John Thos. Brown
General Counsel for Appellant
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
BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of TOWN HOUSE DEPARTMENT STORES, INC., dba ISLAND BUSINESS SYSTEMS & SUPPLIES, APPELLANT	APPELLANT'S HEARING BRIEF DOCKET NO. OPA-PA -08-012

INTRODUCTION:

The Protest below and this Appeal from it were brought about because GSA adamantly proceeded and intended to purchase brand name or equal copier equipment from the Federal Supply Schedule in disregard of the mandated methods of source selection and other provisions of the Procurement Act. The requisition below, critically examined, reveals a nonchalant indifference to and defiance of the procurement process and the policies of the Procurement Act by GSA and the purchasing agency. These are the substantive matters raised by Appellant in connection with the Protest below and the within Appeal.

Regrettably, this behaviour has been authorized if not facilitated by a line of Attorney General opinion stretching back years. More regrettably, as stipulated herein, the Attorney General's office has not retracted that authority; it is very much alive and well.

This Hearing will involve broadly two opposing postures, because GSA has not raised a defence of the substantive issues of this Appeal.

Appellant desires that the substantive issues have a final determination and Decision by the Public Auditor.

GSA desires to avoid such a Decision on the substantive issues by taking the unilateral tactical manoeuver, late in the course of this Protested solicitation, to select a different method of source selection than the one it has claimed is its right to make in the Protested procurement action below, for the limited purpose of conducting this particular requisition.

GSA reckons that simple tactic makes the whole Appeal moot. Appellant reckons that tactic is merely symptomatic of the gamesmanship that GSA has exhibited throughout this entire requisition to deny Appellant a full resolution of the substantive issues of its dispute arising from and in connection with its Protest below.

This case is about the power of GSA or a purchasing agency to elect, in its own discretion, when to abide by the Procurement Act and when not to. Below, it elected not to. Herein, without defending or abandoning the action below, it now says it will do so, at least and only so far as the instant requisition is concerned.

Appellant believes that the failure to resolve the substantive issues while this matter is properly before the Public Auditor for review would sustain a detrimental legal challenge to the integrity of the procurement process which it is the duty of the Public Auditor to address. Thus, it believes that it would be error to dismiss this Appeal without rendering a Decision on the substantive matters raised.

The Public Auditor has a duty to use her jurisdiction to promote the integrity of the procurement process, which is undermined by GSA's claim to and use of that discretion.

A. Principal Relevant Law:

1. Jurisdictional Basis of Protest:

> "Any actual or prospective bidder ... who may be aggrieved *in connection with* **the method of source selection** ... may protest to the Chief Procurement Officer...." (5 GCA §5425(a); emphasis added.)

2. Jurisdictional Basis of Appeal:

> "A decision [of the Chief Procurement Officer] ... may be appealed by the protestant, to the Public Auditor...." (5 GCA §5425(e).)

3. Jurisdiction of the Public Auditor:

   a. "The Public Auditor shall have the power to review and

> determine *de novo* *any matter* properly submitted .... The Public Auditor's jurisdiction ***shall* be utilized to promote the integrity of the procurement process** *and* **the purposes of [the Procurement Act].**" (5 GCA §5703; emphasis added.)
>
> b. Jurisdiction extends to "[a]ny *determination* of an **issue**" as well as "any determination regarding the **application** *or* **interpretation** of the procurement law or regulations". (5 GCA §5704; emphasis added.)

B. Factual Background and Overview:

This Protest was brought, in the first instance, to contest GSA's use of a Request for Proposal as a method of source selection for a requisition of copiers when the magnitude of the RFQ revealed that a competitive sealed bid method of source selection was required.

Then, in the CPO's letter denying the Protest, GSA raised *another* matter when it revealed that what it was *really* doing was conducting an entirely unique method of source selection that it had devised itself. There is no mention of this method either in the Procurement Act or Regulation.

This is an outrageous abuse of authority and interpretation of the Procurement Act, a matter Appellant vigorously objected to and extensively argued in its Notice of Appeal. Nevertheless GSA has the considered, long standing authority of the Attorney General to back it up.

Although the RFQ was issued before the date of the controversial Opinion specifically relied upon in denying the Protest, that Opinion cites prior AG authority in support of GSA's actions.

It would appear GSA has had the backing of the Attorney General's office and managed to avoid any critical examination of its Federal Supply purchase practices for many years. It certainly wants no such examination in this case. (And any review of the Procurement Record would reveal many reasons why it would not want any critical examination of what went on behind the scenes of this particular procurement, either.)

After denying the Protest and after this Appeal was filed, GSA decided to change tact once again, to conduct this requisition by competitive sealed bid.

This is a thimble game and GSA's motion to dismiss is brought to tempt the Public Auditor to turn over an empty thimble rather that the thimble with the substantive issues underneath, which neither the AG nor GSA have conceded.

Appellant argues this refusal to concede the substantive issues raised in connection with the

Protest and Appeal is a direct and ongoing threat to the integrity of the procurement process.

GSA must not be allowed to shift the pea from thimble to thimble to avoid an examination of it.

The Attorney General has joined with GSA to concoct implied authority for an alternative method of source selection that is not mandated or even mentioned in the Procurement Act. Then they have usurped procurement powers GSA does not possess to turn that implied authority into a procurement method for making direct Federal Supply purchases that blatantly disregards the policies and purposes of the Procurement Act. Thus, they challenge the scope and nature of the procurement process laid out in the Procurement Act.

But neither GSA nor the Attorney General's office have risen to utter one word in defence of their claimed authority, the authority they *relied on* in denial of the Protest below. Having put Appellant to the task of challenging that claim, they now seek to have this case dismissed without a review of that challenge, without a concession of their claim.

The Public Auditor has a greater and overriding responsibility in the discharge of her jurisdiction of this Appeal than the simple disposition of this one requisition. "The Public Auditor's jurisdiction **shall** be utilized to promote **the integrity of the procurement process** and the purposes of [the Procurement Act]." (5 GCA §5703)

The Public Auditor cannot disregard the challenge to the procurement process posed by the method concocted and chosen by GSA under the authority of the Opinion of the Attorney General. She has both the authority and the obligation to provide her oversight of this Appeal to confront the challenge raised by GSA's *ad hoc* implementation of an alternative method of source selection. Her failure to do so would condone the challenge to the authority and responsibility of her Office.

Before passing on to the arguments, Appellant notes that the objectionable Attorney General Opinion and the GSA procedure did not take into account the role that proper specifications play in weighing whether the implication and use of agency powers is consistent with the Procurement Act and its policies. On the other hand, however, the Attorney General has not asserted that those specification requirements do not apply to GSA, in contrast to its argument that competitive sealed bidding does not apply to FSSP purchases. Therefore, Appellant has accepted the Attorney General's assurances that GSA will draft specifications that comply with the competitive requirements of the procurement law and regulations, with the implication it will do so from now on, so does not press the issue of the content of the specifications on Appeal, though the issue of how the specifications came about may be implicated by an examination of the improper procurement process utilized by GSA and the purchasing agency in the Protested procurement below.

C. Arguments:

1. This argument concerns the substantive issues raised, whether GSA can ignore the methods of source selection mandated by the Procurement Act and otherwise skirt the procurement processes as it did below, thereby undermining the integrity of the procurement process, simply because a requisition might be sourced from the Federal Supply Schedule? Appellant argues it cannot. The Attorney General's line of opinions says it can.

The Government of Guam has sometimes chosen to purchase copiers and other products by competitive sealed bidding, and sometimes chosen to purchase those exact same products from the Federal Supply Schedule without going through the processes of any of the authorized methods of source selection mandated by the Procurement Act.[1] It thereby exhibits its own discretion when to abide by the Procurement Act.

The Procurement Record reveals that the requisition herein began with apparently unsolicited proposals prepared by Xerox for particular copiers, to be delivered to various departments within the Department of Revenue and Tax. The procurement did not proceed, however, by way of competitive sealed bid, as would be required by 5 GCA §5219(e). Indeed, the Procurement Record reveals many failures of the procurement process connected with this requisition.

The Rev&Tax requisition forms were then prepared and forwarded to GSA for procurement. The requisition forms described the specifications by Xerox brand name and model, as contained in the Xerox proposals. "Xerox Corporation" is the stated "JUSTIFICATION" for each requisition, but there is no sole source determination. The requisitions indicate the items are covered under a particular Federal GSA contract.

The day after receipt of the requisitions, GSA issued RFQs to three select businesses, including Xerox and Appellant. The RFQs required responsive quotes within four days. The specifications in the RFQs did not name "Xerox" as the brand name but did name the Model Number (which could only be Xerox), coupled with "or equal".

The RFQs contained no mention that they was intended only to generate mere price information, without any intent to purchase, nor that they were issued to facilitate GSA's direct purchase of Federal Supply products. The RFQs wanted a 60-month lease of the items, but failed to specify any terms of the lease.

Appellant protested the RFQ as an improper method of source selection for this requisition. In

---

[1] See, 9/9/08 letter from CPO Acfalle denying Appellant's Protest, second page, regarding her request for procurement information from GPA: "Two (2) machines are identical to the copier machines that GSA is soliciting...."(Procurement Record, Tab 1.)

denying Appellant's Protest, GSA advised it was doing this pursuant to a procurement procedure that it had adopted, and relied on an Attorney General Opinion that suggested that this procedure was just hunky dory.

Now that this Appeal has been brought, GSA has unilaterally and belatedly determined to conduct this requisition by competitive sealed bid.

The fickle changes of procurement tactics by GSA in this Appeal simply represents a continuation of its past practice of sometimes choosing to abide by the Procurement Act and sometimes deciding to go its own way.

The jurisdictional basis of Appellant's Protest was its complaint that GSA was required to conduct this requisition by the competitive sealed bid method required by 5 GCA §5210(a) rather than RFQ, coupled with issues relative to the scope and nature of the specifications. (5 GCA §5425(a).) That jurisdictional basis follows to support this Appeal. (5 GCA §5425(e).)

But, in denying its Protest, GSA expanded the issues by introduction of a hidden agenda, which Appellant had only suspected. .

Neither GSA's Agency Report nor its Rebuttal to Appellant's Comment on Agency Report defended nor objected to the matter of the GSA Federal Supply procurement method being submitted. Indeed, it hardly could since GSA's denial of the Protest was based entirely on the AG Opinion to that effect. GSA simply prefers that the Public Auditor now ignore this matter rather than render a Decision on it.

In reviewing this Appeal, the jurisdictional power of the Public Auditor broadens beyond the initial narrow jurisdictional basis of the Protest to include *any matter* properly submitted (5 GCA §5703). Since the controversial issue of GSA's practice of ignoring mandated methods of source selection when making Federal Supply purchases, arose from and was raised in connection with Appellant's Protest, it is properly before this review Hearing

Moreover, the Public Auditor's jurisdiction carries with it an even broader *duty* to *utilize* her jurisdiction for the protection of the integrity of the Procurement Act and the procurement process (5 GCA §5703).

That process is clearly undermined by the continued refusal of GSA to concede[2] that Federal

---

[2] In the Rebuttal to Appellant's Comment on Agency Report, at page 2, GSA almost concedes the matter, saying, "[a]s a result of investigation, research, and advice from its attorney, GSA has accepted the rational and reasoning of IBSS in this matter." But GSA based its decision denying Appellant's protest on the Attorney General Opinion at the core of this Appeal and, despite its advice to GSA, the Attorney General's office has stipulated herein (joint

Supply Schedule purchases must be conducted only as specified by the Guam Procurement Code, which makes no exception for, or even provides any mention of, an alternative method of source selection for Federal Supply purchases[3].

The AG Opinion declares that competitive sealed bidding is incompatible with and not an intended application in connection Federal Supply purchases[4]. It is within the jurisdiction and power of the Public Auditor to specify the appropriate *application* of which method to apply to Federal Supply purchases(5 GCA §5704) , and it is essential for the integrity of the procurement process that the Public Auditor rule on the novel method adopted by GSA.

The Public Auditor has the jurisdictional authority to *interpret* the Procurement Act and Regulations (*id.*) and to offer her own Opinion whether, as the Attorney General has opined, 5 GCA§5122 provides an authorized alternative method of source selection[5]. It is essential for the integrity of the procurement process that the Public Auditor *interpret* §5122 to determine if it is indeed implicit authority for an alternative method of source selection. Failure to do so opens the door to any number of other claims to conduct government purchases by some other creative method "other wise authorized by law", in the language of 5 GCA §5210(a)[6], as argued in the

---

stipulation 10) that it has not formally retracted its Opinion.

[3] The AG Opinion agrees: "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." (Page 5,)

[4] The AG Opinion says, "An examination of the government's procurement rules show that the competitive sealed bidding process was not intended for use to compare prices." (Page 6.Cf, 2 GAR §3109(n)((1), relative to competitive sealed bidding: "[t]he contract is to be awarded "to the lowest responsible and responsive bidder".)

[5] The AG Opinion says, "[O]ne 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 consider that 5 GCA §5122, authorizing procurement through the Federal GSA, is one such other valid law...." (Page 5.)

[6] See, *In re: Request of Governor Felix P. Camacho Relative to the Interlpretation and Application of Sections 6 and 9 of the Organic Act of Guam* 2006 Guam 5, at ¶¶ 76 - 80, to the effect that legislative language "otherwise providing" does not imply a duty to act; *GFT v. Perez* 2005 Guam 25, at ¶ 414 et seq., to effect that grant of authority does not mandate duty to act; *Bank of Guam v. Riedy*, 2001 Guam 14 at ¶ 23, to effect that a statute merely reflecting a government policy does not create a duty of performance.

AG Opinion.

Likewise, the Public Auditor has the jurisdictional authority to interpret the Procurement Law and Regulations to independently assess whether, as the AG Opinion[7] declares, GSA's power to adopt operational procedures governing the internal functions of GSA's procurement operations, gives it authority to adopt a procurement method independent of the procurement methods specified in the Procurement Act, to purchase directly from the Federal Schedules[8].

If GSA does possess such power to promulgate procurement regulations, the Public Auditor has the authority to independently determine whether the "procedure" adopted by GSA is, as the AG opines, "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 ...."

Failure to place limits on GSA's interpretation of its power to adopt operational procedures, or at least refute them in this case, opens the door to wholesale rewriting of the Regulations by GSA, to the detriment of the integrity of the procurement process.

The AG Opinion, and its predecessors, undermines the express requirement of the Procurement Act to prefer competitive procurement processes, and the competitive sealed bid method of source selection in particular, and relies on dubious implications of authority, illogical conclusions and is *intended* to subordinate the preferred method of source selection to an ill-defined, awkward and non-competitive procurement procedure, as extensively argued in Appellant's Notice of Appeal (so not repeated here).

There could hardly be a more blatant repudiation of the Procurement Act and attack on the integrity of the procurement process.

5 GCA §5001(b)(8) declares that it is the **policy** of the Guam Procurement Act "to require public access to *all aspects* of procurement *consistent with* the *sealed bid* procedure *and* the integrity of the procurement process. (The paramount policy preference for sealed bids is emphasized in 2 GAR §1102(7), which italicizes "sealed bid" in the quote above; other emphasis added.) GSA's Federal Supply purchase method denies such access.

5 GCA §5010 declares an explicit "**Policy** in Favor of Planned Procurement", mandating that:

---

[7] "The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him." (2 GAR §12103(a); also, no prior determination is final or conclusive on the Hearing Officer (2 GAR §12109).)

[8] See Argument 5 of the AG Opinion, beginning at page 7.

> "All procurements of supplies and services shall, where possible, be made sufficiently in advance of need for delivery or performance to promote maximum competition and good management of resources. Publication of bids and requests for proposals shall not be manipulated so as to place potential bidders at unnecessary competitive disadvantage. Except in emergency situations, lower price bids are generally preferable to shorten delivery or performance bids." (Emphasis added.)

GSA's Federal Supply purchase method facilitates impulse and convenience over planned procurement, and *non*competitive source selection over competition.

Of the specified allowable methods of source selection, the competitive sealed bid method is the mandated preferred choice. (5 GCA §§5210(a) and 5211(a); 2 GAR §3109(b): "Competitive sealed bidding is the preferred method for the procurement of supplies, services, or construction.")

The *Federally* granted privilege (GovGuam cannot and does not "authorize" such purchases) to allow GovGuam to purchase off the Federal Supply Schedule is no free trip around the principles of the local procurement process, either. The Federal Regulation applicable to the FSSP itself underscores the primacy of the *Guam* Procurement Act[9] and insists on similar principles of competition and planning[10] found in Guam procurement policy, law and regulation.

And Guam procurement law makes no exception from its prescribed procurement methods for

---

[9] Section 8.404(b) of the applicable Federal Regulations, entitled "Use of Federal Supply Schedules", requires that "[t]he contracting officer, when placing an order ..., is responsible for applying *the regulatory and statutory requirements applicable to the agency for which the order is placed* ...." (Emphasis added.)

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

> (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.

[10] See, Section 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, ...

"(b) Encouraging offerors to supply commercial items,...; and

"(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 ...." [And so on.]

the obvious Federal benefit granted to purchase from the Federal Supply schedule, 5 GCA §5004(b) declaring "This Chapter shall apply to *every expenditure* of public funds irrespective of their source, including federal assistance funds...."

It must be emphasized that Appellant does not wish to deprive Guam of that benefit. It merely strives to assure that Guam procurement policies, law and regulations are not ignored to do so. In fact, it proposed to the Attorney General an IFB contract clause consistent with competitive sealed bidding to achieve that goal.

To the extent that the much vaunted 5 GCA §5122 bears at all on this question, it simply places an additional stricture on such purchases, requiring no such purchase if there is another contractor prepared to offer an item within 10% of the Federal Supply Schedule price.

These various explicit policies, preferences, proscriptions and prescriptions ought not be subverted by strained implication or any perception of inconvenience. These matters have all been determined by law, and GSA's efforts to tinker with these issues or otherwise disregard them to its own ends, with or without the aegis of the Attorney General, calls out for the guiding authority of the Public Auditor.

Appellant has fully argued the legal points of its arguments in the Notice of Appeal, and GSA has offered no alternative, other than insistence on the authority of the Attorney General, which has not been retracted.

The Public Auditor's jurisdiction in this matter ***must*** "be utilized to promote the integrity of the procurement process and the purposes of [the Procurement Act]." (5 GCA §5703.) The Public Auditor should promote the integrity of the procurement process by stating, affirmatively and categorically, that there is no exception, expressed or implied, in the Procurement Act uniquely intended for Federal Supply purchases, therefore the expressly mandated competitive sealed bid method or other alternative specified in 5 GCA §5210(a) must be used for such purchases; and, that GSA is not authorized, by its limited power to adopt internal operational procedures, to adopt general procurement procedures.

2. Does the Public Auditor lose jurisdiction over this matter simply because GSA has agreed to abandon the Protested RFQ and open this particular requisition to competitive sealed bid? Appellant argues substantive and procedural issues are at stake requiring a Decision in this Appeal.

This Appeal requires a Decision and not dismissal because, substantively, it concerns matters of significance beyond the instant requisition. The Attorney General Opinion recites, under the category of "Statement of Facts", that

> "[t]he local GSA has been using Federal GSA contracts for many years to acquire supplies.... This practice has been called into question by the government's external auditors...."

This is an admission of a long standing and questionable practice. The outcome of this Appeal bears on and begs an answer to that questionable practice.

The Opinion cites, without objection or disapproval (indeed, with a hint of power of precedence and an implication of intent to expand on) a *prior* AG Opinion issued in 1991 that gives GSA the green light to disregard local procurement law when purchasing from the Federal Supply Schedule. That prior Opinion is cited on page 2 of the instant AG Opinion to say,

> "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."

Thus there is a long standing lore, fed by official opinions from the AG's Office, that GSA is possessed of some kind of legal immunity, free ride or privileged bypass of local procurement law when dealing with the FSSP. That lore is contrary to the FSSP regulations[11] in the first instance and, as argued at length in Appellant's Notice of Appeal, not substantiated by any critical interpretation of the Guam Procurement Act or Regulations.

A dismissal of this Appeal without Decision would leave that line of lore and AG authority unopposed.

Indeed, even if the specific 2006 Opinion relied upon by GSA in this case were withdrawn, the prior line of Attorney General reasoning would stand. This issue needs to be reviewed by the Public Auditor, and overruled *in toto*.

What are other agencies and other parties concerned with the procurement process meant to take away from the record of this Appeal if it is simply dismissed without a reported Decision? It is reasonable to believe that they will draw the conclusion that Appellant has failed in its underlying arguments. They must draw the conclusion that the Attorney General's line of authority *continues* to give GSA, and by extension other agencies, a free bypass around procurement law and process, straight to the Federal Supply Schedule, at GSA's whim.

They might easily conclude that the Public Auditor, by her silence in the face of her dismissal of these disputed matters, condones or agrees with the substance of the AG Opinion(s). Is that the message the Public Auditor desires to convey? If it is, the Public Auditor should expressly

---

[11] Footnote 9, *supra*.

condone the Opinion and not leave it to conjecture. If it is not, the Public Auditor should distance herself from, distinguish or express her disagreement with the Opinion and interpret and apply the relevant Procurement Act and Regulations accordingly.

There are additional, procedural due process, considerations to GSA's mootness arguement. Consider how and when GSA's decision to drop direct purchase and elect a bid process came about.

At the time of the *Protest*, Appellant suspected but did not know[12] that the RFQ was being used to facilitate a non-competitive Federal Supply purchase[13]. It was only in denying Appellant's Protest that the CPO finally revealed the ulterior purpose of the solicitation was, in fact, to facilitate a Federal Supply purchase.[14] The Protest was denied because GSA asserted a claim of right and authority to disregard the mandated methods of source selection of the Procurement Act when conducting Federal Supply purchases, particularly the right to disregard the competitive sealed bid method.

Thus, the first opportunity Appellant had to directly address the matter of the applicability of the competitive bid method of source selection *in connection with Federal Supply purchases* was in the Notice of Appeal.

In its Appeal, Appellant extensively argued that the only authorized method of source selection for any Federal Supply purchase is competitive sealed bid. Appellant also extensively argued GSA has no power to adopt another method, taking exception to the AG Opinion claimed to be the basis of the Protest denial. These disputed matters have been properly submitted in this Appeal and are fully and substantively before the Public Auditor for Decision.

---

[12] The Protested RFQs are presented in the Procurement Record, Tab 9. They bear no mention of any intent to merely obtain price comparisons; nor do they disclose that there is no genuine intent to obtain the specified products from the vendor whose price quotation is sought. On their face, the RFQs appear to be good faith attempts to instigate a purchase of the specified copiers by RFQ; to the extent they do not dispel such appearance, they violate the requirement of Good Faith established by 5 GCA §5003.

[13] "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". (Protest, page 7.) "IBSS suggests that, to comply with Guam law and regulation it will be necessary to first conduct a fair and proper procurement, with fair and proper specifications, under competitive sealed bids, fairly evaluated. " (Protest, page 8.)

[14] "The intent of the General Services Agency (GSA) is to procure copier machines through the Federal GSA ...." (GSA's denial of protest, first page.)

It should further be pointed out that GSA did not decide to abandon the RFQ and adopt a competitive bid process for the instant requisition until *after* the Protest was denied, *after* the Notice of Appeal was filed. It finally did so in its Agency Report, where it carefully *limited its response*. GSA simply announced its determination to implement *this* requisition by competitive seal bidding[15] and ducked any defence of the substantive matters raised in connection with the Protest and Appeal, which Appellant had vigorously contested[16].

And, after GSA changed again, the first opportunity Appellant had to respond to *that* development was in its Comment on Agency Report, where Appellant criticized GSA's carefully limited response and supplemented its Request for Relief accordingly.

If GSA has any complaint about what matters the Public Auditor should decide and what matters is should avoid in this Appeal, the primary cause of that lies with the constantly changing field of play that GSA has itself designed since the Requests For Quotes were issued, Protested and Appealed

For its part, Appellant has claimed, from day one, that *any* purchase from the Federal Supply Schedule should be conducted by competitive sealed bid[17], and nothing that GSA or the AG have said or done since amounts to any acquiescence to the merits of that argument. Even if GSA has tried to get the dispute over the method of source selection applicable generally to Federal Supply purchases put on the back burner, it is still cooking away, and if it cannot be resolved in this Appeal, how will it ever be?

Appellant protested and appealed the method of source selection that GSA has created and

---

[15] From "Statement Answering Allegation of Appeal" in GSA's Agency Report: "1. GSA agrees that the acquisition of the supply and service items *covered by this* Appeal ... *specifically identified* in [the particularly numbered RFQs] ... shall be acquired by the use of the competitive sealed bid method of source selection specified in 5GCA §5210(a)." Also, see "Statement of Anita Cruz" filed therewith: GSA is currently seeking to respond *to the requisition requests from the Department of Revenue and Taxation* [specifying particular Requisition Numbers] by the competitive sealed bidding method ...." (All italics added.)

[16] From "Ruling Request" in GSA's Agency Report: "A. IBSS has requested that the Public Auditor rule that FSSP purchases be conducted by the competitive sealed bid method. GSA is pursuing *these* purchases by competitive sealed bid." (Italics added.)

[17] From the Ruling Requested in the Notice of Appeal: "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 request for relief concerned purchase*s*, plural, not *this* purchase.

elected to use for Federal Supply purchases whenever it chooses. This Appeal is clearly about and rises in connection with that *method.* Such a significant issue must not be allowed to go unexamined by the fickleness of GSA's handling of this requisition.

Apart from the fact that the Public Auditor's jurisdiction and power of review is, as briefed above, broader than the usual civil court or administrative review body where "case or controversy" rules are relevant, because her jurisdiction requires an *additional* proactive duty to promote the integrity of the whole *procurement process*, GSA's mootness argument is defective for two additional procedural reasons.

First, it would be unfair and an abuse of due process to pull the rug out from under Appellant's Protest and Appeal. GSA claims that Appellant has now got all that it asked for, but that's not true. It asked for more than that this requisition be conducted by competitive sealed bid. Its request for relief asked that all Federal Supply purchases be subjected to competitive sealed bid.

Although the Public Auditor has the jurisdiction and authority to *interpret* the Procurement Act[18], Appellant did not bring its Protest directly as a Declaratory Relief action. The question s regarding the appropriate method of source selection for Federal Supply purchases was properly raised and submitted *in connection with* its protest over GSA's chosen method of source selection[19].

To the extent there has been *any* acquiescence over that question on GSA's part, it did not come in response to the Protest, which would have mooted this Appeal. Rather, GSA categorically denied Appellant's Protest, based on a thorough, if faulty, legal opinion of the Attorney General. And it did not come until *after* Appellant was put this Appeal.

If an Appellant prevailed on review because the respondent fully capitulated to Appellant's arguments, the appropriate action, on review, is to give the Decision to Appellant, not take it away from him. And where is there due process where, as here, the defence only capitulates to part of the claim, carefully excising the substantive issues?

Where is the justice if one party can simply unilaterally cause the dismissal of an action after putting the other party to great time and expense? Is that not prejudice? That is not the result in

---

[18] "Any decision of the Public Auditor, including any determination regarding the application or interpretation of the procurement law or regulations, shall be entitled to great weight and the benefit of reasonable doubt...." (5 GCA §5704.)

[19] "Any actual or prospective bidder ... who may be aggrieved in connection with the method of source selection ... may protest...." (5 GCA §5425(a).)

civil matters[20]. In the procurement process, this can be analogized to the difference between cancelling an IFB before bid opening and after bid opening[21]; clearly the *equities* are different when *the times* for making decisions are different.

Appellant argues GSA has taken IBSS too far down the protest road to dump it now. It should pay the fare and it is only fair that Appellant get a Decision on the substantive issues.

Second, GSA's acquiescence is a mirage; it bears the illusion of agreement with Appellant's Protest but does not actually capitulate to the reasons for GSA's denial of the Protest nor the arguments in the Notice of Appeal.

In GSA's Rebuttal to Appellant's Comment on Agency Report, GSA's counsel who prepared the Rebuttal mentioned, at page 2, that GSA's attorneys met with IBSS' counsel. It was mentioned that, in the meeting, the AG's office agreed with IBSS' counsel and advised such counsel GSA would move the process forward, using competitive sealed bidding.

That is, indeed, *part* of the story.[22] After and based on the meeting, Appellant's counsel requested the Attorney General to stipulate to withdraw the Opinion upon which GSA relied to deny Appellant's Protest. The Attorney General declined to do so, saying that would go too far. In response, the AG proposed stipulations that were no more or less than the actions taken in its Agency Report, limiting its reply to the instant requisition. The Opinion still has not been retracted, as stipulated herein. Clearly the issue remains at large.

The controversial AG Opinion is inextricably connected to the Protest. A back down on this one requisition does not abandon the full field of the controversies connected with and arising from the denial of Appellant's Protest, including the various AG Opinions upon which the denial rests. The issue of this particular requisition is only one of the many matters submitted in this Appeal, and the Public Auditor should Decide *all* the matters submitted.

---

[20] See, GRCP 41; cf, 2 GAR §12104(c)(9) concerning a party's obligation to continue a Procurement Appeal once filed.

[21] See, *In the Appeal of Pacific Security Alarm, Inc.*, OPA-PA-07-009. To some extent the parties end up at the same place, but there are meaningful distinctions calling for different actions due to separate time frames.

[22] To the extent that meeting might be construed to be a settlement meeting (which Appellant does not concede) and the comments made therein or arising therefrom protected, GSA's counsel has, by introducing comments from the meeting in its Rebuttal, waived the privilege and opened the door to clarifying and further evidence associated with that meeting.

Furthermore, the "facts" of this case are not limited to the particulars of the requisition, as GSA would try to frame the argument.

The facts include the fact and substance that GSA has adopted procurement procedures to implement an alternative method of source selection not found in nor authorized by the Procurement Law or Regulation. Appellant has objected to that fact in connection with GSA's denial of its Protest. GSA has admitted to no action to defend, abandon or withdraw those procurement procedures.[23]

The facts by which Appellant has been aggrieved includes the fact of as well as the substance of the disputed AG Opinion; the Opinion was, after all, the stated reason for denying the Protest. It is a stipulated fact that the Opinion exists without retraction. This is an ongoing affront to the application and interpretation of the Procurement Act and the integrity of the procurement process, which must be dealt with.

That fact implicates concern that other purchasing agencies, not before or subject to the jurisdiction of the Public Auditor in this Appeal, will adopt the rationale of the Attorney General Opinion(s) and conduct Federal Supply purchases, and perhaps other requisitions, without regard to competitive sealed bid processes or other mandates of the Procurement Act. They serve as encouragement to other agencies which have been delegated the powers of the CPO to adopt other unique procurement procedures. They are pertinent to whether GSA's external auditors will or can continue to object to Federal Supply purchases they have considered in the past to be questionable.

The Public Auditor cannot simply dismiss this case without taking cognizance of all of these facts and concerns. The disputed matters raised by the AG Opinion(s) have been properly submitted, they are within the scope and argument of the Protest and Appeal and are integral to a full disposition thereof, and they bear on the greater need for adherence to the Procurement Act and uniformity across the entire span of Government of Guam purchasing; that is to say, the integrity of the procurement system hangs on the disposition of this Appeal, not merely the outcome of this particular requisition.

Decisions of the Public Auditor are expected to build up a body of procurement law to provide guidance on the application and interpretation of the Procurement Act. "Determinations" of the

---

[23] It is noted that the Attorney General has advised GSA that the competitive sealed bid method "is to be utilized for purchases that are *anticipated* to be made from the Federal Supply Schedule Program (FSSP)". (Rebuttal to Appellant's Comment on Agency Report, page 2; italics added.) See however circumscribed affidavit of Anita Cruz at Footnote 15, *supra*. Furthermore, the actions of GSA and the AG to limit the reach of this Protest and Appeal, and the failure to retract and disavow the Opinions on which the denial of Protest are based, speak louder than words.

Attorney General are also part of that body of law[24], but the "Decisions" of the Public Auditor are determined *de novo*[25] regardless of the Attorney General Opinion, and "entitled to great weight and the benefit of reasonable doubt"[26]. A dismissal without Decision fails to add to that guidance, and consideration of that should be made before exercising the discretion to dismiss this Appeal without a Decision being rendered.

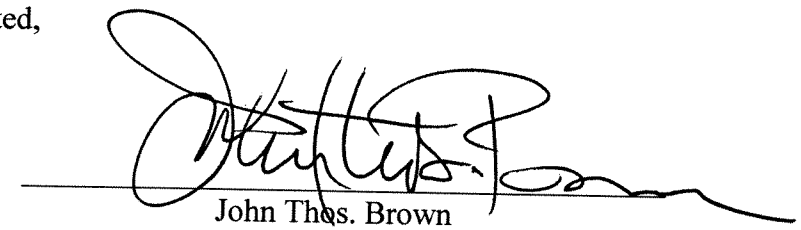
But when, as here, there is the added element of claims to implied authority, interpretation and application which are contrary to procurement policies and simply incompatible with the *express* mandates of the Procurement Act, or at least very arguably so, then the integrity of the Procurement Act and the procurement process is undermined and the Public Auditor has a positive legislative duty to bring the full weight of her jurisdiction to bear on the matter. She not only should render a Decision on the merits of all matters raised in this Appeal, she must do so.

D. Conclusion:

GSA does not seek to defend, resolve or address the substantive disputes raised in this Appeal. It merely desires to engage in procedural gamesmanship of avoidance. The Procurement Record and course of events in this Appeal reveal casual disregard of competitive procurement policies and great mischief undertaken by GSA under cover of the Opinion of the Attorney General. GSA offers no categorical amends, reserving to itself the power and discretion when and whether to ride on its own arrangements to bypass the bid process. That defiance can only undermine the integrity of the procurement process.

The Public Auditor has a legislative mandate to promote the integrity of the procurement process. Refusal to categorically confront and decide the challenge to the procurement process which is raised in this Appeal would be to shirk that duty, and that would be highly uncharacteristic of the Public Auditor.

Respectfully submitted,



John Thos. Brown
General Counsel for Appellant

---

[24] See, 5 GCA §5150 (Duties of the Attorney General).

[25] 5 GCA §5703.

[26] 5 GCA §5704.