



Jerrick Hernandez <jhernandez@guamopa.com>

Procurement Appeal, OPA-PA-21-006

GPE INC <guampacific@gmail.com>

Wed, Sep 29, 2021 at 12:57 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>, "Camacho, Anthony" <arcamacho@triton.uog.edu>, "Gumataotao, Emily" <eggumataotao@triton.uog.edu>, uogbids@triton.uog.edu

Good afternoon Mr. Hernandez,

Please see attachments relative to Opposition to Motion to Dismiss. Please confirm receipt of this email.

Very Respectfully,
Sedfrey M. Linsangan
President
Guam Pacific Enterprise Inc.
649-6997-8-4

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Guam Pacific Enterprise, Inc.
Tel: (671) 649-6994/7/8



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Sedfrey M. Linsangan
P.O. Box 23128
Barrigada, Guam
96921. Pro se

BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM


In the Appeal of
Guam Pacific Enterprise Inc.
Appellant
vs.
University of Guam
Defendant

Appeal No: OPA-PA-21-006

Opposition to Motion
to Dismiss (VOG)

Appellant, Sedfrey M. Linsangan provides
his opposition arguments, substantiating
that Motion to Dismiss be denied.

Dated: Sep 29, 2021


Sedfrey M. Linsangan
Appellant
Pro-se

Memorandum of Points and Authorities

Motion to Dismiss is not proper, not credible and does not pass muster. Instead of defending the University based on merits, the Legal Counsel introduced the improper Motion.

I will start by attacking the Procurement record that was submitted incomplete. It did not comply with Section 12104 and Section 12105 of CH12, Div. 4 of 26AR on (c).

Please see Exhibit D and E (3) which provides that the head of the Purchasing Agency shall submit a complete copy especially the catalogs and specs of the bidders. The action was intentional on part of UOG because the specs that they approved is not designed for classrooms but for homes only which is also noisy putting the health of students at risks.

Now, I will provide my subsequent arguments why the Motion should be denied.

Pursuant to Section 12103. Jurisdiction of the Public Auditor. (a) The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him. Please see Exhibit F.

Section 12101 of Chapter 12, 26 AR provides that the Public Auditor the duty to be in control of and be responsible for procurement appeals in Guam, Please see exhibit G.

The argument of the Defense that GPE failed to submit a protest to the University President does not pass muster. Please see Section 12102. Definitions, (e) provides the authority of the head of the Purchasing Agency on procurement. (Exhibit H)

Please see Exhibit I, relative to the definition and duty of Procurement Officer pursuant to Section 5030, of Chapter 5, (P,Q) to administer contracts. UOG's policy is not consistent with the procurement law because the procurement duty is mandated, and delegated to the head of purchasing agency not the University President.

The argument by the Defense that GPE did not received a decision relative to its protest that warrants a dismissal is erroneous.

The decision was made on June 7 by the Supply Administrator. The bid status was issued on July 1 but both were not provided to GPE until Sep. 2, 2021.

The agency is not acting in good faith and lost its integrity to file such argu

ment that a decision was not made. Please
See Exhibit J, Section 5003. Requirement of
Good Faith and Section 5001 (h3, (3)
(4) (5) (7) (8).

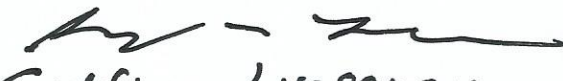
The precedent cases cited by the Defense
are irrelevant and does not apply to my
appeal because UOG violated several relevant
and pertinent laws on procurement. Since
the product is made in Israel, UOG vio-
lated the Buy American Act "Maximizing
Use of American Goods, Products and
Materials. The author of the bid did not
comply with Section 5263, 5266, 5267
5265, 5268. (Please see Exhibit K)

Conclusion

I am respectfully requesting that the Motion
to Dismiss be denied due to foregoing rebuttals.

Dated
Sep. 29, 2021

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Sedfrey Linsangan
Appellant

Sec 12104

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 CH. 12 PROCUREMENT APPEALS TO THE PUBLIC AUDITOR

the receipt of an Appeal. It shall be the duty of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency to give notice of the Appeal to the Attorney General or other counsel for the agency.

→ (2) The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall give notice of the Appeal to the contractor if award has been made or, if no award has been made, to all Interested Parties; shall instruct said parties to communicate directly with the Public Auditor regarding the status of the Appeal, and directly with the procurement officer as allowed by law regarding the protested procurement action; and shall communicate to the Public Auditor the identities and addresses of said parties.

→ (3) The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall submit to the Public Auditor a complete copy of the procurement record relevant to the appeal within five (5) working days of receiving notice of an Appeal, in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents. It shall additionally submit an answer to the appeal in the form of a detailed Agency Report, and shall furnish a copy of the report to the Appellant. This Agency Report shall comply to the requirements of § 12105 of this Chapter. The Agency Report shall be submitted within ten working days of receipt of by the Agency of the notice of Appeal of a Method, Solicitation, or Award; or notice of Appeal of a Suspension. The Agency Report shall be submitted within twenty days of receiving notice of Appeal on a Contract Dispute, or notice of Appeal of a Debarment. ↙

(4) Comments on the agency report by an Appellant or an Interested Party, including testimony and evidence by any competing bidder, offeror or contractor of the Appellant, shall be filed with the Public Auditor within ten (10) days after the Public Auditor's receipt of the report, with a copy to the agency office that furnished the report. Any rebuttal an Agency may care to make shall be filed with the Public Auditor within five (5) working days after receipt by the Public Auditor of the comments to which rebuttal is directed, with a copy to the Appellant. Unsolicited agency rebuttals

Exh D

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Exhibit
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shall be considered if filed within five (5) days after receipt by the Public Auditor of the comments to which rebuttal is directed.

(5) The failure of an Appellant or any Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed.

(6) If the Appellant or the Agency considers that the Appeal, the Procurement File, the Agency Report, or any other report or material submitted contains material which shall be withheld pursuant to law or regulation, a statement advising of this fact must be affixed to the front page of the document and the allegedly exempted information must be so identified wherever it appears.

(7) Requested Information Time for Filing. In order to expedite consideration of the Appeal, any additional information requested by the Hearing Officer shall be submitted within five working (5) days of receipt of such request unless another time is established in the request. Failure of any party to comply expeditiously with a request for information by the Hearing Officer may result in resolution of the Appeal without consideration of any information, which is untimely filed pursuant to such request.

(8) After notice of an Appeal to the Public Auditor has been filed a party may not discontinue such Appeal without prejudice, except as authorized by the Public Auditor.

SOURCE: 5 GCA § 5708.

(9) Any objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed. The Public Auditor shall have the right motion to raise the issue of its jurisdiction and shall do so by an appropriate order.

SOURCE: Subsection (c)(9) approved by inaction of the *I Mina' Bente Ocho Na Liheslaturan Guåhan* (28th Guam Legislature) on July 17, 2006.

§ 12105. Agency Report.

The Agency Report shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the contents of the file and shall include the following, if not already submitted to the OPA as part of the procurement record required by § 12104(c)(3):

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Exhibit
E

- (a) A copy of the protest;
- (b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest;
- (c) A copy of the solicitation, including the specifications or portions thereof relevant to the protest;
- (d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest;
- (e) Any other documents which are relevant to the protest; including the contract, if one has been awarded, pertinent amendments, and plans and drawings;
- (f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant;
- (g) A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal;
- (h) If the award was made after receipt of the protest, the report will include the determination required under 2 GAR § 9101(e); and
- (i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding.

SOURCE: ABA 2002 Model Procurement Rules.

§ 12106. Making Information on Appeals Available.

The Public Auditor shall, upon written request, make available to any Interested Party or member of the public information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential shall so request by specifically identifying such information within documents submitted,

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is less than seven (7) days, intermediate Saturdays, Sundays, legal holidays and days that government offices are closed by order of the Governor shall be excluded in the computation.

→ § 12103. Jurisdiction of the Public Auditor; Exhaustion of Remedies. ✓

(a) The Public Auditor shall have the power to review and determine *de novo* any matter properly submitted to her or him. The Public Auditor shall not have jurisdiction over disputes having to do with money owed to or by the government of Guam. No prior determination shall be final or conclusive on the Public Auditor. The Public Auditor shall have the power to compel attendance and testimony of, and production of documents by, any employee of the government of Guam, including any employee of any autonomous agency, public corporation or board or commission. The Public Auditor may consider testimony and evidence submitted by any competing bidder, offeror or contractor of the Appellant. The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 GCA Chapter 5. ✓

SOURCE: 5 GCA § 5703.

(b) Effect of Judicial Proceedings. If an action concerning the procurement under Appeal has commenced in court, the Public Auditor shall not act on the Appeal except to notify the parties and decline the matter due to Judicial involvement. This Section shall not apply where a court requests the decision of the Public Auditor. Parties are required to notify and provide copies to the Public Auditor within 24 hours of any action in court concerning the procurement under Appeal.

§ 12104. Form and Filing of Appeal.

(a) When Filed. Appeals shall be made in writing to the Public Auditor and shall be filed in triplicate. Timely facsimile, electronic, or magnetic filing may also be authorized by the Office of the Public Auditor upon the adoption of appropriate guidelines. An Appeal is considered filed when received by the Office of the Public Auditor, which shall cause evidence of the date of filing to be stamped upon each Appeal and triplicate. Appeals filed after the allowable filing period set forth in statute or these rules shall not be considered.

(b) Form. To expedite handling of Appeals, the envelope, transmittal letter, and the actual Appeal shall be labeled "Procurement

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CHAPTER 12
PROCUREMENT APPEALS TO THE PUBLIC AUDITOR

NOTE: Submitted by the Office of the Public Auditor to *I Mina 'Bente Ocho Na Liheslaturan Guåhan* (28th Guam Legislature) on July 17, 2006.
Approved by inaction of the legislature.

- § 12101. Authority and Purpose of Rules of Procedure.
 - § 12102. Jurisdiction of the Public Auditor; Exhaustion of Remedies.
 - § 12103. Definitions.
 - § 12104. Form and Filing of Appeal.
 - § 12105. Agency Report.
 - § 12106. Making Information on Appeals Available.
 - § 12107. Ex Parte Communications with Hearing Officer.
 - § 12108. Hearing Procedures.
 - § 12109. Authority of the Hearing Officer.
 - § 12110. Decisions of the Public Auditor.
 - § 12111. Finality of Decisions.
 - § 12112. Appeal to Public Auditor relative to Method, Solicitation, or Award.
 - § 12113. Appeal to Public Auditor relative to Contract or Breach of Contract Controversies.
 - § 12114. Appeal to Public Auditor of Debarment or Suspension.
 - § 12115. Review of Award Pending Protest or Appeal.
 - § 12116. Disqualification of Public Auditor.
- Appendices A-D.

§ 12101. Authority and Purpose of Rules of Procedure.

These Rules of Procedure are promulgated under the authority of 5 GCA Chapter 5, Article 12, and Public Law 28-68, which gives the Public Auditor the duty to be in control of and be responsible for procurement Appeals in Guam, and the authority to adopt rules of procedure pursuant to 5 GCA § 5701. These rules shall be construed and applied to provide for the expeditious resolution of controversies in accordance with the requirements of 5 GCA Chapter 5 (Guam Procurement Law) and the Guam Procurement Regulations contained in 2 GAR Division 4.

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§ 12102. Definitions.

As used in this Chapter, unless the context in which they are used requires a different meaning, the following definitions shall apply.

→ (a) Appellant means an aggrieved person who Appeals to the Public Auditor a decision of the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or the designee of such officer.

(b) Interested Party means an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied.

(c) Protestor means any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract and who filed a protest, or who has received a notice of suspension or debarment. Such a protestor is sometimes referred to herein as an "aggrieved person."

(d) A prospective bidder, contractor or offeror is one who will actually submit a bid, contract or otherwise offer his services if such person would prevail in the Appeal.

→ (e) The affected agency or using agency is that agency that has used or is intending to use the supplies, services, or construction, the procurement of which is being Appealed. If more than one affected using agency is involved, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may designate one or more representatives to be consulted in respect to this action.

(f) File and submit mean receipt in the Office of the Public Auditor, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, as the case may be.

(g) In computing any period of time prescribed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included unless it is a Saturday, a Sunday, a legal holiday or when the Office of the Public Auditor is closed by order of the Governor, in which event a period extends until the end of the next day which is not a Saturday, a Sunday, a legal holiday or when the Office is closed. When the period of time prescribed or allowed

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University of Guam, the Department of Education, and the Guam Memorial Hospital Authority.

(l) Grant means the furnishing by the Territory of assistance, whether financial or otherwise, to any person to support a program authorized by law. It does not include an award whose primary purpose is to procure an end product, whether in the form of supplies, services or construction; a contract resulting from such an award is not a grant but a procurement contract.

(m) May denotes the permissive.

(n) Person means any business, individual, union, committee, club, other organization or group of individuals.

(o) Procurement means buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.



(p) Procurement Officer means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The term also includes an authorized representative acting within the limits of authority.



(q) Purchasing agency means any governmental body other than the Chief Procurement Officer or the Director of Public Works which is authorized by this Chapter or its implementing regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts.



(r) Regulation shall have the meaning given in the Administrative Adjudication Law.

(s) Services means the furnishing of labor, time or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance. This term shall not include any form of employment relationship with the government or collective bargaining agreements. Services also includes printing and processing for printing finished products, such as books, reports,



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the department shall be required to work with the various Procurement Officers of the Government of Guam and non-profit organizations which are in the business of feeding people, to maintain a market all year round for the crops of the farmers, fishes from the fishermen, and other local producers of foodstuffs. (P.L. 23-18:1)

2009 NOTE: P.L. 28-045:10 (June 6, 2005) changed the name of the Department of Education to the Guam Public School System. P.L. 30-050:2 (July 14, 2009) reverted the name of the Guam Public School System to the Department of Education.

§ 5002. Supplementary General Principles of Law Applicable.

Unless displaced by the particular provisions of this Chapter, the principles of law and equity, including the Uniform Commercial Code of Guam, the law merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions of this Chapter.

SOURCE: GC § 6950.1. MPC § 1-102.

§ 5003. Requirement of Good Faith.

This Chapter requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.

SOURCE: GC § 6950.2. MPC § 1-103.

§ 5004. Application of this Chapter.

(a) General Application. This Chapter applies only to contracts solicited or entered into after the effective date of this Chapter unless the parties agree to its application to a contract solicited or entered into prior to the effective date.

(b) Application to Territorial Procurement. This Chapter shall apply to every expenditure of public funds irrespective of their source, including federal assistance funds except as otherwise specified in § 5501 of this Chapter, by this Territory, acting through a governmental body as defined herein, under any contract, except that this Chapter shall not apply to either grants or contracts between the Territory and another government. Nothing in this Chapter or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from

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- § 5011. Policy in Favor of Service Disabled Veteran Owned Businesses.
- § 5012. Qualifications of a Service-Disabled Veteran Owned Business.

**SUBARTICLE B
DETERMINATIONS**

- § 5020. Determinations.

**SUBARTICLE C
DEFINITIONS IN THIS CHAPTER**

- § 5030. Definitions.

**SUBARTICLE A
PURPOSES, CONSTRUCTION AND APPLICATION**



§ 5001. Purposes, Rules of Construction.

(a) Interpretation. This Chapter shall be construed and applied to promote its underlying purposes and policies.

(b) Purposes and Policies. The underlying purposes and policies of this Chapter are:

(1) to simplify, clarify, and modernize the law governing procurement by this Territory;

(2) to permit the continued development of procurement policies and practices;



(3) to provide for increased public confidence in the procedures followed in public procurement;



(4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;



(5) to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory;

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(6) to foster effective broad-based competition within the free enterprise system;

→ (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and ✓

→ (8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.

(c) Singular-Plural and Gender Rules. In this Chapter, unless the context requires otherwise:

(1) words in the singular number include the plural, and those in the plural include the singular; and

(2) words of a particular gender include any gender and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

(d) Policy Concerning Sheltered Workers or Persons with Disabilities. If any entity of the government of Guam or any entity expending governmental funds intends to procure any supply or service which is offered by a nonprofit corporation employing sheltered workers or persons with disabilities, or a government of Guam entity employing sheltered workers or persons with disabilities, then that entity shall procure such supply or service from that nonprofit corporation or government entity if the supply or service is available within the period required by the procuring entity.

(1) Notwithstanding any other provision of law, any nonprofit corporation or government of Guam entity employing sheltered workers or persons with disabilities that had an existing contract or contract in force on March 1, 2001, with the government of Guam, which shall include line agencies and autonomous agencies of the government of Guam such as the Guam Power Authority, the Guam Telephone Authority and the Department of Education, shall continue said contracts for two (2) years hence, ending March 31, 2003.

(e) Procurement of local produce and fish from local farmers and fishermen may be made without competition provided that the

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informed of such within twenty-four (24) hours of such conviction.

(c) Duties of the General Services Agency or Procurement Administrators. All contracts, bids, or Requests for Proposals shall state all the conditions in § 5253(b).

(d) Any contractor found in violation of § 5253(b), after notice from the contracting authority of such violation, shall, within twenty-four (24) hours, take corrective action and shall report such action to the contracting authority. Failure to take corrective action within the stipulated period may result in the temporary suspension of the contract at the discretion of the contracting authority.

SOURCE: Added by P.L. 28-024:2 ((Apr. 21, 2005). Amended by P.L. 28-098:2 (Feb. 7, 2006).

ARTICLE 4
SPECIFICATIONS

- § 5260. Definitions.
- § 5261. Duties of the Policy Office.
- § 5262. Duties of the Chief Procurement Officer and Director of Public Works.
- § 5263. Exempted Items.
- § 5264. Relationship With Using Agencies.
- § 5265. Maximum Practicable Competition.
- § 5266. Specifications Prepared by Architects and Engineers.
- § 5267. Publication of Source of Specifications.
- § 5268. Salient Features.
- § 5269. Purchase of Drugs by Generic Names.
- § 5270. Government to Purchase Drugs from Manufacturer.
- § 5271. Prescription of Drugs by Generic Name.

§ 5260. Definitions.

As used in this Chapter Specification means any description of the physical or functional characteristics, or of the nature of a supply,

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service, or construction item. It may include a description of any requirement for inspecting, testing or preparing a supply, service or construction item for delivery.

SOURCE: GC § 6965. MPC § 4-101.

§ 5261. Duties of the Policy Office.

The Policy Office shall promulgate regulations governing the preparation, maintenance, and content of specifications for supplies, services and construction required by the Territory.

SOURCE: GC § 6965.1. MPC § 4-202.

§ 5262. Duties of the Chief Procurement Officer and Director of Public Works.

(a) The Chief Procurement Officer shall prepare, issue, revise, maintain and monitor the use of specifications for supplies and services required by the Territory.

(b) The Director of Public Works shall prepare, issue, revise, maintain and monitor the use of specifications for construction required by the Territory.

SOURCE: GC § 6965.2. MPC § 4-202 modified.

COMMENT: This Section is changed to reflect the split between construction and other procurement.

 **§ 5263. Exempted Items.**

Specifications for supplies, services or construction items procured under § 5120 of this Chapter, or exempted pursuant to § 5121 of this Chapter, may be prepared by a purchasing agency in accordance with the provisions of this Article and regulations promulgated hereunder.

SOURCE: GC § 6965.3. MPC § 4-203.

§ 5264. Relationship With Using Agencies.

The Chief Procurement Officer and the Director of Public Works shall obtain expert advice and assistance from personnel of Using Agencies in the development of specifications and may delegate in writing to a using agency the authority to prepare and utilize its own specifications.

SOURCE: GC § 6965.4. MPC § 4-204.

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§ 5265. Maximum Practicable Competition.

All specifications shall seek to promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive.

SOURCE: GC § 6965.5. MPC § 4-205.



§ 5266. Specifications Prepared by Architects and Engineers.

The requirements of this Article regarding the purposes and nonrestrictiveness of specifications shall apply to all specifications, including, but not limited to, those prepared by architects, engineers, designers and draftsmen for public contracts.

SOURCE: GC § 6965.6. MPC § 4-206.



§ 5267. Publication of Source of Specifications.

The specifications contained in any invitation for bids or request for proposals, and any amendment thereto, for the procurement of supplies shall identify the person responsible for drafting the specifications and any persons, technical literature or manufacturer's brochures relied upon by the responsible person in drafting the specifications.

SOURCE: GC § 6965.7 added by P.L. 18-044:21 (Nov. 14, 1986).



§ 5268. Salient Features.

(a) Specifications shall not include requirements, such as but not limited to restrictive dimensions, weights or materials, which unnecessarily restrict competition, and shall include only the essential physical characteristics and functions required to meet the Territory's minimum needs.

(b) Purchase descriptions shall not specify a product having features which are peculiar to the products of one manufacturer, producer or distributor unless it has been determined in writing by the Director of the using agency that those particular features are essential to its requirements and specifying the reason that similar products lacking those features would not meet minimum requirements for the item.