LEGAL MEMORANDUM

TO: Director, Department of Public Works

FROM: Attorney General

SUBJECT: Publication and Notice Requirements for Small Purchases of Construction

You have asked for assistance in establishing guidelines for giving public notice relative to small purchases of construction. Your request is due to the perceived conflict in the various laws on the subject, namely 5 GCA § 5211(c); 2 GAR Division 4 § 3109(d); 2 GAR Division 4 § 3109(f)(2); 2 GAR § 3111(d); and 29 GAR § 1167, which are cited by the Office of the Public Accountability in a recent performance audit of the Department of Public Works (DPW) procurement of certain capital improvement projects.

The first three laws cited concern procurement accomplished using the competitive sealed bidding method only. Each of the other methods of procurement has a procedure different from that of competitive sealed bidding. The other methods of procurement are not required to follow any part of the competitive sealed bidding procedure unless expressly stated in the law.

The three laws cited provide, in pertinent part, as follows:

§ 5211. Competitive Sealed Bidding.

(c) Public Notice. Adequate public notice of the Invitation for Bids shall be given a reasonable time prior to the date set forth therein for the opening of bids, in accordance with regulations promulgated by the Policy Office. . . .

5 GCA § 5211.

§ 3109. Competitive Sealed Bidding.

(d) Bidding Time. Bidding time is the period of time between the date of distribution of the Invitation for Bids and the time and date set for receipt of bids. In each
case bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of 15 days shall be provided unless a shorter time is deemed necessary for a particular procurement as determined in writing by the procurement officer.

(f) Public Notice.

(2) Publication. Every procurement in excess of $25,000 shall be publicized at least once and at least seven (7) days before the final date of submission of bids.

2 GAR Division 4 § 3109.

The initial subsection of 2 GAR Division 4 § 3109, subsection (a), provides that "[t]he provisions of this Section apply to every procurement made by competitive sealed bidding, including multi-step bidding." Subsection (a) does not state that § 3109 applies also to small purchases or other methods of procurement.

Instead, another section of the procurement rules, 2 GAR Division 4 § 3111, covers the procedures for small purchases, and its initial subsection (a) provides that "... this Section is established for procurement of... less than $50,000 for construction." None of the subsections of § 3111 call for notice or publication of notice of any kind. Insofar as procurement of construction between $500 and less than $50,000 is concerned, § 3111 only intends for the government to obtain three positive quotations by directly approaching at least three businesses and requesting a quotation without any formal publication of notice of the procurement.

Perhaps the confusion with 2 GAR Division 4 § 3109(f)(2) lies in the words "every procurement," giving the impression that all methods of procurement are covered by § 3109(f)(2). However, this notion must be dispelled because 2 GAR Division 4 §§ 3109 and 3111 are for clearly distinctive methods of procurement, and each of the two sections contains the complete and only requirements for each type of procurement method.¹

Insofar as 29 GAR § 1167 is concerned, this section of the rules, and all the other rules for DPW, were adopted in or about 1975. DPW’s procurement rules were promulgated in response to former 5 GCA § 50107 which addressed public bidding for construction by DPW. However, once the Guam Legislature enacted the Guam Procurement Law pursuant to P. L. 16-124 effective October 1, 1983, a centralized procurement system was established for all executive

¹ In contrast, 2 GAR Division 4 § 3114 covers competitive selection procedures for professional services, and subsection (e) thereof clearly provides that "public notice shall be given as provided in § 3109(f)," incorporating the public notice requirements of competitive sealed bidding.
branch agencies and replaced any other procurement procedures in existence prior thereto.\(^2\) Accordingly, with the enactment of P. L. 17-9, the Guam Legislature repealed 5 GCA § 50107, and with the repeal of § 50107, any of DPW’s rules concerning procurement in 29 GAR Chapter 1, Article 1 (§§ 1101-1183) were likewise repealed, albeit impliedly.

Therefore, 29 GAR § 1167, and all other rules regarding the old procurement procedures of DPW, are no longer in effect, having been impliedly repealed when 5 GCA § 50107 was repealed by P. L. 17-9.

Finally, the Guam Procurement Code provides that "[any] procurement not exceeding the amount established by regulation may be made in accordance with small purchase procedures promulgated by the Policy Office . . . ." [Emphasis added.] 5 GCA § 5213. Because of the permissive word "may," the government has a choice to use the small purchase method of procurement or to use competitive sealed bidding when a construction procurement is below $50,000. If the latter method is chosen, then publication of notice in accordance with 2 GAR Division 4 § 3109 is required. However, if the small purchase method is used, then regardless of the small purchase amount, no publication is required.

---

\(^2\) In addition to enacting the Guam Procurement Law, P.L. 16-124 amended or repealed the procurement laws of various agencies such as the Guam Telephone Authority, the Guam International Airport Authority, the Port Authority of Guam, the University of Guam, the Guam Memorial Hospital Authority, the Guam Community College, and the Guam Mass Transit Authority.