



Office of the Attorney General
 Alicia G. Limtiaco
 Attorney General of Guam
 Civil Litigation Division
 287 West O'Brien Drive
 Hagåtña, Guam 96910 • USA
 Tel. (671) 475-3324 • Fax (671) 472-2493
 babrams@guamattorneygeneral.com

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PROCUREMENT APPEALS

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Attorneys for the Department of Public Works

BEFORE THE GUAM PUBLIC AUDITOR
Procurement Appeal

IN THE APPEAL OF:)	DOCKET NO. OPA-PA 09-007
)	
)	
)	
GUAM EDUCATION FINANCING)	<u>HEARING BRIEF</u>
FOUNDATION, INC.,)	
)	
Appellant.)	
)	

Standard of Review

Appellant's Hearing Brief and its contentious list of issues are devoid of any allegation that the Purchasing Agency violated Guam procurement regulations.

The Courts of Guam have indicated a standard of review applicable to OPA appeals, which is: Absent any breach of procurement law, the determinations made by the Purchasing Agency should stand. So said the Court in Fleet Services, Inc. v. Department of Administration and Kloppenburg Enterprises, Inc. 2006 Guam 6, where the Guam Supreme Court based its decision to overturn procurement, and to rule that the procurement had to be redone, only after it found that the Department of

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Administration had violated Guam procurement law and failed to follow statutory procurement process. Likewise in TRC Environmental Corporation v. Office of the Public Auditor, Spec. Proc. Case No. SP160-07, ruled in its Decision and Order on Petition for Writ of Mandate (“D&O”) (Guam Super. Ct., Nov. 21, 2008) “a procurement decision can be set aside if it lacked a rational basis or if the agency’s decision-making involved a violation of regulation or procedure. D&O at 8, citing Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d. 1324, 1332 (Fed. Cir. 2001), and The Ravens Group, Inc. v. United States, 79 Fed. Cl. 100, 112 (Fed. Cl. 2007). Further, the Superior Court held that while the administrative agency has discretion in how it proceeds, the discretion is not unfettered. TRC Environmental Corp., D&O, at p. 2. Then there is the earlier case, Pacific Data Systems, Inc. v. Superior Court of Guam, 1990 WL 320357 (D. Guam A.D.) October 24, 1990, which was a review of a procurement appeal from the Superior Court of Guam to the Appellate Division of the District Court of Guam. At the time of Pacific Data, there was no appeal of a procurement decision at the agency level to the Office of Public Accountability, or any other administrative body. The Procurement Appeals Board, provided for in the procurement law as the first level of administrative appeal, was a non-functioning entity and procurement appeals went directly to the Superior Court after a protest was denied by the procuring agency. Therefore, the Superior Court in Pacific Data, (as is the OPA here) was the first level of appeal after an agency decision to deny a protest. The Superior Court, in Pacific Data, was in the position of determining matters on appeal, as the Public Auditor is in the instant case. So the same standard should apply. The Public Auditor reviews procurement appeals *de novo*. 5 GCA § 5703. However, *de novo* review cannot be a review without standards by which a procurement process will

be overturned. The Court stated, at 1990 WL 320357 *2, that *it is appropriate to interfere and substitute a court's judgment for the administrator's only when there appears no rational basis for the procurement decision. See Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, (1984), where, discussing government procurement in general, at 844, the Supreme Court said, we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.*"

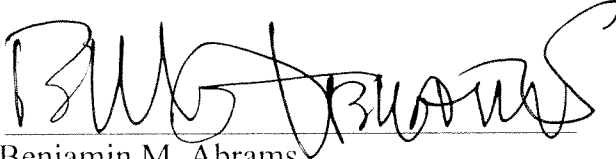
Consequently, the Department of Public Works suggests that the Public Auditor to adopt as the proper standard of review the following: Unless and until an appellant demonstrates a material violation of procurement law, or that a rational basis for its decision is clearly lacking, with resulting prejudice as a result, then the procurement process shall be upheld.

Contrariwise, the GEFF appeal raises only discretionary determinations by the Purchasing Agency, based on inchoate, incomplete and inconclusive documentation. Hence this appeal does not present, nor could it present, a clear abuse of discretion by the Purchasing Agency. This is because in the first place, there were none, and secondly, even if there were, it would only become demonstrable on the basis of the protected portion of the procurement record to which Appellant has no access. In analogous cases, courts have declined to reverse Purchasing Agency evaluations claimed to be "unreasonable" or "disagreeable". See Comptroller General's decision in Matter of: K-Mar Industries, Inc., B-400, 487 (2009) CPD P 159, 2008 WL 6665282, *2 (Comp.Gen. Nov. 03, 2008).

And so, Appellant's appeal fails to reach the standard for reversal of the ranking of IBC as the lead bidder in the JFK procurement process. The GEF appeal should be denied.

Dated this 23rd day of November 2009.

OFFICE OF THE ATTORNEY GENERAL
Alicia G. Lintiaco, Attorney General

By: 
Benjamin M. Abrams
Assistant Attorney General