

Alicia G. Limtiaco  
Attorney General



Alberto E. Tolentino  
Chief Deputy Attorney General

## Office of the Attorney General

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June 16, 2008

### LEGAL MEMORANDUM

Ref: GSA 07-1084

TO: Chief Procurement Officer, General Services Agency

FROM: Attorney General *ALC*

SUBJECT: **Legality of Purchasing through Federal GSA Contracts**

You have requested an opinion regarding the following question:

**ISSUE:** When supplies needed by the government of Guam are available under a Federal General Services Administration (Federal GSA) contract, may the government of Guam General Services Agency (local GSA) use the Federal GSA contract to make the purchase without first going through a competitive sealed bid process?

**ANSWER:** See discussion and conclusion.

### STATEMENT OF FACTS:

The local GSA has been using Federal GSA contracts for many years to acquire supplies when supplies needed by a government of Guam agency are available under a Federal GSA contract. This practice has been called into question by the government's external auditors Deloitte & Touche LLP ("Deloitte") in the Government of Guam Single Audit Reports for the Year Ended September 30, 2006 ("FY06 Audit").

For example, in the FY06 Audit's Schedule of Findings and Questioned Costs for grant money from the U.S. Department of Homeland Security, Finding No. 06-30 indicated that of 34 procurement transactions audited, the local GSA used informal quotes for nine of them even though the nine transactions "did not meet the small purchase threshold of \$14,999". However, according to the local GSA, these nine transactions were undertaken as Federal GSA contract purchases and not put out to bid, and were documented accordingly. The transaction amounts ranged from \$25,695 to \$313,562.

The criteria against which Deloitte measured the nine transactions was indicated in the FY06 Audit on page 67 as:

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In accordance with applicable procurement requirements, the grantee will maintain records sufficient to detail the significant history of a procurement. These records will include a rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price. Furthermore, in accordance with the applicable local procurement law, the following requirements apply:

- The Guam General Services Agency shall procure from the United States only when the cost is ten percent less than procuring from other contractors.
- The Guam General Services Agency shall use competitive sealed bidding when the procurement exceeds the small purchase threshold of \$14,999.

In response to the FY06 Audit's Finding No. 06-30, the local GSA wrote to Deloitte on May 31, 2007 justifying the nine transactions as procurement from companies with Federal GSA contracts. However, Deloitte has subsequently indicated that its position on the questioned costs remains unchanged.

In making the purchases questioned in the FY06 Audit under Federal GSA contracts, the local GSA relied upon an Attorney General opinion issued on August 21, 1991 (Ref. No. GSA 91-1358). The opinion discussed, among other laws, the only Federal law directly addressing the subject found in the Organic Act of Guam. The Federal law stated:

**§1423l. Purchase through GSA.** The Territorial and local governments of Guam are authorized to make purchases through the General Services Administration.

48 U.S.C. §1423l. The opinion concluded at page 2:

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.

The request from the local GSA for the present opinion cites 5 GCA §5122 which provides:

**§5122. U.S. Government.** The General Services Agency shall procure supplies from the United States when the cost to the General Services Agency is less by ten percent (10%) than from other contractors.

The instant memorandum will revisit the same question analyzed in the prior opinion, and asked once again by the local GSA.

## **DISCUSSION:**

### **1. In 1993, 48 U.S.C. §1423l cited in the prior Attorney General opinion was omitted and replaced by 48 U.S.C. §1469e.**

According to the notes to §1423l, this section was enacted as part of a series of annual appropriations to the U.S. Department of Interior and was never a part of the Organic Act of Guam, nor was it originally enacted as a part of Title 48 of the U. S. Code. The first enactment

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of this language was in the General Appropriations Act of 1951 in the chapter on the U.S. Department of Interior, and was part of an appropriation to the Office of the Secretary. The enactment read:

For expenses necessary for the administration of Territories and possessions under the jurisdiction of the Department of the Interior, including expenses of the Offices of the Governors of Alaska, Hawaii, and Guam, and the Government of the Virgin Islands, including the agricultural station; compensation and mileage of members of the legislatures in Alaska and Hawaii; compensation of members of the Supreme Court and the legislature in Guam; care of insane as authorized by law for Alaska (48 U.S.C. 46-50); grants to the Virgin Islands and Guam, in addition to current local revenues, for support of governmental functions; personal services, household equipment and furnishings, and utilities necessary in the operation of the several Governors' houses; and personal services in the District of Columbia; \$3,392,180; Provided, That the territorial and local governments of the Virgin Islands and Guam are authorized to make purchases for their public institutions through the General Services Administration. [Emphasis added.]

General Appropriations Act of 1951, Ch. VII, Title I, §101, 64 Stat. 694 (Sept. 6, 1950), 82nd Cong., 2nd Sess., 1950 U.S. Code Cong. & Admin News, 763.

Subsequent to the first enactment in September of 1950, similar language appeared in annual appropriations to the Department of Interior every fiscal year up to 1992. At some point in time, apparently, the Federal Office of the Law Revision Counsel saw fit to place the language in Title 48 of the U. S. Code in the chapters of each of the territories administered by the Department of the Interior and affected by the enactment. For Guam, that became 48 U.S. C. §1423l.

By the last inclusion of the language in an appropriations act in 1992, the pertinent language had changed to read:

*Provided*, That the territorial and local governments herein provided for are authorized to make purchases through the General Services Administration;

Department of Interior & Related Agencies Appropriations Act of 1993, U.S. Pub. L. 102-381, Title I, 106 Stat. 1392 (Oct. 5, 1992).

In any event, in 1993, the Office of the Law Revision Counsel omitted §1423l from the U. S. Code because Congress enacted another law in Title 48 in Chapter 10 on the general provisions applicable to the territories. The new law, still in effect today, reads:

**§1469e. Insular Government Purchases.** The Governments of American Samoa, Guam, the Northern Mariana Islands, the Trust Territory of the Pacific Islands and the Virgin Islands are authorized to make purchases through the General Services Administration.

The legislative history of §1469e indicates that the "provision would codify a long standing Federal Government policy which has been enacted annually in the legislation to provide

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appropriations for the Department of Interior and related agencies." S. Rep. No. 243, 102th Cong. (1992).

Thus, Congress clearly intended Guam to have the authority to purchase through the Federal GSA system, such that Congress consistently ever since 1950 included the authority to do so in an appropriations act to the Department of Interior, finally codifying the policy in 1992 for Guam and the other territories as 48 U.S.C. §1469e.

**2. 48 U.S.C. §1469e permits Guam to use the Federal Supply Schedule Program but does not make its use mandatory, and therefore, Guam may legitimately impose limitations on use of the Program.**

The language from the two appropriations acts quoted above and 48 U.S.C. §1469e do not require Guam or the other territories to purchase through the Federal GSA contract system, known as the Federal Supply Schedule Program. This is in contrast to some Federal agencies which are required to use the program as their primary source of supplies. Those agencies are identified directly in the supply schedules. *See* 48 C.F.R. §38.101(b). Agencies not identified as mandatory users may use the system if they wish to, but are not required to. *See* 48 C.F.R. §38.101(c).

Given the permissive tone of the language granting authority to the territories in §1469e, the governments of the territories must fall into the non-mandatory category of users.

Thus, the Guam Legislature could decide how or when the government would use the Federal Supply Schedules, or to place restrictions or limitations on the use thereof.

Furthermore, the Federal Acquisition Regulations indicate that:

Orders placed under a Federal Supply Schedule contract . . . 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.

48 C.F.R. §8.404(c)(3). Therefore, the 10% differential mentioned in 5 GCA §5122 is a legitimate limitation on use of Federal supply contracts by the government of Guam, and the government of Guam must first comply with any requirements imposed by the local procurement laws.

**3. Competitive sealed bidding is the primary procedure for procurement by the government of Guam, but 5 GCA §5210 lists exceptions and recognizes that other laws may have the effect of creating an exception.**

What is not clear from 5 GCA §5122 is how the 10% differential is to be determined.

Regarding competitive sealed bidding, the Guam Procurement Law provides:

**§5210. Methods of Source Selection.** (a) Unless other wise [sic] authorized by law, all territorial contracts shall be awarded by competitive sealed bidding, pursuant

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to §5211 of this Article, except for the procurement of professional services and except as provided in:

- (1) Section 5212 of this Article; [Repealed section]
- (2) Section 5213 of this Article;
- (3) Section 5214 of this Article;
- (4) Section 5215 of this Article;
- (5) Section 5216 of this Article for services specified in §5212 of this Chapter; or
- (6) Section 5217 of this Article. [Emphasis added.]

5 GCA §5210(a). Thus, competitive sealed bidding is made the primary procedure for government procurement with the exceptions noted in §5210. The listed exceptions are for small purchases (5 GCA §5213); sole source purchases (5 GCA §5214); emergency purchases (5 GCA §5215); purchases of services specified in 5 GCA §5121 (5 GCA §5216); and purchases from nonprofit corporations (5 GCA §5217). The services specified in 5 GCA §5121 are for "accountants, physicians, lawyers, dentists, licensed nurses, other licensed health professionals, and other professionals", commonly referred to collectively as professional services.

Omitted from the listed exceptions of §5210(a) is procurement from the Federal GSA. However, the competitive sealed bidding statute includes at its beginning the phrase "unless other wise [sic] authorized by law". We cannot assume that just because the Legislature listed exceptions to the competitive sealed bidding procedure that the phrase "unless other wise [sic] authorized by law" is meaningless. The rules of statutory construction require that every word, sentence and phrase in a statute be given effect and meaning, and that no word be considered mere surplusage. *Hechtman v. Nations Title Insurance of N.Y.*, 840 So.2d 993, 996 (Fla. 2003).

Giving the phrase its full meaning, one 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 may consider that 5 GCA §5122, authorizing procurement through the Federal GSA, is one such other valid law excepting procurement via competitive sealed bidding if the effect of §5122 is indeed to except it from any competitive procedure.

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. In contrast, the Legislature in the case of procurement from nonprofit corporations, one of the exceptions listed in §5210, specifically stated that competition was not required. Section 5217 of 5 GCA provides:

**§5217. Procurement from Nonprofit Corporations.** A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers. . . . [Emphasis added.]

Thus, there is a genuine question as to whether the local GSA was meant to forego competitive sealed bidding altogether when procuring from the Federal GSA. After all, §5122 requires some sort of price comparison to satisfy the 10% differential and competitive sealed bidding is certainly one way of obtaining prices for comparison.

**4. The competitive sealed bidding process was not intended for use in acquiring prices for comparison against Federal GSA contract prices.**

To suggest that competitive sealed bidding must be used is to also suggest that the competitive sealed bidding process can be cancelled once it has been used as the vehicle to acquire prices for comparison purposes, assuming the 10% price differential is met. However, if the local GSA knows from the outset of the competitive sealed bidding process that it merely wishes to compare bid prices with the Federal GSA contract price and then cancel the bid process if the 10% differential is met, then to not make this disclosure from the outset of the process would be to practice a deceit upon those submitting bids in earnest with the hope of winning the bid.

Therefore, GSA would have to issue the invitation to bid giving full disclosure that the supply is available through a Federal GSA contract and GSA must also disclose the possibility of cancelling the solicitation after the bids have been opened and the prices compared against the Federal GSA price. This is in keeping with the statutory procurement policy that the government ensure the fair and equitable treatment of all bidders at all times. 5 GCA §5001(b)(4). However, for obvious reasons, these disclosures would probably have the effect of discouraging bidders from placing bids.

An examination of the government's procurement rules show that the competitive sealed bidding process was not intended for use to compare prices. This intent is evident in the rule pertaining to cancellation of invitations to bid. Section 3115(b) at 2 GAR Division 4 states the policy on cancellation as:

**(b) Policy. Solicitations should only be issued when there is a valid procurement need unless the solicitation states that it is for informational purposes only.** The solicitation shall give the status of funding for the procurement.

**Preparing and distributing a solicitation requires the expenditure of government time and funds. Businesses likewise incur expense in examining and responding to solicitations. Therefore, although issuance of a solicitation does not compel award of a contract, a solicitation is to be cancelled only when there are cogent and compelling reasons to believe that the cancellation of the solicitation is in the territory's best interest.** [Emphasis added.]

Section 3115(b) sets the parameters for when competitive sealed bidding may or may not be used by indicating that there must be a "valid" procurement. We take this to mean that the government must have a genuine intent to carry out all the steps of the sealed bid procedure to the end resulting in an award to the lowest bidder. Otherwise, the government should not begin the process at all. If GSA is searching for information only, or does not intend to fully carry out the solicitation for any other reason, then GSA must use some other form of procedure such as an invitation to solicit interest or invitation to solicit information or a request for quotation.

Section 3115(b) also makes clear the reason why an invitation to bid should not be issued unless there is an intent, from the outset, to carry it through the very end. Time is used and money is spent to conduct or participate in a competitive sealed bidding process, both by the government and by the bidders, much more than for an invitation to solicit information or a request for quotation. The government incurs the costs of writing the specifications, preparing the invitation to bid packages, and advertising in a newspaper of general circulation. The bidders incur the costs of analyzing and researching the bid requirements, negotiating with subcontractors, putting a bid together, and acquiring a bid bond. These costs will always be more than for a streamlined process to acquire prices for mere comparison purposes.

Section 3115 then goes on to give examples of what are considered cogent and compelling reasons for cancellation. The list of reasons includes:

- (i) the supplies, services, or construction being procured are no longer required;
- (ii) ambiguous or otherwise inadequate specifications were part of the solicitation;
- (iii) the solicitation did not provide for consideration of all factors o[f] significance to the territory;
- (iv) prices exceed available funds and it would not be appropriate to adjust quantities to come within available funds;
- (v) all otherwise acceptable bids or proposals received are clearly unreasonable prices; or
- (vi) there is reason to believe that the bids or proposals may not have been inadequately arrived at in open competition, may have been collusive, and may have been submitted in bad faith.

2 GAR Division 4, 3115(d). This list of cogent and compelling reasons suggests that cancellation is appropriate only when GSA becomes aware of a fact after the solicitation process begins, or when a new fact arises after the process begins. However, if GSA is aware from the outset that cancellation is possible or imminent, then competitive sealed bidding is simply not the procedure anticipated by these procurement laws, even if full disclosure is given concerning GSA's intent to possibly cancel.

**5. GSA has the authority to adopt standard operating procedures and GSA adopted a procedure reasonably calculated to determine whether a 10% differential exists.**

The rules, which are promulgated by the Policy Office, do not expand upon how to find the 10% differential. In fact, the rules do not even mention procurement through the Federal GSA.

However, 5 GCA §5113 gives the Chief Procurement Officer the power to "adopt operational procedures governing the internal functions of [GSA's] procurement operations." This section was fleshed out and incorporated in the rules at 2 GAR Division 4 §2104(b) as follows:

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Consistent with the provisions of the Guam Procurement Act and the Guam Procurement Regulations, the Chief Procurement Officer . . . may adopt operational procedures governing the internal functions of their procurement operations, a copy shall be provided to the Policy Office. [Emphasis added.]

Because the rules do not make any decisions regarding the 10% differential, the manner of finding the differential was left to the Chief Procurement Officer as an "operational procedure" of GSA's procurement functions, and the Chief Procurement Officer had every right to adopt a procedure therefor in order to make the statute authorizing procurement through the Federal GSA a functional one. In doing so, the Chief Procurement Officer would be consistent with both the procurement statutes and rules which left the question open to interpretation and gave GSA the authority to decide how to handle the procedure.

Furthermore, the Chief Procurement Officer is required by §2104(b) to provide the Policy Office with a copy of any standard operating procedure adopted; thus giving the Policy Office an opportunity to consider the procedure adopted and have it changed if any part of it was disagreeable.

Presumably in accordance therewith, the Chief Procurement Officer established a standard operating procedure for its buyers to use, a copy of which is attached to this memorandum as Attachment A.

The steps of the standard operating procedure, simplified and restated, are as follows:

1. The buyer shall inquire through the Federal GSA office in Hawaii whether the Federal GSA has a contract for the type of supplies or equipment desired. If available through the Federal GSA, then the buyer shall request the contract number and all other pertinent information.
2. After receipt of the information from the Federal GSA, the buyer shall issue a request for quotation to at least three (3) local vendors in order to calculate the 10% differential required by 5 GCA §5122.
3. The buyer shall then prepare an abstract with the information obtained from the three local vendors and compare the local prices against the Federal GSA contract price to see if the Federal GSA contract price is at least 10% less than the three local vendors.
4. If the 10% differential exists, then the supplies or equipment shall be obtained through the Federal GSA contract.

Not stated in the standard operating procedure, but implied therein and confirmed by the Chief Procurement Officer, is that if the abstract shows a 10% differential does not exist, then the local GSA must begin a competitive bid process for the supplies or equipment needed.

On its face, this procedure is 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 and also to prevent the inappropriate

cancellation of such bidding process once begun. Certainly, it is not the only means to acquire prices for comparison purposes, but it was the means chosen by the local GSA in accordance with the authority granted to it to adopt operational procedures.

**CONCLUSION:**

The Chief Procurement Officer had the authority to adopt standard operating procedures for determining that a 10% difference exists between the Federal GSA contractor's price and the prices of local vendors. Therefore, if the local GSA office procures through the Federal GSA in accordance with the standard operating procedure adopted, then competitive sealed bidding is not required. However, if the abstract prepared in accordance with the procedure shows that the Federal GSA contractor's price was not at least 10% less than the prices quoted by the three local vendors, then the local GSA must issue an invitation to bid.



**DEBORAH RIVERA**  
**Assistant Attorney General**

Attachment (1)

cc: Director, Department of Administration  
Public Auditor of Guam  
Deloitte & Touche LLP

## PURCHASING FROM GSA FEDERAL SUPPLY CONTRACT

### PROCEDURE

If a Buyer receives a requisition and the item being requested is for supplies, services or equipment, it may be purchased through the federal contract without the bidding procedure. The following steps shall be followed:

1. The Buyer shall inquire through GSA Federal in Hawaii by fax or by phone if they have the type of supplies, services or equipment in their contract. If so, request for the contract number and under what Federal Supply Contract number.
2. Upon receipt of the requested information from GSA Federal, the Buyer will then issue a request for quotation to at least three (3) local vendors in order to calculate the 10% as stated by the 5GCA. The buyer will then prepare an abstract and make their determination whether to process thru bidding or purchase thru the Federal Supply Contract depending on the outcome of the calculation.
3. If it is listed on the Federal Supply Contract and the local vendors provided a quote exceeding the 10% requirement a purchase order shall be prepared indicating the description, the quantity and the amount, etc. to Federal Supply Contract.
4. A purchase order shall be processed through the GSA Federal in Hawaii.
5. All the delivery, warranty and other terms are pre-negotiated under the federal contract.
6. The Buyer shall make appropriate follow ups with GSA Federal to keep up-to-date with the status of the order.
7. If the order is an equipment or vehicle, it still gets cleared through DPW before final acceptance.

Attachment A

