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 PROCUREMENT APPEALS

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PROCUREMENT APPEAL
 BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)
)
 TOWN HOUSE DEPARTMENT STORES,)
 INC., dba)
 ISLAND BUSINESS SYSTEMS)
 & SUPPLIES,)
 APPELLANT)

APPELLANT'S REQUEST FOR
 NOTICE TO BE TAKEN RE
 FEDERAL ACQUISITION
 REGULATIONS

DOCKET NO. OPA-PA -08-012

APPELLANT, Town House Department Stores, Inc., dba Island Business Systems & Supplies, hereby requests that the Public Auditor and Hearing Officer take notice of certain Federal Regulations at the scheduled Hearing, January 7, 2009, and in considering the matters raised in this Appeal:

This Appeal involves purchases by the Government of Guam from the Federal Supply Schedule Program. This implicates the Federal Acquisition Regulations applicable to such purchases. A reviewing body would normally take notice of such regulatory law without controversy.

Appellant makes this request for the convenience of and inn the context of bringing this body of law to the Public Auditor's attention and to the attention of GSA and its Attorney General counsel to the extent they have not taken or had the opportunity to consider it.

Appellant draws attention to these Federal Regulations for the purpose, first, of illustrating that the procedure adopted by GSA and condoned by the Attorney General fails of the essential purpose of conducting an appropriate Federal Supply Schedule acquisition in compliance with the Federal rules applicable thereto, thereby undermining local Guam procurement integrity and Guam's ability to continue to take part in that benefit. Second, for the purpose of suggesting that the policies and requirements of Guam procurement laws and regulations applicable to competitive sealed bidding are generally more consonant than incompatible with Federal procurement directives, thus there is no compelling need to try to fashion a unique method of

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source selection for such purchases which avoids the strictures of competitive sealed bidding, as GSA has done and the AG has facilitated.

The FARs (Federal Acquisition Regulations) are found in Title 48 of the Code of Federal Regulations. Notice ought be taken of an electronic form made available from the US National Archives and Records Administration online at this link:
http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?sid=ead527447d7edc27890a20f1dc4dbaa5&c=ecfr&tpl=/ecfrbrowse/Title48/48tab_02.tpl

The Federal Government also provides a central online resource for regulations and other information relating to Federal acquisitions, called Acquisition Central, located online at <http://www.acquisition.gov/> . This access point is described as follows:

“ACQUISITION CENTRAL, the web site for the federal acquisition community and the government's business partners.

ACQUISITION CENTRAL is hosted by IAE (Integrated Acquisition Environment), the E-Gov Initiative that is streamlining the federal acquisition process.”

This resource links to a comprehensive online version of the Federal Acquisition Regulations System, available in a variety of formats: <http://www.acquisition.gov/far/> .

This resource also provides access to a concise collection of pertinent FARs, notice of which ought be taken, which can be found in pdf format at <http://www.arnet.gov/far/90-36/pdf/toc.html>.

Part 8 of the FAR concerns, generally, the required sources of supplies and services (<http://www.acqnet.gov/far/90-34/pdf/8.pdf> .)

Subpart 8.4 deals particularly with the Federal Supply Schedules Program (“FSSP”). (http://www.acquisition.gov/far/current/html/Subpart%208_4.html .)

Within that Subpart, Appellant wishes to draw particular attention, but not to the exclusion of other relevant provisions, to the following excerpts:

8.401 Definitions.

As used in this subpart—

“Ordering activity” means an activity that is authorized to place orders, or establish blanket purchase agreements (BPA), against the General Services Administration’s (GSA) Multiple Award Schedule contracts.” [The Government of Guam is an “ordering activity” within the contemplation of the FARs.]

8.403 Applicability.

(a) Procedures in this subpart apply to—

(1) Individual orders for supplies or services placed against Federal Supply Schedules

contracts

8.404(c) *Acquisition planning*. Orders placed under a Federal Supply Schedule contract—

- (1) Are not exempt from the development of acquisition plans ...;
- (2); and
- (3) 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.

8.405-6 Limited sources justification and approval.

- (a) ... [A]n ordering activity must justify its action when restricting consideration — ...
- (2) To 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....

With reference to "Acquisition planning" (8.404(c), above), Appellant draws attention generally to FAR Subpart 7 (http://www.acqnet.gov/Far/01-11/html/Subpart_7_1.html), with particular reference to Subpart 7.1 (*Id.*) and the following subsections:

7.103 Agency-head responsibilities.

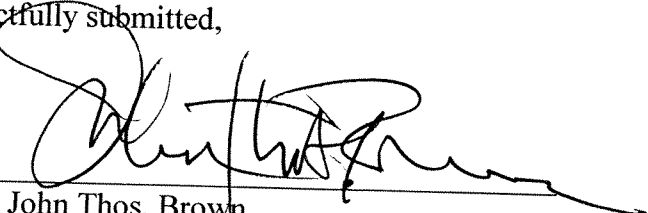
The agency head or a designee shall prescribe procedures for-

(a) Promoting and providing for full and open competition (see Part 6) or, when full and open competition is not required in accordance with Part 6, for obtaining competition to the maximum extent practicable, with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2301(a)(5) and 41 U.S.C. 253a(a)(1)).

...

(c) Ensuring that acquisition planners address the requirement to specify needs, develop specifications, and to solicit offers in such a manner to promote and provide for full and open competition with due regard to the nature of the supplies and services to be acquired (10 U.S.C. 2305(a)(1)(A) and 41 U.S.C. 253a(a)(1)). (See Part 6 and 10.002.)

Respectfully submitted,



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