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## Office of the Attorney General

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June 25, 2008

**OPINION**

**Ref: AG 08-0583**

TO: Administrator, Guam Economic Development Authority

FROM: Attorney General

**SUBJECT: Whether the Government's Consolidated Banking Services Are Subject to the Guam Procurement Law**

This is in response to a request from Ms. Tina Garcia, Acting Deputy Administrator, requesting an opinion whether the government's consolidated banking services are subject to the Guam Procurement Law, and therefore must be bid out; or whether the Guam Procurement Law is inapplicable to the services, and therefore they may be acquired in any manner.

The government's consolidated banking requirements or business includes demand deposit accounts, ordinary savings accounts, time certificates of deposits, and trust accounts totaling in the hundreds of millions of dollars.

The question is whether the Guam Procurement Law applies since banks do not charge any fees for the government's consolidated banking business, and so the government is not expending any public funds to do its banking business. 5 G.C.A. §5004(b) provides, in relevant part:

This Chapter shall apply to every expenditure of public funds irrespective of their source . . . by this Territory, acting through a governmental body as defined herein, under any contract . . . .

We begin by quoting various sections of the Guam Procurement Law which together support the application of the law to the government's banking requirements.

Section 5210 of the Guam Code Annotated provides that "all territorial contracts shall be awarded by competitive sealed bidding" or other authorized procedure. [Emphasis added.]

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"Contracts" are defined as "all types of territorial agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction." 5 G.C.A. §5030(d). [Emphasis added.]

"Procurement" is defined, in part, as "buying, purchasing, renting, leasing or otherwise acquiring any supplies, services or construction." 5 G.C.A. §5030(o). [Emphasis added.]

"Services" are defined, in part, as "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." 5 G.C.A. §5030(s).

Furthermore, the underlying policies of the government's procurement system were included in the Guam Procurement Law. Important to this discussion is the statutory policy "to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory." 5 G.C.A. §5001(b)(5).

In 1997, an independent report on the government's banking practices and relationships was issued by the Barents Group (Barents). Barents found that a single bank had been the beneficiary of the government's primary banking business since the 1970's without competition, and that this practice had increased the government's cost of banking, reduced its ability to earn a higher yield on investments, and limited its ability to manage liquidity. Thus, Barents recommended that the government's banking business be bid out every five years. See *Bank of Guam v. Reidy*, 2001 Guam 14, pp. 2-3. Barent's recommendation is in keeping with the Guam Procurement Law's policy to maximize the value of public funds. Unless the government bids out its banking requirements and provides for competition among those who wish to service the government, the government cannot be certain that it is getting the best value among those able and willing to compete pursuant to the procurement law's statutory policy.

We also make the point that while banks do not charge the government to handle its banking business, the reason is because banks make money off the deposits for themselves. Thus, banks want and seek large depositors for their own enjoyment and benefit. However, banks also pay a portion of their earnings as interest to the depositors. The amount of the interest paid varies from institution to institution, and for large depositors like the government, apparently, the interest rate can be negotiated within a bank's limitations.

This difference in interest rates from one bank to another is of significance to this discussion. If the government can make a greater profit from interest earned with one bank over other competing banks, then an arrangement which provides for the least amount of profit or a lesser profit must be an expenditure to the government within the meaning of 5 G.C.A. §5004(b).

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In *Signacon Controls, Inc. v. Mulroy*, 32 N.Y.2d 410, 298 N.E.2d 670, 345 N.Y.S.2d 527 (N.Y. 1973), a county Fire Coordinator solicited interest from companies to provide a county-wide fire alarm reporting system. Interstate Traffic Equipment Co. offered to supply a central control console for free to the county, and the company would then charge an override cost on each transmitter sold to private purchasers like restaurants and hospitals to recoup the console's price. The county unanimously accepted the offer over others without ever signing a contract. Signacon objected on the basis that the acceptance violated a state law that prohibited contracts involving expenditures over a certain minimum dollar amount unless the bids were advertised and solicited, and an award made to the lowest bidder. The state's highest court noted that the accepted offer was not without costs to the county and discussed the many ways competitive bidders might have offered a better deal. The court affirmed the lower court's decision by concluding:

A contract which provides for a lesser income to the governmental unit than a competing contract might provide, is an "expenditure" within the meaning of section 103. . . . It is very possible in the case at bar that the agreement between Interstate and the county was the best agreement possible. But absent competitive bidding we have no way of knowing that. We can see no major burden added to a governmental unit in requiring bidding in a case such as this, and we can foresee much harm that could result from a lack of competitive bidding. Most importantly, the policy interest behind section 103 of the General Municipal law virtually mandates that there be competitive bidding when the county is so deeply involved in an agreement and is, in fact, a recipient of the seller's products and services.

Thus, the state court in *Signacon* not only relied on policy, but expanded the usual meaning of "expenditure" in its procurement law to capture those who would argue that the law did not apply because no money was going to be paid out by the county.

If the government of Guam consummates an arrangement with a bank to handle the government's consolidated banking business without putting the matter out to bid, then the government has no way of knowing for certain whether a better deal on interest rates could have been struck with another bank. Just as in *Signacon*, the difference in the interest rates between what the government gets through a direct deal and what it might have gotten if the matter were bid out may be classified as an "expenditure" to the government and within the meaning of 5 G.C.A. §5004(b).

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For the foregoing reasons, it is our opinion that the Guam Procurement Law applies to the government's consolidated banking requirements.



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