



February 17, 2011
OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

The Honorable Benjamin J. F. Cruz
Vice Speaker and Chairman
Committee on Youth, Cultural Affairs, Procurement,
General Government Operations, and Public Broadcasting
31st Guam Legislature
155 Hesler Place
Hagåtña, Guam, 96910

**RE: Written Testimony of Public Auditor Doris Flores Brooks, CPA, CGFM, on
Behalf of the Office of Public Accountability (OPA) Opposing the Passage of
Bill No. 48-31 (COR).**

Hafa Adai Vice Speaker Cruz,

The Office of Public Accountability (OPA) agrees that the Government of Guam must obligate the remaining \$150 Million (approximately) of 2009 American Recovery and Reinvestment Act (ARRA) funds by September 30, 2011 because the federal government's extension of time to obligate the funds is uncertain in these austere times. However, the OPA does not believe that Guam's Procurement Laws and Regulations impede the Government of Guam from the timely solicitation and award of contracts obligating ARRA funds.

Guam's existing Procurement Laws and Regulations create an expedited solicitation process. The majority of the Government of Guam's large contracts are awarded using the Invitation for Bid (IFB) process, and the Request for Proposal (RFP) process. The IFB process only requires fifteen (15) days from IFB publication to the bid submission deadline. See 2 G.A.R., Div. 4, Chap. 3, §3109(d). The RFP process, for contracts exceeding \$25,000, only requires seven (7) days from RFP's publication to the proposal submission deadline. See 5 G.C.A. §5010, §5211(c), 2 G.A.R., Div. 4, Chap. 3, §3111(b) (5) and §3111 (c) (2) and GSA Procedural Directive June 1, 1995. Thus, if the Government of Guam managed and efficiently planned its efforts to solicit contracts to obligate the ARRA funds in the timeframe prescribed by law, it could draft and publish the necessary IFBs or RFPs, in two (2) weeks; receive proposals and bids responding to the solicitations in one (1) to two (2) weeks, respectively; and award the contracts obligating the ARRA funds in the week after receiving such proposals and bids. Thus, the Government of Guam can solicit and award contracts obligating the ARRA funds within a four (4) week period using the existing IFB and RFP procedures.

Use of Guam's existing Procurement Laws and Regulations will ensure that the Government of Guam complies with the ARRA's stringent accountability and transparency provisions that were designed to curtail fraud, waste, and abuse.

Temporarily increasing the small purchase amount to from \$15,000 to \$100,000 for goods and services, and from \$50,000 to \$250,000 for construction, as proposed by Section 2 of Bill 48-31, will not achieve equivalent transparency. The small purchase procedure requires no less than three positive written quotations from businesses to be solicited. See 5 G.C.A. §5213, 2 G.A.R., Div. 4, Chap. 3, §3111(b), (c), and (d), and GSA Procedural Directive dated June 1, 1995. In practice this means that Request for Quotations (RPQ) must be faxed, mailed, or emailed to at least three (3) vendors. In contrast, for contracts exceeding \$25,000, the IFB and RFP procedures require publication in: (1) A newspaper of general circulation on Guam; or (2) In a newspaper of local circulation in the area pertinent to the procurement; or (3) In industry media; or (4) In a Government Publication designed for giving Public Notices. See 5 G.C.A. §5010, §5211(c), 2 G.A.R., Div. 4, Chap. 3, §3111(b) (5) and §3111 (c) (2) and GSA Procedural Directive June 1, 1995.

The existing caps on the amounts authorizing use of the small purchase procedure require use of the IFB and RFP procedures. The publication requirements for larger contracts guarantee transparency and encourage more potential vendors to submit bids or proposals. Thus, the proposed increase of the caps on the small purchase procedure will limit the notice of the solicitation of \$100,000 contracts for goods and services and \$250,000 contracts for construction to the three (3) potential vendors the procurement officers choose to contact, thus, limiting transparency and encouraging poor contracting and grant management, which has historically plagued our government and the people it serves.

Use of Guam's existing Procurement Laws and Regulations will ensure a protestor's due process and equal protection rights, guaranteed by the U.S. Constitution and Guam's Organic Act, are protected when the Government of Guam, or the Courts of Guam, must decide a procurement protest. The Procurement Protest Appeals decided by the OPA have exposed and corrected questionable or improper Government of Guam procurement practices. The existing protest procedure and procurement appeal process serve as a significant deterrent to fraud, waste, abuse, and poor contract management. Section 3 removes the right to protest when the Governor of Guam and the Public Auditor agrees to waive a Procurement Law or Regulation in a solicitation. Further, Section 4 removes the right of protestor to file a petition for review of the Public Auditor's decision in the Superior Court of Guam. These provisions are possible violations of a protestor's right to an administrative notice and a hearing and rights to equal protection of the laws, as protestors for solicitations for non-ARRA funded contracts would retain these substantial rights, which are protected by the U.S. Constitution and the Organic Act of Guam.

The OPA does agree with the imposition of the time limit for the purchasing agency to answer a protest. The OPA has found that the most substantial reason procurement protests cause delays in the procurement process is the long period of time purchasing agencies take to respond to protests. There is currently no limit to the period of time an agency has to answer a protest.

Further, additional amendments to prevent parties from delaying the procurement protest and appeal process, by prematurely going to Superior Court (Court), and requiring the parties who are authorized to commence an action in Court, after the OPA issues a decision on a procurement protest, should be limited to those parties who appeared in the appeal before the OPA. A limit of the automatic stay imposed by a timely protest to last until the OPA issues its final administrative determination of the protest and to require the protestor to apply to the Court for a stay if it appeals an OPA decision, will greatly enhance the efficiency of the protest resolution process.

The Legislature can achieve the foregoing by the making the following amendment to 5 G.C.A. §5425:

(b) Authority to Resolve Protests. The Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers shall have the authority, ~~prior to the commencement of an action in court concerning the controversy,~~ to settle and resolve a protest of an aggrieved bidder, offeror, or contractor, actual or prospective, concerning the award of a contract. This authority shall be exercised in accordance with regulations promulgated by the ~~Policy Office~~ Office of Public Accountability.

(c) Decision. If the protest is not resolved by mutual agreement, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of one of these officers shall promptly issue a decision in writing within seven (7) calendar days of receiving the written protest. Failure to issue a decision within the foregoing time period shall be deemed a decision denying the protest by such officers or their designees, as the case may be. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protestant of its right to administrative ~~and judicial~~ review.

(d) Notice of Decision. A copy of the written decision set forth in Subsection (c) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

(e) Appeal. A decision under Subsection (c) of this Section, including a decision there under regarding entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the protestant, to the ~~Public Auditor~~ Office of Public Accountability seven (7) calendar days after receipt by the protestant of the notice of decision or the failure of the Chief Procurement Officer, the Director of Public Works, or the head of

purchasing agency, or the designees of such officers, to issue a written decision seven (7) days after receiving a protest as set forth in Subsection (c) of this Section. Unless good cause requires an extension of time, the Public Auditor or his or her hearing officer Office of Public Accountability shall hold a hearing on such appeal within ~~forty (40)~~ sixty (60) calendar days of receipt of the protestant's notice of appeal ~~unless good cause requires an extension of time, in which case the hearing in the protestant's appeal shall be held within sixty (60) calendar days of receipt of the protestant's appeal.~~ The ~~Public Auditor~~ Office of Public Accountability shall render a written decision of the protestant's appeal within thirty (30) calendar days of from the completion of the hearing on the issue or issues appealed from.

(f) Finality. A decision of the ~~Public Auditor~~ Office of Public Accountability shall be final and conclusive unless ~~fraudulent, or a party,~~ who entered an appearance in such appeal, who is ~~aggrieved person~~ adversely affected by the decision commences an action in the Superior Court of Guam in accordance with Subsection (a) of §5480 of this Chapter.

(g) Stay. In the event of a timely protest under Subsection (a) of this Section ~~or under Subsection (a) of §5480 of this Chapter,~~ the Territory Government of Guam shall not proceed further with the solicitation or award of the contract prior to the final resolution of such protest by the Chief Procurement Officer, the Director of Public Works, or the head of a purchasing agency, or the designee of any such officer, as the case may be, or the resolution of the appeal of such protest by the Office of Public Accountability if an appeal is filed pursuant to Subsection (a) of this Section, and any such further action is void unless....

Furthermore, the OPA's holds that the enactment of P. L. 30-72 in December 2009, which mandates that the Attorney General (AG) review and approve all solicitations of \$500,000 or more, must be considered in the review of Bill No. 48-31 and the role this law has had on the possible risk of losing approximately \$150 Million in ARRA funding.

The mandated requirements of P. L. 30-72 has caused inherent delays of large government solicitations and contracts because when the law was first enacted, the standard operating procedures (SOP's) on how the review process would be executed, was not incorporated into the law. The OPA is in agreement with the intent and purpose of P. L. 30-72, however, the lack of a defined process created confusion for government line agencies because they did not know if they should send their requisitions directly to the AG's office for review or to the General Services Agency (GSA) Chief Procurement Officer (CPO) who would then forward it to the AG for review and approval.

In May 2010 the GSA CPO issued a directive to all line agencies to send requisitions for \$500,000 or more directly to the AG's office for review and approval. In one agency's solicitation, which is now under review by the OPA, the agency followed the GSA CPO's directive and sent their requisition directly to the AG's office, only to have the requisition returned to them two months later with instructions to re-submit the requisition to GSA

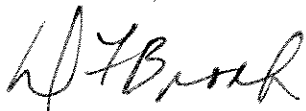
because the AG only works directly with the GSA CPO. After the AG's office returned the requisition, the agency subsequently revised the quantity, unit and total value of the requisition which brought the requisition below the \$500,000 dollar threshold -- a change the OPA does not condone. If the requisition, which the agency initially submitted to the AG for review, did complete the AG's review and approval process, the errors uncovered in OPA's review of this solicitation may have been prevented. In this case, the solicitation was delayed by 60 days because the requisition was bounced between the AG's office, the purchasing agency and GSA. This solicitation is now the subject of an on-going review by the OPA.

The government agencies' efforts to comply with the mandates of P. L. 30-72 has been further exacerbated by the fact that there is only one attorney within the AG's office who is currently assigned to review solicitations and contracts that involve ARRA funds. The AG's constrained staff of attorneys is another factor that has caused inherent delays. In a recent case, the OPA learned that it took 120 days for the AG to complete the review and issue approval for a solicitation submitted by the Guam Energy Office. The OPA holds that an improved expedited process to review and approve large solicitations and contracts must be addressed. A proposed solution is for the AG to deputize other attorneys to act in his stead by delegating review and approval authority to the purchasing agency's in-house or contracted attorney to ensure compliance with the intent and purpose of P. L. 30-72 by utilizing existing resources.

The foregoing are the substantial amendments that the OPA recommends prior to the passage of Bill 48-31. Should you have any questions, please contact me or OPA legal counsel and hearing officer, Anthony R. Camacho, Esq.

Thank you for your time and consideration.

Senseramente,

A handwritten signature in black ink, appearing to read 'Doris Flores Brooks', written in a cursive style.

Doris Flores Brooks, CPA, CGFM
Public Auditor