

believed to be in conflict with law and the taxpayers' best interests (see letter to Cenzon attached hereto as Exhibit "A"). Yet the Governor, acting upon advice of his own legal counsel, believes the settlement to be legitimate and wishes to resolve this procurement appeal on that basis and intends to intervene in this matter without representation by the Guam Attorney General in order to achieve this settlement. Therein lies the present conflict of positions.

The resulting substitution of attorneys and entry of appearance by alternate legal counsel for the Governor and DOA, with the Attorney General remaining in this matter in its own right pursuant to its statutory mandate, is warranted to insure the integrity of the procurement process and its common law powers to enforce proper government spending in this procurement appeal in terms of GovGuam's fiduciary relationship with the taxpaying public of Guam.

Facts recited in this Memorandum can be supported by evidence at the continuation of the hearing on the merits of this Appeal.

ARGUMENT

I. Motion to Vacate Procurement should be decided before settlement is considered.

In this procurement appeal, the Attorney General has raised certain instances of impropriety by the Appellant in its 14 June 2012 Verified Motion to Vacate Procurement supported by declarations of Bryan Cruz filed 28 June, Tom Ashe filed 3 July and Ed Cruz filed 5 July. Also in this proceeding evidence is emerging of Appellant's intentional disruption of critical GovGuam accounting functions by

deactivation of GovGuam's Application Program Interface during the first part of 2012 for the purpose of pressuring the Government to award Appellant the solicited point of sale contract. (see p. 9, Section III hereinbelow).

Having raised evidence of illicit practices by Appellant in this Appeal is consistent with the Guam procurement law and justifies the Attorney General to participate further in this matter.

When for any reason collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General. 5 GCA §5246.

The Public Auditor has reserved ruling on the motion to vacate procurement pending presentation of evidence by the Attorney General, which has yet to commence.

Should the Public Auditor, after hearing the evidence in support of the allegations of impropriety, grant the motion to vacate, it would thereby render the Procurement void would have the effect of nullifying the Appeal, so there would be nothing to settle.

Such a favorable ruling would vitiate the procurement, rendering it legally null and void.

vacate, vb. 1. To nullify or cancel; make void; invalidate.
Black's Law Dictionary, 8th Ed.

Consequently, the Public Auditor should hold settlement matters in abeyance until it adjudicates the strength of the evidence to be presented in support of the Attorney General's motion to vacate the procurement.

II. Statutory Role of Attorney General in Procurement Proceedings.

In the procurement of supplies and services by the government of Guam, the Attorney General has mandatory roles determined by statute. For example, the Attorney General serves as legal counsel and provides necessary legal services to the General Services Agency. 5 GCA §§ 5150 and 5118.

The roles of the attorney General in procurement are further denominated in other sections of procurement law:

Information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the General Services Agency, the Department of Public Works or the purchasing agency without prior written consent by the bidder or offeror, but may be disclosed to the Attorney General at any time. 5 GCA §5230(b).

III. Settlement Agreements proposed by the Governor are of questionable legality.

Apparent illegalities in the Agreements that the Attorney General is being requested to approve in the proffered settlement of *Appeal by Data Management*

Resources:

A. The Procurement is itself unlawful.

The procurement appeal itself stems from the effective cancellation of a Request for Proposals seeking to acquire a second Point of Sale software system and related hardware. Appellant was the only offeror in response to the solicitation. The records indicate that the Government had identified approximately \$383,000.00 for the software and equipment. The offeror's first offer was to provide the items needed for

page 4 of 16 pages

approximately \$3.2 Million. After some negotiation with Appellant, the Government reduced the items it was attempting to purchase and the price of those items reduced the offer to \$2.2 Million. Ultimately, at the request of the government, Appellant made a best and final offer of \$1.8 Million. The Government rejected this best and final offer and cancelled the solicitation on the correct basis that it did not have adequate resources to make the acquisition.

In response to the procurement cancellation, Appellant protested this action, then subsequently appealed denial of the protest. In the course of the investigation by the Office of the Attorney General there were numerous concerns that were raised about this particular procurement. Those concerns include:

- The apparent inability of the General Services Agency to provide a complete procurement record in this matter.
- A “counter-offer” by the Chief Procurement Officer on 28 September 2012 of \$2.2 Million communicated to Appellant as the sole offeror under circumstances, in which there was never more than approximately \$383,000.00 for the acquisition, and no evidence is found that such a counter-offer was ever approved by, let alone made known to, the head of the agency (Department of Administration) acquiring the software and hardware.
- A record that indicates that Bank of Guam as one of two prospective offerors withdrew from the process because it could not be provided certain ‘source code’ information, professed to be owned by Appellant, the other offeror, and was then unable to effectively respond to the solicitation.

page 5 of 16 pages

- The existence of a fiber-optic cable between Appellant's headquarters and the computer array of the Department of Administration's central data base building (about two blocks away) that evidence indicates would allow Appellant to gain uncontrolled access to proprietary and confidential information of the Government that, if available to Appellant, would place it at a anti-competition advantage over other offerors, and with the Government in any negotiation leading to a contract.

A motion to vacate the procurement *ab initio* on the basis that the procurement is void due to a number of these procurement concerns is under advisement by the Public Auditor in *Appeal of Data Management Resources*.

B. The Proposed Settlement Agreement and Mutual Release Appears Contrary to Law.

The proffered settlement is comprised of three documents to be executed by the Attorney General. These are:

- Order of Dismissal by Stipulation. The proposed order, to be executed by an Assistant Attorney General would establish that the Parties to *Appeal of Data Management Resources* have reached a settlement of the procurement dispute in that the Government has agreed to buy a second Point of Sale software from Appellant, Data Management Resources for \$1.3 Million in exchange for the dismissal of two cases (the procurement appeal itself and an underlying Writ action brought by DMR for failure to produce documents pursuant to both the

Sunshine Reform Act and the procurement law), and the execution of a Settlement Agreement and Mutual Release, and a Contract For Services entered into between DMR and the Government for acquisition of the Point of Sale software.

- Settlement Agreement and Mutual Release. This proposed settlement agreement provides for not only the resolution of this procurement appeal and Writ case, but also for the mutual release of certain rights by each Party. This Agreement is to be approved as to form and legality by the Attorney General before it is executed by the Governor of Guam. Of most importance in this Agreement is the following provision: "... the Government of Guam ... hereby fully releases and forever and irrevocably discharges all Claims of any nature related to the Procurement Appeal, Writ Proceedings, and Claim to Ownership ..."

Claim of Ownership is defined in the agreement.

"Claim to Ownership" means that claim and assertion made by the Government of Guam or any of its agents, employees, contractors, attorneys of the source code ownership of proprietary software developed by DMR for the DOA Financial Management Information System (FIRM/400), DRT Guam System, DRT Taxation and Regulatory Application Software System, and the Point of Sale and Internet Payment Processing System, Application Program Interface of the DRT Taxation and Regulatory Application Software System, and the Point of Sale and Internet Payment Processing System.

page 7 of 16 pages

- Contract for Services Request for Proposal DOA/RFP-014-11. This contract, as yet not thoroughly reviewed, provides for acquisition by GovGuam of the lease of the Point of Sale software for three years, plus training and maintenance services. This contract is to be approved as to form and legality by the Attorney General and executed by the Governor of Guam. All source code and design will remain the sole property of the contractor, Data Management Resources. It is understood that this is consistent with the RFP and with the proffered agreement of the Parties.

Assuming without conceding, for present purposes, that the underlying procurement is first found by the Public Auditor to be otherwise legal, that is, that the assertion that the procurement should be declared void due to the unfair advantage by Appellant is incorrect or unfounded, and the Government chooses to resolve the procurement dispute by entering into an agreement with Appellant in settlement of the dispute, the question becomes one of whether the Government can enter into the Settlement Agreement and Mutual Release.

The primary concern with the Mutual Release document is the release by the Government of any claim to ownership of the 'Application Program Interface of the DRT Taxation and Regulatory Application Software System'. It is understood that the government of Guam owns this Application Program Interface. Data Management Resources asserts that the government of Guam does not own the interface program. There is a contract, dated January 2004 that appears on its face to state that ownership of

this program is by the Government as it relates to both merchant billing services and point of sales software services. The contract states:

System Ownership shall be as stipulated in Attachment B, Request for Proposal, Attachment C, contractor's Response to RFP 2003-01, and Attachment E, Merchant Applications. The web based application of Point of Sale and internet Payment Processing System, known as GGWIOP, along with all source code and design will remain the sole property of the Contractor. GovGuam will own the Application Program Interface or conduit, including source code that ties the GGWOIP system to the government's AS/400 system.¹ (emphasis added)

Data Management Resources, through its attorney, has asserted that there is a document that has been executed between Merchant Billing Services Pacific and Data Management Resources that would clarify that ownership of the Application Program interface software, developed by DMR, could not be transferred to a third party. It has been asserted that this agreement between these two parties was in some manner acknowledged or approved by Government of Guam. Despite several requests forwarded to the attorney for Data Management Resources for a copy of this document, it has not been provided to the Office of the Attorney General. This documentation is now under subpoena by the Hearing Officer of this appeal proceeding. The assertion is that Government of Guam could not own the Application Program Interface, even

¹ Attachment B, Request for Proposals, Attachment C, the offeror's proposal, and Attachment E, Merchant Applications have been reviewed. There are inconsistencies as between the Contract, the RFP and the Offer as to source code ownership. Pursuant to the RFP at section 1.4.31, the RFP and the subsequent contractor's proposal will be made a part of any resultant contract. In the event of a contradiction between the provisions of the documents comprising the Contract, the order of preference shall be: First, the Contract, Second, the provisions of the RFP, and Third, the provisions of the proposal. Both the Contract and the RFP would indicate that, as to the Application Program Interface, GovGuam is stated to be the owner of the source code.

despite the language in the 2004 contract because of this agreement.²

Execution of the mutual release document would result in the Government of Guam giving up any claim to ownership of the Application Program Interface, quite without any corresponding benefit to the Government.³ This interface is essential to a point of sale program operating in that it allows the computers of the Department of Revenue and Taxation to communicate with the computers of the Department of Administration (a data conduit) such that the point of sale software would be able to accomplish its purposes. One of the essential bases for the Attorney General's Motion to Vacate the Procurement (see p.2 Section I, hereinabove) is the admission by Appellant that it intentionally disabled this Interface during early 2012 evidently to (a) prevent the Government's utilization of an in-house developed Point of Sale system and (b) to disrupt critical Government accounting functions, ostensibly to coerce GovGuam's acquiescence in making a procurement award to Appellant.

It is relevant to note that the point of sale solicitation is necessary because the prior arrangement for this service, that is the January 2004 contract with Merchant Billing Services Pacific, was coming to a conclusion as of November 30, 2011. On

² It is worth noting that in the Proposal from Merchant Billing Services in response to the RFP leading to the 2004 contract, the Subcontractor agreement between Merchant Billing Services and Data Management Resources was attached. There is no reference in this agreement to ownership of software or limitations that Merchant Billing Services would recognize in regard to the Application Program Interface (or any other software developed by Data Management Resources).

³ It is stated by the Governor's legal counsel that the former head of the Bureau of Information Technology in the Office of the Governor asserts that the government of Guam in some manner relinquished ownership of the Application Program Interface in the past, and, further, that the government of Guam has not exercised ownership of this program for many years. However, the government has possessed the program and utilized the program continuously up until about January 2012, when it was removed or turned off.

November 30, 2011 Data Management Resources, as the agent for Merchant Billing Services, ‘turned off’ the programs operating two of the three components of the contracted service, i.e., the merchant billing component, and the point of sale component. The Application Program Interface was not disconnected or ‘turned off’ by Data Management Resources on November 30, 2012. This program continued to operate apparently until a date in late January 2012.⁴ Data between the computers at Department of Revenue and Taxation and the Department of Administration continued to flow from November 30, 2011 until late January 2012.

There a basis for the Attorney General to decline to execute or approve the proffered settlement documents. Given the authority and responsibility of the Attorney General in procurement of supplies and services for the Government, and the responsibility to protect and preserve the property and the funds of the Government, it is necessary to decide whether the problems that have been identified in the attempted procurement of a point of sale computer and web-based system for the Department of Administration and Department of revenue and Taxation rise to the level that prevents the Attorney General from approving the proffered settlement of the dispute between the offeror, Data Management Resources, and the government of Guam.

The Attorney General, when he approves contracts, shall determine not only the correctness of their form, but their legality. In doing so, the Attorney general may

⁴ At about the same time in January 2012, employees of the government of Guam were attempting to test operate the first components of a point of sale system developed by government programmers. The internally developed point of sale system has never been able to be tested thoroughly because of the absence of the interface program. Written demand has been made to DMR to return or reactivate the interface program. In response, DMR now asserts that it owns the program and simply forgot or failed to remove it or turn it off on November 30, 2011.

require any or all agencies involved in the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out. 5 GCA §5150. The procurement process conducted by the Government is understood to be a precedent procedure that is to be reviewed prior to the execution of a contract.

The Supreme Court has stated:

It is clear that the Attorney General has the authority to review contracts with respect to their legality and form pursuant to Title 5 GCA § 5150. However, when determining whether to approve or disapprove contracts, the Attorney General may only consider the legality and form of the proposed contract. *See Citizens Energy Coalition of Indiana v. Sendak*, 594 F.2d 1158, 1162 (7th Cir. 1979); *see also State ex rel. Fahlgren Martin, Inc. v. McGraw*, 438 S.E.2d 338, 344-345 (W. Va. 1993) (holding that reviewing a contract for “‘form’ does not include matters extrinsic to the actual contract”). Thus, the Attorney General has the legal duty to approve a contract which is lawful as to form and content. *See Sendak*, 594 F.2d at 1162 (holding that the Attorney General has no discretion to reject a contract that is lawful and correct in form).

Guam International Airport Authority v. Moylan, 2005 Guam 5, ¶65. This is not simply a ministerial act. *Id.*, at ¶65, footnote 8.

In the context of the review and approval of a contract settling a potential claim of negligence against the government of Guam, the Supreme Court clarified the responsibility of the Attorney General in the approval of a contract in a circumstance in which the Attorney General stated that he had approved the contract only as to form:

page 12 of 16 pages

“Notwithstanding this finding by the trial court, we do not believe the Attorney General should be permitted to so easily disavow their legal obligations in reviewing contracts. According to 10 GCA 5 80104(e)(2), “[n]o contract requiring an expenditure of more than Ten Thousand Dollars (\$10,000) shall be entered unless the Attorney General shall have approved its form and found that its purpose is within the powers of the hospital.” 10 GCA 5 801 04(e)(2).

“ ... Kono's approval of the contract under law necessarily implies that the expenditure of the funds was within the powers of the hospital, and it appears prudent and reasonable for Lujan and Gutierrez to rely on Kono's approval. If Kono did not undertake the requisite task of reviewing the purpose and legality of the payments to Batoyan, he should not have approved the settlement agreement.”

Attorney General of Guam v. Gutierrez, 2011 Guam 10 ¶¶51, 52.

As well, “[a]ll procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefor.”

5 GCA §5247.

IV. Relevance of Statutory and Common Law Powers of the Attorney General to Participation in Procurement Appeal Proceedings.

The Attorney General, an elected official of the Government of Guam, by virtue of the Organic Act, has both statutory and common law powers. These powers include responsibility and authority to protect the properties of the Government of Guam and to uphold and enforce the fiduciary relationship with Guam taxpayers.

The Attorney General Act provides:

5 GCA § 30109. Duties.

The Attorney General is the public prosecutor and, by himself, a deputy or assistant, shall:

...

(f) Be diligent in protecting the rights and properties of the government of Guam;

page 13 of 16 pages

5 GCA § 30103. Common Law Powers of Attorney General.

The Attorney General shall have, in addition to the powers expressly conferred upon him by this Chapter, those common law powers which include, but are not limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. ...

These statutory and common law duties have been explicitly upheld as Organic powers by the Guam Supreme Court. Attorney General of Guam v. Gutierrez, 2011 Guam 10.

“As the public prosecutor, the AG has broad authority to investigate and prosecute claims and perform other duties required by law. Under 5 GCA 5 30109(f), the AG must ‘[b]e diligent in protecting the rights and properties of the government of Guam.’ 5 GCA 5 30109(f). This duty has long been considered a responsibility of the Attorney General’s Office, and its predecessor, the Island Attorney. See Guam Govt. Code 5 71 01 (1953). Section 301 09 further provides that the AG shall also ‘[p]erform such other duties as are required by law.’ 5 GCA 5 30109(h). Clearly, the AG has broad statutory authority to investigate and prosecute violations of the law, including spending or obligating taxpayer money without appropriation or contrary to law.

Id., at ¶ 37.

“The AG, in addition to the powers expressly conferred by Chapter 30 of Title 5, has certain common law powers, which include, but are not limited to, the right to bring suit to challenge laws which he believes to be unconstitutional and to bring action on behalf of the Territory representing the citizens as a whole for redress of grievances which the citizens individually cannot achieve, unless expressly limited by any law of Guam to the contrary. 5 GCA §30103.

... Thus, the ability of citizens individually to achieve relief under 5 GCA § 7103 cannot be interpreted as limiting the AG from bringing suit to control illegal spending of government funds; section 30103 does not prohibit the AG from bringing suit simply because individual citizens have the ability to seek redress.”

Id., at ¶33.

It can be understood by both Moylan, 2005 Guam 5, and Gutierrez, 2011 Guam 10 that the statutes and common law confer upon the Attorney General broad responsibility to preserve and protect the property and resources of the government of Guam, and, specifically to oversee procurement processes in both the representation of government agencies in procurement matters as well as the review of contracts stemming from procurement of goods and services.

Proper Government Spending Act, 5 GCA § 7101 et seq. is a valid example of the need for the Attorney General to uphold and enforce legitimate Government expenditures within this procurement appeal, regardless of whether the Governor intends to proceed with his own counsel independent of the Attorney General. The Enforcement of Proper Government Spending Act itself recognizes, in its first section, “the Attorney General is the only officer empowered to bring court actions to control such illegal spending...” The Act itself justifies the continued participation of record by the Attorney General in this procurement appeal:

5 GCA § 7101. Legislative Intent.

It is the intent of the Legislature that the government of Guam practice fiscal responsibility, and that the persons who spend the taxpayer’s money follow the mandates of law in expending government funds. Historically, there have been many instances of government officials in the government of Guam spending and obligating money without appropriation or contrary to law. Since the Attorney General is the only officer empowered to bring court actions to control such illegal spending and the only officer who can represent the government in recovering such money, and since the Attorney General is an appointed member of the Governor’s cabinet, laws relating to improper spending of funds by the Executive Branch have generally not been

enforced, and in some instances been openly ignored.
(emphasis added)

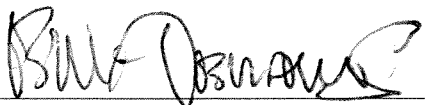
§ 7102. Standards Established for Handling Money.

Any officer, agent, contractor, or employee of the Executive Branch of the government of Guam who is charged with or assumes responsibility for the certification of availability of funds or the spending of money belonging to the territory of Guam, including the Governor and Lt. Governor of Guam, stands in a fiduciary relationship to the people of Guam in regard to the management of public money. Any such officer, agent, contractor, or employee of the Executive Branch shall discharge their duties with respect to the management of public money solely in the interest of the people of the territory of Guam. Any such officer, agent, contractor, or employee shall discharge his duties with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims.
(emphasis added)

There are both compelling and cogent reasons why the common law and statutory powers of the Attorney General should be required in this procurement appeal. The proposed settlement involves relinquishment of a valuable government asset, i.e. the program interface, and the payment of an inordinately large amount of money to acquire a point of sale system that we developed ourselves and already have in-place at a quite nominal cost to the taxpayers of this Island.

Dated, this 26th day of November 2012.

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General

By: 
Benjamin M. Abrams
Assistant Attorney General

page 16 of 16 pages

EXHIBIT A

11-23-12 en

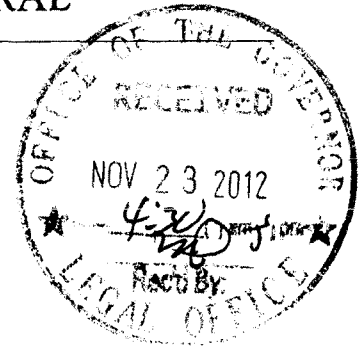
LEONARDO M. RAPADAS
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OFFICE OF THE ATTORNEY GENERAL

November 23, 2012



Maria Cenzone
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Hagatna, Guam 96910

Dear Ms. Cenzone,

The Office of the Attorney General recently received proposed documentation in Appeal of Data Management Resources, OPA-PA-12-007. It has been represented to the Office that Governor Eddie B. Calvo and Mr. Richard Taitano have negotiated a global settlement in connection with the case. Based on a preliminary review of the proposed settlement documentation in OPA-PA-12-007 that includes, inter alia, a services contract and mutual release and settlement, this Office cannot at this time agree to approve the services contract and mutual release as to legality and form. As you know, we discussed our reasons and concerns with you fairly extensively. Consequently, there appears to be clear conflict of positions between the Office of the Attorney General and the Department of Administration vis-à-vis the Governor. Unless and until this conflict is resolved, there would be a need for this Office to withdraw as legal counsel of record for the Department of Administration, but the Office will remain in the procurement proceedings pursuant to its statutory responsibilities and obligations, as well as for the public interest.

On this basis, we recommend that the Department of Administration retain substitute counsel in this procurement appeal.

Sincerely yours,


LEONARDO M. RAPADAS
Attorney General of Guam