



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

Attorneys for the Government of Guam

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 PROCUREMENT APPEALS

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OFFICE OF THE PUBLIC AUDITOR
 PROCUREMENT APPEAL

IN THE APPEAL OF:

APPEAL CASE NO. OPA-08-012

TOWN HOUSE DEPARTMENT STORES, INC. DBA
 ISLAND BUSINESS SYSTEMS & SUPPLIES,

APPELLANT

REBUTTAL TO COMMENT ON
 AGENCY REPORT

The Appellant, Town House Department Stores, Inc. DBA Island Business Systems & Supplies (hereafter IBSS) seeks to have a hearing on this matter despite the complete resolution of the question presented by the case. The General Services Administration (hereafter, GSA) asserts that this matter is completely resolved. The GSA has agreed to do exactly what IBSS has asked the agency to do. This matter is now moot.

The IBSS Comment On Agency Report would insist on seeing some subversive or mischievous motives on the part of the GSA in the act of agreeing with IBSS. There is no subversion. There is no mischief. There is just agreement.

The attorney for GSA studied the Notice of Appeal filed by IBSS. The GSA attorney met with the Chief Procurement Officer of GSA, and the staff involved in the attempt to acquire the copier machines that are the subject of this appeal. The attorney for GSA met

1 with the attorney for IBSS. As a result of investigation, research, and advice from its
2 attorney, GSA has accepted the rational and reasoning of IBSS in this matter.

3 There was a meeting of the attorneys concerning this question. The attorneys for GSA
4 told the attorney for IBSS that we agreed with him. We advised him that we were going to
5 follow his reasoning and move the process forward using the sealed bid method of source
6 selection as required by 5 GCA § 5210(a). The GSA has been advised that this is the method
7 that is to be utilized for purchases that are anticipated to be made from the Federal Supply
8 Schedule Program (FSSP). The Agency Report, filed herein on October 10, 2008, is clear on
9 this.

10 As a result, IBSS has been accorded every remedy it has requested in its Notice of
11 Appeal. There is no dispute to be resolved by a Hearing Officer. This matter is now moot.
12 *Carl Corp. v State of Hawaii, Dept. of Education*, 93 Hawaii 155, 997 P.2d 567 (2000).
13 *Thomas Sysco Food Service v. Martin*, 983 F.2d 60 (CA6, 1983). GSA, in its Agency
14 Report, at pp 3-4, provided a response to every request for relief set out by IBSS. Now, after
15 receiving 100% of the relief requested, IBSS asserts that it deserves more.

16 *Carl Corp., supra*, is like the present matter. In *Carl* the appellant protested a contract
17 awarded to a competitor for automation services for the state public library system. Carl
18 Corporation sought the rescission of the contract (and ultimately, award of the contract to
19 itself). Initially, a Hearing Officer ruled that he did not have the authority to act on the
20 request and Carl Corporation appealed to court. The trial court ordered the Hearing Officer
21 to take the appeal and either rescind the contract or ratify the contract. Before the Hearing
22 Officer could take up the matter again, the State terminated the questioned contract, as terms
23 of the contract permitted, with the intent to redo the entire contracting process. Once the
24 contract was terminated, the Hearing Officer determined that the matter was moot. The
25 Hearing Officer reasoned that could not ratify a contract that no longer existed, and could not
rescind for the same reason. On appeal, the Supreme Court of Hawaii agreed, stating that
mootness is properly invoked where "events ... have so affected the relations between the

1 parties that the two conditions for justiciability relevant on appeal – adverse interest and
2 effective remedy – have been compromised.” *Application of Thomas*, 73 Haw. 223, 226, 832
3 P.2d 253, 254 (1992) (quoting *Wong v Board of Regents, University of Hawaii*, 62 Haw. 391,
4 394, 616 P2d 201, 203-04 (1980).

5 GSA would submit that those same two conditions of justiciability are lacking in this
6 matter as well. First, there are no longer any adverse interests between IBSS and GSA. GSA
7 is doing what it has been requested to do. Further, IBSS has not only an effective remedy; it
8 has the remedy it has requested.

9 There is a settled exception to the rule that appellate courts will not consider moot
10 questions. If the question raised concerns important public interests, and it is likely that
11 similar questions arising in the future would, as well, become moot before an authoritative
12 determination can be made, the exception to the mootness doctrine is invoked. *Los Angeles*
13 *County v. Davis*, 440 US 625, 99 S.Ct. 1379, 59 L. Ed.2d 642 (1979); *Wong, supra.* at 394.
14 Generally, courts have been concerned about questions that evade review because of the
15 passage of time and are capable of being repeated. These factors are not present here.

16 IBSS would assert that there has been subterfuge on the part of GSA. See Comment
17 On Agency Report, p.1. There has never been any subterfuge. GSA is required to purchase
18 from FSSP “when the cost to the General Services Agency is less by 10% than from other
19 contractors.” 5 GCA § 5122. This has always been understood to mean that GSA is required
20 to purchase through FSSP unless another contractor could sell the same supply or service for
21 within 110% of the FSSP price. The question is: How to determine whether there is another
22 contractor offering the supply or service within 110% of the FSSP price.

23 GSA proceeded on the basis of determining whether the supply or service was available
24 from “another contractor” through a Request For Quotations. This was both a saving of time
25 and expense for both the contractor and GSA. Simply stated, a Request For Quotation is less
expensive and less time consuming than a Request For Bids. The end result is the same. If a
contractor has the supply or service for less than 110% of FSSP then GSA has been able to

1 determine that a purchase is not to be made through FSSP. There is simply no reason for
2 subterfuge, and there has been no subterfuge.

3 IBSS goes on to assert that GSA has “washed its hands of the substantive issues of this
4 Appeal.” Comment On Agency Report, p.2. Actually, I thought we were agreeing with
5 IBSS, and then doing what had been requested of us. If this is “washing our hands” I can
6 only imagine what IBSS would accuse us of if we had dared to disagree with them. But alas,
7 we do not disagree with them. We agree. So where in all of this is the question to be
8 decided by the Hearing Officer.

9 IBSS states that GSA’s Agency Report “is unjust and unfair to Appellant and a waste of
10 resources and prophylactic benefits of the procurement appeal and review process.”
11 Comment On Agency Report, p.2. It is unclear from IBSS where the injustice and unfairness
12 is to be found. Again, it must be stated that IBSS succeeded in its efforts. It is difficult to
13 comprehend the injustice and unfairness in this. As to a waste of resources, however, I
14 would point to the regulations adopted by the Public Auditor that state that “[t]hese rules
15 shall be construed and applied to provide for the expeditious resolution of controversies in
16 accord with the requirements of 5 GCA Chapter 5, (Guam Procurement Law) and the Guam
17 Procurement Regulations...” 2 GAR Div. 4 §12101. The just, fair and expeditious
18 resolution of this controversy is to recognize that the controversy is over.

19 GSA respectfully requests that the Public Auditor recognize that this matter is resolved,
20 recognize that IBSS has received all of the relief it has requested in its Statement Specifying

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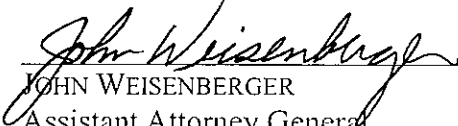
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24 Ruling Requested, p. 23, Notice of Appeal, and that this matter be dismissed.
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1 GSA respectfully requests that the Public Auditor recognize that this matter is resolved,
2 recognize that IBSS has received all of the relief it has requested in its Statement Specifying
3 Ruling Requested, p. 23, Notice of Appeal, and that this matter be dismissed.

4 Dated this 20th day of October, 2008.

5 OFFICE OF THE ATTORNEY GENERAL
6 Alicia G. Limtiaco, Attorney General of Guam

7 By: 
8 JOHN WEISENBERGER
9 Assistant Attorney General