has not gone through the process of registering its products and prices with the Federal government GSA purchasing mechanism.

The requirement of quoting only GSA prices also is contrary to the policy of the Guam Procurement Law favoring local procurement, which states the following:

“§ 5122 U.S. Government.

The [Guam] General Services Agency [which, by virtue of 5 GCA § 5113(a) “shall serve as the central procurement officer of the Territory with respect to supplies and services”] shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent than from other contractors.”

5 GCA § 5114 authorizes the CPO of Guam GSA to delegate procurement authority to other government bodies, such as GIAA. Since agency procurement power is derived from the power of the CPO, it is also limited by the provisions of § 5122.

IBSS also protests the overly restrictive specifications. For instance, the specifications for one of the machines requires “Server Model HP ML10 G4 Tower Server...” These specifications set out specific criteria which IBSS alleges mimic the published specifications for Xerox product. The multiple specifications did not describe which among them were the salient technical requirements or principal functional or performance needs.

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.*

(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 standards shall be used and *unique requirements shall be avoided*, to the extent practicable.

2 GAR § 4108 ("Publication of Specification Sources") provides:

The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, 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 in drafting the specifications.

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

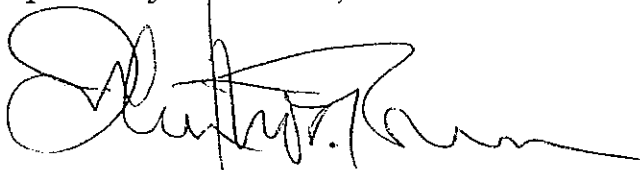
(a) Specifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and *shall include only the essential physical characteristics and functions required to meet the government of Guam's minimum needs.*

(b) **Purchase descriptions shall not specify a product having features which are peculiar to the products of one manufacturer, producer or 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 minimum 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.*

IBSS respectfully protests, and requests that GIAA withdraw the Request for Quotes and issue an Invitation for Bids with properly drawn specifications, for the procurement of the copier machines.

Respectfully submitted,



John Thos. Brown
General Counsel
for IBSSS