

CHAPTER 1 GENERAL PROVISIONS

NOTE: Guam Procurement Regulations authorized by 5 Guam Code Annotated Chapter 5 (Guam Procurement Act)

- §1101. Purpose.
- §1102. Policy.
- §1103. Advance Payments Prohibited.
- §1104. Local Procurement Preference.
- §1105. Requirement of Good Faith.
- §1106. Definitions.

§1101. Purpose. The purpose of the Guam Procurement Regulations, hereinafter referred to as the Regulations, is to provide standard policies and procedures governing the procurement, management, control, and disposal of supplies, services, and construction for the territory in conformity with 5 GCA Chapter 5, hereinafter referred to as the Guam Procurement Act.

§1102. Policy. It is the policy of this territory to promote economy, efficiency, and effectiveness in the procurement of supplies, services and construction by:

- (1) continuously developing sound procurement policies and practices;
- (2) providing for increased public confidence in the procedure followed in public purchasing;
- (3) exercising fair and equitable treatment of all persons who deal with the procurement system of this territory;
- (4) providing for increased economy in procurement activities and to maximize to the fullest extent practicable the purchasing value of public funds;
- (5) fostering effective broad-based competition within the free enterprise system;
- (6) providing safeguards for the maintenance of a procurement system of quality and integrity.
- (7) providing for public access to all aspects of procurement consistent with the *sealed bid* procedure and the integrity of the procurement process.

SOURCE: Item (7) was added by the GSA to comply with 5 GCA §5001(b)(8). (1/1/1999)

§1102.01 Sheltered or Disabled Persons The Chief Procurement Officer, the Director of Public Works or the head of the Purchasing Agency shall, to the extent practicable, purchase supplies and services offered by non-profit corporation employing sheltered or disabled workers, or by a government of Guam entity employing sheltered or disabled workers if the supply or service is available within the period required by the requesting agency or department. Purchases shall be made based on the prices offered by such entities.

SOURCE: Added to comply with 5 GCA 5001(d). (1/1/1999)

§1102.02 Biodegradable, Reusable, Recyclable or Recycled Material or Any Combination. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency shall, whenever possible, procure products that are biodegradable, reusable, recyclable, or made of recycled material, or any of these in any combination. The cost (prior to any adjustments for local vendors) of appropriate biodegradable, reusable, recyclable, or recycled products may be as much as ten percent (10%) greater than the cost of the non-biodegradable, non-reusable, non-recyclable, or non-recycled products they are replacing.

The Chief Procurement Officer, the Director of Public Works or the head of a Purchasing Agency shall determine the authenticity of any statement that a product is recyclable or biodegradable. If the bidder qualifies for the ten percent (10%) preference under this section, then the bidder must be given this preference. The ten percent adjusted cost authorized under this section may be combined with the fifteen percent adjusted cost for local vendors as authorized under Section 1104 of this regulation with a possible combined adjustment of twenty-five percent (25%) of the bid submission price.

SOURCE: Added to comply with P.L. 21-22. (1/1/1999)

§1102.03 Planned Procurement. All procurement of supplies and services shall, where possible, be made sufficiently in advance of need for delivery or performance to promote maximum competition and good management of resources. Publication of bids and requests for proposals shall not be manipulated so as to place potential-bidders at an unnecessary competitive disadvantage. Except in emergency situations, lower bids are generally preferred to shorter

delivery or performance bids. Delivery time may be considered as a factor in making an award to a responsible bidder only if his average delivery time as contained in the bid is delivery, or if performance does not exceed one hundred five percent (105%) of the lower priced bidder.

SOURCE: Added to comply with 5 GCA §5010. (1/1/1999)

§1103. Advance Payments Prohibited. No procurement shall be made which shall require advance payment unless authorized by law.

§1104. Local Procurement Preference. All procurement of supplies, and procurement of services shall be made from among businesses licensed to do business on Guam and that maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

(a) a licensed bona fide manufacturing business that adds at least twenty-five percent (25%) of the value of an item, not to include administrative overhead, using workers who are U.S. citizens or lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their former citizenship in the Trust Territory of the Pacific Islands; or

(b) a business that regularly carries an inventory for regular immediate sale of at least fifty percent (50%) of the supply items to be procured; or

(c) a business that has a bona fide retail or wholesale business location that regularly carries an inventory on Guam of a value of at least one half of the value of the bid or one hundred fifty thousand dollars (\$150,000) whichever is less, of supplies and items of a similar nature to those being sought; or

(d) a service business actually in business doing a substantial portion of its business on Guam, and hiring at least ninety-five percent (95%) U.S. citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

Procurement of supplies and services from off-Guam may be made if no business for such supplies or services may

be found on Guam or if the total cost of F.O.B. job site, unloaded, or procurement from off-Guam is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.

SOURCE: Modified to comply with 5 GCA §5008. (1/1/1999)

§1105. Requirement of Good Faith. These Regulations require all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.

§1106. Definitions. Terms used in these Regulations have the following meaning ascribed to them unless the context in which they are used requires a different meaning, or unless a different definition is prescribed for a particular chapter in the Regulations.

1. *Business* means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.

2. *Change Order* means a written order signed by the Procurement Officer, directing the contractor to make changes which the changes clause of the contract authorizes the Procurement Officer to order without the consent of the contractor.

3. *Chief Procurement Officer* means the person holding the position created in §5114 of the Guam Procurement Act, as the head of the central procurement office of Guam.

4. *Contract* means all types of territorial agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or construction.

5. *Contract Modification* means any written alteration in specifications, delivery point, rate of delivery, period of performance, price, quantity or other provisions of any contract accomplished by mutual action of the parties to the contract.

6. *Contractor* means any person having a contract with a governmental body.

7. *Construction* means the process of building, altering, repairing, improving, or demolishing any public structure or building, or other public

improvements of any kind to any public real property. It does not include the routine operation, routine repair, or routine maintenance of existing structures, buildings, or real property.

8. *Data* means recorded information, regardless of form or characteristic.

9. *Designee* means a duly authorized representative of a person holding a superior position.

10. *Employee* means an individual drawing a salary from a governmental body, whether elected or not, and any noncompensated individual performing personal services for any governmental body.

11. *Governmental Body* means any department, commission, council, board, bureau, committee, institution, agency, government corporation, authority or other establishment or official of the Executive Branch of the Government of Guam, except for Guam Community College, the University of Guam, the Department of Education, and the Guam Memorial Hospital Authority.

12. *Grant* means the furnishing by the territory or federal government 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.

13. *May* denotes the permissive.

14. *Person* means any business, individual, union, committee, club, other organization or group of individuals.

15. *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.

16. *Procurement Officer* means any person duly authorized to enter into and administer contracts and make written determinations with respect thereto. The

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term also includes an authorized representative acting within the limits of authority.

17. *Purchasing Agency* means any governmental body other than the Chief Procurement Officer or the Director of Public Works which is authorized by the Guam Procurement Act or its implementing regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts.

18. *Regulation* shall have the meaning given in the Administrative Adjudication Law.

19. *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, and other items which are, when delivered, in finished form and are not to be further processed by the using agency.

20. *Shall* denotes the imperative.

21. *Supplies* means all property, including but not limited to equipment, materials, printing of forms, stationery and the like which are designed for further use or processing by the using agency, insurance and leases of real property, excluding land and a permanent interest in land.

22. *Using Agency* means any governmental body of the territory which utilizes any supplies, services or construction procured under the Guam Procurement Act.

23. *Cost-Reimbursement Contract* means a contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of the Guam Procurement Act, and a fee, if any.

24. *Established Catalogue Price* means the price included in a catalogue, price list, schedule or other form that:

(a) is regularly maintained by a manufacturer or contractor;

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(b) is either published or otherwise available for inspection by customers; and

(c) states prices at which sales are currently or were last made to a significant number of any category of buyers or buyers constituting the general buying public for the supplies or services involved.

25. *Invitation for Bids* means all documents, whether attached or incorporated by reference, utilized for soliciting bids.

26. *Purchase Description* means the words used in a solicitation to describe the supplies, services or construction to be purchased, and includes specifications attached to, or made a part of, the solicitation.

27. *Responsible Bidder or Offeror* means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

28. *Responsive Bidder* means a person who has submitted a bid which conforms in all material respects to the Invitation to Bids.

29. *Specification* means any description of the physical or functional characteristics, or of the nature of a supply, 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.

30. *Architect-Engineer and Land Surveying Services* are those professional services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of Guam.

31. *Excess Supplies* means any supplies other than expendable supplies having a remaining useful life but which are no longer required by the using agency in possession of the supplies.

32. *Expendable Supplies* means all tangible supplies other than nonexpendable supplies.

33. *Nonexpendable Supplies* means all tangible supplies having an original acquisition cost of over One Hundred Dollars (\$100) per unit and a probable useful life of more than one (1) year.

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34. *Supplies* means supplies owned by the territory. (See also §1106.21 of these Regulations).

35. *Surplus Supplies* means any supplies other than expendable supplies no longer having any use to the territory.

36. *Blind Trust* means an independently managed trust in which the employee-beneficiary has no management rights and in which the employee-beneficiary is not given notice of alterations in, or other dispositions of, the property subject to the trust.

37. *Confidential Information* means any information which is available to an employee only because of the employee's status as an employee of this territory and is not a matter of public knowledge or available to the public on request.

38. *Conspicuously* means written in such special or distinctive format, print or manner that a reasonable person against whom it is to operate ought to have noticed it.

39. *Direct or Indirect Participation* means involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing or in any other advisory capacity.

40. *Financial Interest* means:

(a) ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, more than Two Thousand Five Hundred Dollars (\$2,500) per year, or its equivalent;

(b) ownership or such interest in any property or any business as may be specified by the Ethics Commission; or

(c) a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.

41. *Gratuity* means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless

consideration of substantially equal or greater value is received.

42. *Immediate Family* means a spouse, children, parents, brothers and sisters.

43. *Official Responsibility* means direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct territorial action.

44. *Purchase Request* means that document whereby a using agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for evaluation, suggested sources of supply, and information supplied for the making of any written determination required by the Guam Procurement Act.

45. *Sell* as used means signing a bid, proposal, or contract; negotiating a contract, contracting any employee for the purpose of obtaining, negotiating or discussing changes in specifications, price, cost allowances or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract, therefore, is subsequently negotiated by another person.

46. *Entity* means any department, agency, board commission, instrumentality, public corporation, or branch of the Government of Guam and any corporation or persons expending funds appropriated from the Government of Guam.

47. *Emergency* means a condition posing an imminent threat to public health, welfare, or safety which could not have been foreseen through the use of reasonable and prudent management procedures, and which cannot be addressed by other procurement methods of source selection.

SOURCE: Subsections (46) and (47) added to comply with 5 GCA 5030(w) and (x). (1/1/1999)

CHAPTER 2
PROCUREMENT ORGANIZATION

- §2101. Creation and Membership of the Procurement Policy Office.
- §2102. Duties and Responsibilities.
- §2103. Creation of the General Services Agency.
- §2104. Authority of the Chief Procurement Officer and the Director of Public Works.
- §2105. Delegation of Authority by the Chief Procurement Officer and the Director of Public Works.
- §2106. Delegation of Authority to Officials in Other Departments and Agencies.
- §2107. Exceptions to Delegation.
- §2108. Limitations on Delegation.
- §2109. Revolving Fund.
- §2110. Centralization of Procurement Authority.
- §2111. Coordination, Training and Education; Collection of Data Concerning Public Procurement.
- §2112. Authority to Contract for Certain Services and Approval of Contracts (5 GCA §5121 of the Guam Procurement Act)
- §2113. Duties of the Attorney General.

§2101. Creation and Membership of the Procurement Policy Office. (a) **Policy- Office Created.** The Procurement Policy Office was created as a part of the Office of the Governor and is referred to in these Regulations as the Policy Office.

(b) **Membership of the Policy Office.** The Policy Office shall consist of three(3) officers or, employees of the government of Guam appointed by the Governor; the Director-of Public Works and the Director of Administration, who shall serve as the chairperson. None of the three persons appointed by the Governor shall act concurrently as Procurement Officer nor shall any of such members [be] subordinates, unless such members are directors of agencies or instrumentalities, [or] act as procurement officers.

(c) **Administrative Support.** The Governor's Office provides such services as the Policy Office may request, including office space and administrative assistance.

SOURCE: Modified to comply with 5 GCA §5101. (1/1/1999)

§2102. Duties and Responsibilities.

1. Advise the Governor on policies, regulations, and procedures concerning procurement administration matters.

2. Establish regulations, consistent with the Guam Procurement Act, governing the procurement, management, control and disposal of any and all supplies, services and construction to be procured by the territory.

3. Consider and decide matters of policy within the provisions of the Guam Procurement Act, and those referred to it by the Chief Procurement Officer or Director of Public Works.

4. Audit and monitor the implementation of its regulations and the requirements of the Guam Procurement Act.

5. Be prohibited from exercising authority over the award or administration of any particular contract or over any dispute, claim, or litigation.

6. Promulgate regulations pertaining to the delegation of authority by the Chief Procurement Officer or the Director of Public Works to its designees.

7. Promulgate regulations for the purpose of procuring services of accountants, physicians, lawyers, dentists and other professionals.

8. Conforms its regulations to the provisions of the Administrative Adjudication Law. The Policy Office is prohibited from delegating its power to promulgate its regulations.

9. Promulgate regulations providing for as many alternative methods of construction management, as it may determine feasible.

10. Provide determination concerning non-substantial manner in non-compliance with bid security requirements.

11. Promulgate regulations pertaining to form of bonds and reduction of bond amounts.

12. Promulgate regulations requiring the inclusion in territorial construction contracts of clauses providing for adjustment in prices, time of performance or other contract provisions, as appropriate.

13. Promulgate regulations requiring the inclusion in territorial construction contracts of clauses providing for appropriate remedies and covering the following subjects:

- a. liquidated damages as appropriate;
- b. specified excuses for delayed performance;
- c. termination of the contract for default;
- d. termination of the contract in whole or in part for the convenience of the territory.

14. Promulgate regulations putting forth cost principles.

15. Shall promulgate regulations governing the:

- a. management of supplies during their entire life cycle;

- b. sale, lease or disposal of surplus supplies by public auction, competitive sealed bidding or other appropriate method designated by regulation, provided that no employee of the owning agency or disposing agency shall be entitled to purchase any such supplies;
- c. transfer of excess supplies.

16. Promulgate regulations to debar or suspend a person.

§2103. Creation of the General Services Agency. The centralized procurement of the Government is placed within an existing department, the Department of Administration, in the same position as is the Supply Management Division, but with expanded responsibilities.

However, the Chief Procurement Officer is a part of the Department of Administration, the Guam Procurement Act places procurement responsibilities with the Chief Procurement Officer, rather than with the Director of Administration, who still remains his superior. Nonetheless, the Chief Procurement Officer must make the decisions and, to this end, it is he, not the Director of Administration, who must have the qualifications in the specialized area of public procurement.

§2104. Authority of the Chief Procurement Officer and the Director of Public Works. (a) **Principal Contracting Officers of the Territory.** The Chief Procurement Officer of the General Services Agency, shall serve as the central procurement officer of the territory with respect to supplies and services. The Director of Public Works shall serve as the central procurement officer of the territory with respect to construction.

(b) **Power to Adopt Operational Procedures.** Consistent with the provisions of the Guam Procurement Act and the Guam Procurement Regulations, the Chief Procurement Officer and the Director of Public Works may adopt operational procedures governing the internal functions of their procurement operations, a copy shall be provided to the Policy Office.

(c) **Duties.**

(1) Except as otherwise specifically provided in the Guam Procurement Act, the Chief Procurement Officer shall, in accordance with regulations promulgated by the Policy Office:

- (i) procure or supervise the procurement of all supplies and services needed by the territory;
- (ii) exercise general supervision and control over all inventories of supplies belonging to the territory; and

(iii) establish and maintain programs for the inspection, testing and acceptance of supplies and services.

(2) Except as otherwise specifically provided in the Guam Procurement Act, the Director of Public Works shall, in accordance with regulations promulgated by the Policy Office:

(i) procure or supervise the procurement of all construction needed by the territory; and

(ii) establish and maintain programs for the inspection, testing and acceptance of construction.

§2105. Delegation of Authority by the Chief Procurement Officer and the Director of Public Works.

Application. The Chief Procurement Officer or the Director of Public Works may delegate authority to designees or to any governmental body or official.

Decision to Delegate. The Chief Procurement Officer or the Director of Public Works may delegate authority or may revoke authority such officer has delegated. Factors to consider in making the decision to delegate include:

(a) the expertise of the potential delegate in terms of procurement knowledge and any specialized knowledge pertinent to the authority to be delegated;

(b) the past experience of the potential delegate in exercising similar authority;

(c) the degree of economy and efficiency to be achieved in meeting the territory's requirements if authority is delegated;

(d) the available resources of the Office of the Chief Procurement Officer to exercise the authority if it is not delegated; and

(e) the consistency of delegation under similar circumstances.

Compliance with the Guam Procurement Act. Any designee of the Chief Procurement Officer, or the Director of Public Works, shall exercise delegated authority in accordance with the Guam Procurement Act and these Regulations.

§2106. Delegation of Authority to Officials in Other Departments and Agencies. The Chief Procurement Officer or the Director of Public Works may delegate in writing such authority as may be deemed appropriate to the head of any department or independent agency of this territory. Such delegation shall be in writing and shall specify:

(a) the activity or function authorized;

(b) any limits or restrictions on the exercise of the delegated authority;

- (c) whether the authority may be further delegated;
- and
- (d) the duration of the delegation.

§2107. Exceptions to Delegation. The authority conferred on the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency in the following sections of the Guam Procurement Regulations shall not be delegated:

- (a) Section 5104 (Contract Performance and Payment Bonds, Reduction of Bond Amounts);
- (b) Section 5106 (Contract Clauses and Their Administration, Modification of Required Clauses);
- (c) Section 6101 (Contract Clauses and Their Administration, Modification of Clauses);
- (d) Section 9101 (Authority to Resolve Protested Solicitations and Awards, Stay of Procurement During Protests); and
- (e) Section 9102 (Authority to Debar or Suspend, Authority).

§2108. Limitations on Delegation. (a) Under Section 3109 (Competitive Sealed Bidding, Award) of the Guam Procurement Regulations, the Director of Public Works, or the head of a Purchasing Agency may delegate the authority to negotiate an adjustment of the bid price for a construction project, provided that no contract may be awarded pursuant to such negotiations without the approval of the Director of Public Works, or the head of a Purchasing Agency.

(b) Under Section 9102 (Authority to Debar or Suspend, Authority) of the Guam Procurement Regulations, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may appoint a hearing officer to receive evidence and make a written report containing findings of fact and conclusions of the case. Thereafter, oral argument may be heard before the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, who shall issue a written decision pursuant to Section 9102, (Authority to Debar or Suspend, Decision), of the Guam Procurement Regulations.

§2109. Revolving Fund. The *Inventory Revolving Fund* is created and shall be maintained separate and apart from other government funds. The Chief Procurement Officer shall be the certifying officer of the Inventory Revolving Fund. The Fund shall be used for the purchase and replenishment of items to be carried in the supplies inventory to be maintained in the warehouse operated by the General Services Agency.

The Fund shall be reimbursed by governmental agencies obtaining supplies from the General Services Agency.

§2110. Centralization of Procurement Authority. Except as otherwise provided in this Chapter, all rights, powers, duties, and authority relating to the procurement of supplies, services, and construction, and the management, control, warehousing of supplies, services, and construction now vested in, or exercised by, any governmental body under the several statutes relating thereto are hereby transferred to the Policy Office and the Chief Procurement Officer and the Director of Public Works, as provided in the Guam Procurement Act §5120 of Title 5.

§2111. Coordination, Training and Education; Collection of Data Concerning Public Procurement. The Chief Procurement Officer shall cooperate with the Bureau of Budget and Management Research and the Territorial Auditor, or any successor agency, in the preparation of statistical data concerning the procurement, usage and disposition of all supplies and services, and employ such trained personnel as may be necessary to carry out this function. All using agencies shall furnish such reports as the Chief Procurement Officer may require concerning usage, needs and stocks on hand, and the Chief Procurement Officer shall have authority to prescribe forms to be used by the using agencies in requisitioning, ordering and reporting of supplies and services, (Guam Procurement Act §5140 of Title 5).

§2112. Authority to Contract for Certain Services and Approval of Contracts (Guam Procurement Act §5121 of Title 5). (a) **General Authority.** For the purpose of procuring the services of accountants, physicians, lawyers, dentists and other professionals, any governmental body of this territory may act as a purchasing agency and contract on its own behalf for such services, subject to the provisions of the Guam Procurement Act, and these Regulations, but this subsection shall not authorize the procuring of such services where any given governmental body is otherwise prohibited from procuring such services.

(b) **Approval of Contracts for Legal Services.** No contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General. Nothing in this Section or the Guam Procurement Act shall preclude the Attorney General or his designee from participating in negotiations for any contract upon the request of the government officer or agency primarily responsible for such negotiations.

(c) **Approval of Contracts Generally.** The Chief Procurement Officer, or his designee, or a procurement officer of an agency authorized to procure the services or supplies in question, as established in these Regulations, shall execute all contracts for the Government of Guam. The Chief Procurement Officer may approve standard form contracts or purchase orders and once such approval of the standard form is given, contracts or purchase orders made on such form may be executed without the further approval of the Chief Procurement Officer unless he has reserved such power of approval pursuant to the applicable Section of these Regulations.

§2113. Duties of the Attorney General. The Attorney General, the Deputy Attorney General or such Assistant Attorneys General as the Attorney General may designate, shall serve as legal counsel and provide necessary legal services to the Policy Office and the General Services Agency. The Attorney General shall, in addition, when he approves contracts, determine not only the correctness of their form, but their legality. In making such determination of legality, he may require any or all agencies involved in the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out. He may prescribe the forms and format required to be followed by the agencies in aiding him in his determination of legality, (Guam Procurement Act §5150 of Title 5).

CHAPTER 3 SOURCE SELECTION AND CONTRACT FORMATION

- §3101. Definitions of Terms Used in this Chapter.
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- §3103. Relations Between Agencies.
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- §3114. Competitive Selection Procedures for Services Specified in §2112 (Authority to Contract for Certain Services and Approval of Contracts) of these Regulations.
- §3115. Cancellation of Invitations for Bids or Requests for Proposals.
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- §3129. Record of all (other) Procurement Actions.
- §3130. Certification of Records.
- §3131. Public Record.
- §3132. Rules for Procurement Records.

§3101. Definitions of Terms Used in this Chapter.

(1) *Capability*, as used in §1106 (Definitions, Responsible

Bidder or Offeror) of these Regulations, means capability at the time of award of the contract.

(2) *Cost Analysis* is the evaluation of cost data for the purpose of arriving at costs actually incurred or estimates of costs to be incurred, prices to be paid, and costs to be reimbursed.

(3) *Cost Data* are information concerning the actual or estimated cost of labor, material, overhead, and other cost elements which have been actually incurred or which are expected to be incurred by the contractor in performing the contract.

(4) *Discussions*, as used in the source selection process, means an exchange of information or other manner of negotiation during which the offeror and the territory may alter or otherwise change the conditions, terms, and price of the proposed contract. Discussions may be conducted in connection with competitive sealed proposals, sole source, and emergency procurement; discussions are not permissible in competitive sealed bidding (except to the extent permissible the first phase of multi-step sealed bidding).

(5) *Prequalification for Inclusion on Bidders List* means determining in accordance with §3117 (Prequalification) that a prospective bidder or offeror satisfies the criteria established for being included on the bidders list.

(6) *Price Analysis* is the evaluation of price data, without analysis of the separate cost components and profit as in cost analysis, which may assist in arriving at prices to be paid and costs to be reimbursed.

(7) *Price Data* are factual information concerning prices, including profit, for supplies, services, or construction substantially similar to those being procured. In this definition, *prices* refer to offered or proposed selling prices, historical selling prices, and current selling prices of such items. This definition refers to data relevant to both prime and subcontract prices.

(8) *Solicitation* means an Invitation for Bids, a Request for Proposals, a request for quotations, or any other document issued by the territory for the purpose of soliciting bids or proposals to perform a territorial contract.

(9) *Suppliers*, as used in §3117 (Prequalification) means prospective bidders or offerors.

§3102. General Provisions. (a) Extension of Time for Bid or Acceptance. After opening bids or proposals, the Procurement Officer may request bidders or offerors to extend the time during which the territory may accept their bids or proposals, provided that, with regard to bids, no other change is permitted. The reasons for requesting such extension shall be documented.

(b) **Extension of Time on Indefinite Quantity Contracts.** The time of performance of an indefinite quantity contract may be extended upon agreement of the parties, provided the extension is for 90 days or less and the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that it is not practical to award another contract at the time of such extension.

(c) **Only One Bid or Proposal Received.**

(1) **One Bid Received.** If only one responsive bid is received in response to an Invitation for Bids (including multi-step bidding), an award may be made to the single bidder if the Procurement Officer finds that the price submitted is fair and reasonable, and that either other prospective bidders had reasonable opportunity to respond, or there is not adequate time for resolicitation. Otherwise, the bid may be rejected pursuant to the provisions of §3115 (Cancellation of Solicitations; Rejection of Bids or Proposals) and:

(A) new bids or offers may be solicited;

(B) the proposed procurement may be cancelled; or

(C) if the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, determines in writing that the need for the supply or service continues, but that the price of the one bid is not fair and reasonable and there is no time for resolicitation or resolicitation would likely be futile, the procurement may then be conducted under §3112 (Sole Source Procurement) or §3113 (Emergency Procurement), as appropriate.

(2) **One Proposal Received.** If only one proposal is received in response to a Request for Proposals, the Procurement Officer may, as such officer deems appropriate, either make an award in accordance with the procedures set forth in §3110 (Competitive Sealed Proposals) or, if time permits, resolicit for the purpose of obtaining competitive sealed proposals.

(d) **Multiple Or Alternate Bids or Proposals .** Unless multiple or alternate bids or proposals are specifically provided for, the solicitation shall state that such bids or proposals shall not be accepted. When prohibited, multiple or alternate bids or proposals shall be rejected, provided that if a bidder clearly indicates a base bid, it shall be considered for award as though it were the only bid or proposal submitted by the bidder or offeror. The provisions of this Section shall be set forth in the solicitation, and if multiple or alternate bids or proposals are allowed, it shall specify their treatment.

(e) (Reserved).

(f) **Bid and Performance Bonds for supply Contracts or Service Contracts.** Bid and performance bonds or other security may be required for supply contracts or service contracts as the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or such officer's designee deems advisable to protect the interest of the territory. Any such requirements must be set forth in the solicitation. Bid or performance bonds should not be used as a substitute for a determination of bidder or offeror responsibility. §5103 (Bid Bonds) and §5104

(Performance and Payment Bonds) set forth bonding requirements applicable to construction contracts and may be considered when establishing any such requirements for supply contracts or service contracts. See Subsections 3109(c)(3) (Bid Bond) and 3109(c)(4) (Performance Bond) for application on supply or service contracts.

(g) **Conditioning Bids or Proposals Upon Other Awards Not Acceptable.** Any bid or proposal which is conditioned upon receiving award of both the particular contract being solicited and another territorial contract shall be deemed nonresponsive and not acceptable.

§3103. Relations Between Agencies. (a) Purchase Requisitions by Agencies.

(1) **Authority to Reject** . When the Chief Procurement Officer, or the Director of Public Works, or the head of a Purchasing Agency, after consultation with the requesting agency, decides that processing the purchase requisition is clearly not in the best interest of the territory or that further review is needed, such officer shall return such purchase requisition to the requesting agency. A statement of the reasons for its return shall accompany the returned requisition. Examples of reasons a purchase requisition may be returned include, but are not limited to:

(A) the request can be satisfied from existing territorial stocks or territorial contracts;

(B) the request exceeds agency needs;

(C) the supplies, services, or construction requested could be procured more economically at a different time without detriment to the territory;
or

(D) the quality requested is inconsistent with territorial standards and usage.

Rejected purchase requisitions may be reconsidered upon approval of a written justification from the affected agency by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. A written determination shall be made a part of the purchase requisition file.

(2) **Authority to Establish Lead times.** Upon receipt of purchase requisitions, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, has authority to decide when the procurement will be initiated and the time for response to the solicitation, provided the requesting agency is notified if any dates this officer establishes exceed those stated by such agency in the purchase requisition or will result in deliveries under the contract being later than the delivery date stated in the purchase requisition.

(3) **Requesting Agency Response.** Any matters relating to disagreements between a requesting agency and the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, in respect to actions taken under Subsections 3103(a)(1) or 3103(a)(2) of this Section, or in regard to any other matter concerning a purchase requisition, may be brought to the Policy Office for resolution.

SOURCE: Fixed typographical error. (1/1/1999)

(b) **Determination of Contractual Terms Conditions.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency is authorized to determine the contractual provisions, terms, and conditions of solicitations and contracts, provided such provisions, terms, and conditions are not contrary to statutory or regulatory requirements governing the procurement.

§3104. Unsolicited Offers. (a) Unsolicited Offers Provision.

(1) **Defined.** An unsolicited offer is any offer other than one submitted in response to a solicitation.

(2) **Processing of Unsolicited Offers.** The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency shall consider the offer as provided in this Section. If an agency that receives an unsolicited offer is not authorized to enter into a contract for the supplies, services, or construction offered, the head of such agency shall forward the offer to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, who shall have final authority with respect to evaluation, acceptance, and rejection of such unsolicited offers.

(3) **Conditions for Consideration.** To be considered for evaluation an unsolicited offer:

(A) must be in writing;

(B) must be sufficiently detailed to allow a judgment to be made concerning the potential utility of the offer to the territory;

(C) must be unique or innovative to territorial use;

(D) must demonstrate that the proprietary character of the offering warrants consideration of the use of sole source procurement; and

(E) may be subject to testing under terms and conditions specified by the territory.

(4) **Evaluation.** The unsolicited offer shall be evaluated to determine its utility to the territory and whether it would be to the territory's advantage to enter into a contract based on such offer. If an award is to be made on the basis of such offer, the sole source procedures in §3112 (Sole Source Procurement) shall be followed.

(5) **Confidentiality.** Any written request for confidentiality of data contained in an unsolicited offer

that is made in writing shall be honored. If an award is made, confidentiality of data shall be agreed upon by the parties and governed by the provisions of the contract. If agreement cannot be reached on confidentiality, the territory may reject the unsolicited offer.

§3105. Novation or Change of Name. (a) Novation or Change of Name Provision.

(1) **No Assignment.** No territorial contract is transferable, or otherwise assignable, without the written consent of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency provided, however, that a contractor may assign monies receivable under a contract after due notice to the territory.

(2) **Recognition of a Successor in Interest; Novation.** When in the best interest of the territory, a successor in interest may be recognized in a novation agreement in which the transferor and the transferee shall agree that:

(A) the transferee assumes all of the transferor's obligations;

(B) the transferor waives all rights under the contract as against the territory; and

(C) unless the transferor guarantees performance of the contract by the transferee, the transferee shall, if required, furnish a satisfactory performance bond.

(3) **Change of Name.** When a contractor requests to change the name in which it holds a contract with the territory, the Procurement Officer responsible for the contract shall, upon receipt of a document indicating such change of name (for example, an amendment to the articles of incorporation of the corporation), enter into an agreement with the requesting contractor to effect such a change of name.

The agreement changing the name shall specifically indicate that no other terms and conditions of the contract are thereby changed.

(4) **Reports.** All change of name or novation agreements effected hereunder other than by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall be reported to such officer within 30 days of the date that the agreement becomes effective.

(5) **Actions Affecting More than one Purchasing Agency.** Notwithstanding the provisions of Subsections 3105(a)(1) through 3105(a)(3) of this Section, when a contractor holds contracts with more than one Purchasing Agency of the territory, the novation or change of name agreements herein authorized shall be processed only through the Office of the Chief Procurement Officer, or the Director of Public Works.

§3106. Contracting for Installment Purchase Payments. Contracting for Installment Purchase Payments, Including Interest. Supply contracts may provide for installment purchase payments, including interest charges, over a period of time. Installment payments, however, should be used judiciously in order to achieve economy and not to avoid budgetary restraints and shall be justified in writing by the head of the using agency. Heads of using agencies shall be responsible for ensuring that statutory or other prohibitions are not violated by use of installment provisions and that all budgetary, funding, or other required prior approvals are obtained. No such agreement shall be used unless provision for installment payments is included in the solicitation document.

§3107. Purchase of Items Separately from Construction Contract Provision. Purchase of Items Separately from Construction Contract. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency is authorized to determine whether a supply item or group of supply items shall be included as a part of, or procured separately from, any contract for construction.

§3108. Methods of Source Selection. Unless otherwise authorized by law, all territorial contracts shall be competitive sealed bidding, pursuant to §3109, (Competitive Sealed Bidding) of these Regulations, except as provided in:

(a) §3110 - Procurement from non-profit corporations.]

(b) §3111 – Small Purchases

(c) §3112 – Sole Source Procurement;

(d) §3113 – Emergency Procurement;

(e) §3114 – Competitive Selection Procedures for Services Specified in Section 2112);

(f) §3115 – Purchase of Drugs by Generic Names;
or

(g) §5108 – Architect-Engineer and Land Surveying Services.

SOURCE: Original subsection (a) repealed to reflect repeal of competitive sealed proposals and to add reference to exemptions for non-profit organizations.1/1/1999)

§3109. Competitive Sealed Bidding. (a) **Application.** The provisions of this Section apply to every procurement made by competitive sealed bidding, including multi-step bidding.

(b) **Use of Competitive Sealed Bidding .** Competitive sealed bidding is the preferred method for the procurement of supplies, services, or construction.

(c) **The Invitation for Bids.**

(1) **Use.** The Invitation for Bids is used to initiate a competitive sealed bid procurement.

(2) **Content.** The Invitation for Bids shall include the following:

(A) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the address of the office to which bids are to be delivered, the maximum time for bid acceptance by the territory, and any other special information;

(B) the purchase description, evaluation factors, delivery or performance schedule, and such inspection and acceptance requirements as are not included in the purchase description; and

(C) the contract terms and conditions, including warranty and bonding or other security requirements, as applicable.

(3) **Bid Bond for Procurement of Supplies and Services.** A surety bid bond or cash deposit may be submitted with any bid, and if required, to prescribe the amount thereof and enforce forfeiture of such bond or deposit if the successful bidder fails to enter into contract within the prescribed time. Bid bond may be required where essential to the best interest of the territory. Determinations to require bid bonds shall be made by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency on individual procurement. The use of a bid bond, however, is required when a performance bond is required. See §5103 for Bonding Requirement in Procurement of Construction.

(A) **Amount required.** Whenever a bid bond is required, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency in accordance with his best judgement shall determine the amount or percentage which when applied to the bid price will produce an amount, that will provide a bid guarantee which is adequate to protect the territory from loss in the event of termination of the contract for default as provided in the Bid

Guarantee provision. The amount shall be not less than 10% of the bid price.

(B) **Invitation for Bids Provision.** When a bid guarantee is required, the invitation for bids shall contain (1) a statement that identifies details which will enable bidders to determine the amount of the bid guarantee and (2) a bid guarantee provision as prescribed in this Section.

(4) **Performance Bond for Procurement of Supplies and Services.**

(A) To determine whether a performance bond shall be required before a contract is entered into, and if required, to prescribe the amount thereof and enforce forfeiture of such bond upon failure of the contractor to perform the contract in a satisfactory manner. Performance bonds may be required where essential to the best interest of the territory. Determinations to require performance bonds shall be made by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency on individual procurement. Examples of situations which may warrant requiring a performance bond for procurement of supplies and services are:

(1) where substantial progress payment are made before delivery of end items commences;

(2) where, in connection with a contract for dismantling, demolition, or removal of improvements, etc., regardless of amount, a performance bond is determined necessary to ensure completion of work and to protect the territory against damage to adjoining property during its performance;

(3) performance bond shall not be required unless the invitation for bids requires such a bond, or the requirement of such bond is in the best interest of the territory; or

(4) any other conditions deemed to be in the best interest of the territory.

(B) **Amount required.** Where the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency determines to require a performance bond, he shall determine the amount that will adequately protect the territory.

(C) **Applicability.** The bonds prescribed in this Section, if its applications on individual procurement are determined by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. See §5103 for Bonds Requirement in Procurement of Construction.

(D) Bonds as may be required in this Section shall be surety licensed to do business in this territory. Bonds shall be on Government standard form or standby irrevocable Letter of Credit or Certified Check or Cashier's Check issued by any local banks or bonding agencies.

(5) **Incorporation by Reference.** The Invitation for Bids may incorporate documents by reference provided that the Invitation for Bids specifies where such documents can be obtained.

(6) **Acknowledgment of Amendments.** The Invitation for Bids shall require the acknowledgment of the receipt of all amendments issued.

(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.

(e) Bidder Submissions.

(1) **Bid Form.** The Invitation for Bids shall provide a form which shall include space in which the bid price shall be inserted and which the bidder shall sign and submit along with all other necessary submissions.

(2) **Telegraphic Bids.** The Invitation for Bids may state that telegraphic bids and mailgrams will be considered whenever they are received in hand at the designated office by the time and date set for receipt of bids. Such telegraphic bids or mailgrams shall contain specific reference to the Invitation for Bids; the items, quantities and prices for which bid is submitted; the time and place of delivery; and a statement that the bidder agrees to all terms, conditions, and provisions of the Invitation for Bids.

(3) Bid Samples and Descriptive Literature.

(A) *Descriptive Literature* means information available in the ordinary course of business which shows the characteristics, construction, or operation of an item which enables the territory to consider whether the item meets its needs.

(B) *Bid Sample* means a sample to be furnished by a bidder to show the characteristics of the item offered in the bid.

(C) Bid samples and descriptive literature may be required when it is necessary to evaluate required characteristics of the items bid.

(D) The Invitation for Bids shall state that bid samples or descriptive literature should not be submitted unless expressly requested and that, regardless of any attempt by a bidder to condition the bid, unsolicited bid samples or descriptive literature which are submitted at the bidder's risk will not be examined or tested, and will not be deemed to vary any of the provisions of the Invitation for Bids.

(E) Disclosure of Major Stockholders. As a condition of bidding, any partnership or corporation doing business with the government of Guam shall submit an affidavit executed under oath that lists the name and address of any person who has held more than ten percent (10%) of the outstanding interest or shares in said partnership, sole proprietorship or corporation at any time during the twelve (12) month period immediately preceding submission of a bid. The affidavit shall contain the number of shares or the percentage of all assets of such partnership, sole proprietorship or corporation which have been held by each such person during the twelve (12) month period.

In addition, the affidavit shall contain the name and address of any person who has received or is entitled to receive a commission, gratuity or other compensation for procuring or assisting in obtaining business related to the bid for the bidder and shall also contain the amounts of any such commission, gratuity or other compensation. The affidavit shall be open and available to the public for inspection and copying. Failure to submit the affidavit concerning commissions paid shall be deemed nonresponsive and cause for rejection of the bid upon opening.

SOURCE: Added to comply with 5 GCA §5233. (1/1/1999)

(f) Public Notice.

(1) **Distribution.** Invitations for Bids or Notices of the Availability of Invitation for Bids shall be mailed or otherwise furnished to a sufficient number of bidders for the purpose of securing competition. Notices of Availability shall indicate where, when, and for how long Invitations for Bids may be obtained; generally describe the supply, service, or construction desired; and may contain other appropriate information. Where appropriate, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may require payment of a fee or a deposit for the supplying of the Invitation for Bids.

(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:

(A) in a newspaper of general circulation on Guam;

(B) in a newspaper of local circulation in the area pertinent to the procurement;

(C) in industry media; or

(D) in a government publication designed for giving public notices.

(3) **Public Availability.** A copy of the Invitation for Bids shall be made available for public inspection at the Procurement Officer's office or the public information office of such officer's agency.

(g) **Bidders' Lists.**

(1) **Purpose.** Bidders' lists may be compiled to provide the territory with the names of businesses that may be interested in competing for various types of territorial contracts. Unless otherwise provided, inclusion or exclusion of the name of a business does not indicate whether the business is responsible in respect to a particular procurement or otherwise capable of successfully performing a territorial contract.

(2) **Deletion of Bidders.** Businesses that fail to respond to Invitation for Bids or Notices of Availability on three (3) consecutive procurement of similar items may be removed from the applicable bidders' list after notice to the bidder. Prospective bidders currently meeting the criteria for inclusion on the list may be reinstated on such lists at their request.

(3) **Public Availability.** Names and addresses on bidders' lists shall be available for public inspection provided the lists shall not be used for Names and addresses on bidders' lists shall be available for public inspection provided the lists shall not be used for private promotional, commercial, or marketing purposes.

(4) **Pre-Bid Conferences.** Pre-bid conferences may be conducted to explain the procurement requirements. They shall be announced to all prospective bidders known to have received an Invitation for Bids. The conference shall be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Nothing stated at the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment as provided in §3109(i) and the Invitation for Bids, if a pre-bid conference was required therein, or the notice of pre-bid conference shall so provide. A summary of the conference shall be supplied to all those prospective bidders known to have received an Invitation for Bids. If a transcript is made, it shall be a public record.

(i) **Amendments to Invitations for Bids.**

(1) **Form.** Amendments to Invitations for Bids shall be identified as such and shall require that the bidder acknowledge receipt of all amendments issued. The amendments shall reference the portions of the Invitations for Bids it amends.

(2) **Distribution.** Amendments shall be sent to all prospective bidders known to have received an Invitation for Bids.

(3) **Timeliness.** Amendments shall be distributed within a reasonable time to allow prospective bidders to consider them in preparing their bids. If the time and date set for receipt of bids will not permit such preparation, such time shall be increased to the extent possible in the amendment or, if necessary, by telegram or telephone and confirmed in the amendment.

(j) **Pre-Opening Modification or Withdrawal of Bids.**

(1) **Procedure.** Bids may be modified or withdrawn by written notice received in the office designated in

the Invitation for Bids prior to the time and date set for bid opening. A telegraphic modification or withdrawal received by telephone from the receiving telegraph company office prior to the time and date set for bid opening will be effective if the telegraph company confirms the telephone message by sending a written copy of the telegram showing that the message was received at such office prior to the time and date set for bid opening.

(2) **Disposition of Bid Security** . If a bid is withdrawn in accordance with this section, the bid security, if any, shall be returned to the bidder.

(3) **Records.** All documents relating to the modification or withdrawal of bids shall be made a part of the appropriate procurement file.

(k) Late Bids, Late Withdrawals, and Late Modifications.

(1) **Definition.** Any bid received after the time and date set for receipt of bids is late. Any withdrawal or modification of a bid received after the time and date set for opening of bids at the place designated for opening is late.

(2) **Treatment.** No late bid, late modification, or late withdrawal will be considered unless received before contract award, and the bid, modification, or withdrawal would have been timely but for the action or inaction of territorial personnel directly serving the procurement activity.

(3) **Notice.** Bidders submitting late bids that will not be considered for award shall be so notified as soon as practicable.

(4) **Records.** Records equivalent to those required in §3109(j)(3) (Pre-opening Modification or Withdrawal of Bids, Records) shall be made and kept for each late bid, late modification, or late withdrawal.

(l) Receipt, Opening, and Recording of Bids.

(1) **Receipt.** Upon its receipt, each bid and modification shall be time-stamped, but not opened and shall be stored in a secure place until the time and date set for bid opening.

(2) **Opening and Recording .** Bids and modifications shall be opened publicly in the presence of one or more witnesses, at the time, date, and place designated in the Invitation for Bids. The name of each bidder, the bid price, and such other information as is deemed appropriate by the Procurement Officer, shall be read aloud or otherwise made available. Such information also shall be recorded at the time of bid opening; that is, the bids shall be tabulated or a bid abstract made. The names and addresses of required witnesses shall also be recorded at the opening. The opened bids shall be available for public inspection except to the extent the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection 3109(l)(3) of this section. Material so designated shall accompany the bid and shall be readily separable from the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available at the time of bid opening regardless of any designation to the contrary.

(3) **Confidential Data.** The Procurement Officer shall examine the bids to determine the validity of any requests for nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing what portions of the bids will be disclosed and that, unless the bidder protests under Chapter 9 (Legal and Contractual Remedies of this Guam Procurement Regulations, the bids will be so disclosed. The bids shall be opened to public inspections subject to any continuing prohibition on the confidential data.

(m) Mistakes in Bids

(1) **General.** Correction or withdrawal of a bid because of an inadvertent, nonjudgmental mistakes in the bid requires careful consideration to protect the integrity of the competitive bidding system, and to assure fairness. If the mistake is attributable to an error in judgment, the bid may not be corrected. Bid correction or withdrawal by reason of a nonjudgmental mistake is permissible, but only to the extent it is not contrary to the interest of the territory or the fair treatment of other bidders.

(2) **Mistakes Discovered Before Opening.** A bidder may correct mistakes discovered before the time and date set for bid opening by withdrawing or correcting the bid as provided in §3109(j) (Pre-Opening Modification or Withdrawal of Bids)

(3) **Confirmation of Bid.** When the Procurement Officer knows or has reason to conclude that a mistake has been made, such officer should request the bidder to confirm the bid. situations in which confirmation should be requested include obvious, apparent errors on the face of the bid or a bid unreasonably lower than the other bids submitted. If the bidder alleges mistake, the bid may be corrected or withdrawn if the conditions set forth in Subsections 3109(m)(4) through 3109(m)(6) of this Section are met.

(4) Mistakes Discovered After Opening but Before Award.

(A) This Subsection sets forth procedures to be applied in three (3) situations described in Subsections 3109(m)(4)(A) through 3109(m)(4)(C) of this Subsection in which mistakes in bids are discovered after the time and date set for bid opening but before award.

(B) **Minor Informalities.** Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes

that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible. The Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the territory. Examples include the failure of a bidder to:

(1) return the number of signed bids required by the Invitation for Bids;

(2) sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound; or

(3) acknowledge receipt of an amendment to the Invitation for Bids; but only if:

(i) it is clear from the bid that the bidder received the amendment and intended to be bound by its terms; or

(ii) the amendment involved had a negligible effect on price, quantity, quality, or delivery.

(C) Mistakes where intended correct bid is evident. If the mistake and the intended correct bid is clearly evident on the face of the bid document, the bid shall be corrected to the intended correct bid and may not be withdrawn. Examples of mistakes that may be clearly evident on the face of the bid document are typographical errors, errors in extending unit prices, transportation errors, and arithmetical errors.

(D) Mistakes where intended correct bid is not evident. A bidder may be permitted to withdraw a low bid if:

(1) a mistake is clearly evident on the face of the bid document, but the intended correct bid is not similarly evident; or

(2) the bidder submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made.

(5) Mistakes Discovered After Award. Mistakes shall not be corrected after award of the contract except where the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency makes a written determination that it would be unconscionable not to allow the mistake to be corrected.

(6) Determination Required . When a bid is corrected or withdrawn, or correction or withdrawal is denied, under Subsection 3109(m)(5) of this Section, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall prepare a written determination showing that the relief was granted or denied in accordance with these regulations, except that the Procurement Officer shall prepare the determination required in Subsection 3109(m)(4)(A) of this Section.

(n) Bid Evaluation and Award.

(1) **General.** The contract is to be awarded “to the lowest responsible and responsive bidder” whose bid meets the requirements and criteria set forth in the Invitation for Bids. See 5 GCA §5211(g) (Competitive Sealed Bidding, Award) of the Guam Procurement Act. The Invitation for Bids shall set forth the requirements and criteria which will be used to determine the lowest responsive bidder. No bid shall be evaluated for any requirement or criterion that is not disclosed in the Invitation for Bids.

(2). **Responsibility and Responsiveness.** Responsibility of prospective contractors is covered by §3116 (Responsibility) of this Chapter. Responsiveness

of bids is covered by 5 GCA §5201(g), of the Guam Procurement Act, which defines *responsive bidder* as a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.

(3) **Product Acceptability.** The Invitation for Bids shall set forth any evaluation criterion to be used in determining product acceptability. It may require submission of bid samples, descriptive literature, technical data, or other material. It may also provide for accomplishing any of the following prior to award:

(a) inspection or testing of a product prior to award for such characteristics, as quality or workmanship;

(b) examination of such elements as appearance, finish, taste, or feel; or

(c) other examinations to determine whether it conforms with any other purchase description requirements.

The acceptability evaluation is not conducted for the purpose of determining whether one bidder's item is superior to another, but only to determine that a bidder's offering is acceptable as set forth in the Invitation for Bids. Any bidder's offering which does not meet the acceptability requirements shall be rejected as nonresponsive.

(4) **Determination of Lowest Bidder** . Following determination of product acceptability as set forth in Subsection 3109(m)(3) of this Section, if any is required, bids will be evaluated to determine which bidder offers the lowest cost to the territory in accordance with the evaluation criteria set forth in the Invitation for Bids. Only objectively measurable criteria which are set forth in the Invitation for Bids shall be applied in determining the lowest bidder. Examples of such criteria include, but are not limited to, transportation cost, and ownership or life cycle cost formulas. Evaluation factors need not be precise predictors of

actual future costs, but to the extent possible such evaluation factors shall:

(a) be reasonable estimates based upon information the territory has available concerning future use; and

(b) treat all bids equitably.

(5) **Restrictions.** Nothing in this Section shall be deemed to permit contract award to a bidder submitting a higher quality item than that designated in the Invitation for Bids if such bidder is not also the lowest bidder as determined in Subsection 3109(m)(4) of this Section. Further, this Section does not permit negotiations with any bidder except as authorized on Section 2108 of these Regulations with regard to a construction project.

(o) **Low Tie Bids.**

(1) **Definition.** Low tie bids are low responsive bids from responsible bidders that are identical in price and which meet all the requirements and criteria set forth in the Invitation for Bids.

(2) **Award.** Award shall not be made by drawing lots, except as set forth below or by dividing business among identical bidders. In the discretion of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, award shall be made in any permissible manner that will discourage tie bids. If no permissible method will be effective in discouraging tie bids and a written determination is made so stating, award may be made by drawing lots.

(3) **Record.** Records shall be made of all Invitation for Bids on which tie bids are received showing at least the following information:

(a) the identification number of the Invitation for Bids.

(b) the supply source, or construction items;
and

(c) a listing of all the bidders and the prices
submitted.

(p) **Documentation of Award** . Following award, a
record showing the basis for determining the successful
bidder shall be made a part of the procurement file.

(q) **Publicizing Awards.** Written notice of award shall
be sent to the successful bidder. In procurement over
\$25,000, each unsuccessful bidder shall be notified of the
award. Notice of award shall be made available to the public.

(r) **Multi-Step Sealed Bidding.**

(1) **Definition.** Multi-step sealed bidding is a
two-phase process consisting of a technical first phase
composed of one or more steps in which bidders
submit unpriced technical offers to be evaluated by the
territory, and a second phase in which those bidders
whose technical offers are determined to be acceptable
during the first phase have their priced bids
considered. It is designed to obtain the benefits of
competitive sealed bidding by award of a contract to the
lowest responsive, responsible bidder, and at the same
time obtained the benefits of the competitive sealed
proposals procedure through the solicitation of
technical offers and the conduct of discussions to
evaluate and determine the acceptability of technical
offers.

(2) **Conditions for Use.** The multi-step sealed
bidding method may be used when it is not practical to
prepare initially a definitive purchase description which
will be suitable to permit an award based on price.
Multi-step sealed bidding may thus be used when it is
considered desirable:

(a) to invite and evaluate technical offers to
determine their acceptability to fulfill the purchase
description requirements;

(b) to conduct discussions for the purposes of facilitating understanding of the technical offer and purchase description requirements and, where appropriate, obtain supplemental information, permit amendments of technical offers, or amend the purchase description;

(c) to accomplish Subsections 3109(r)(2)(a) and 3109(r)(b) of this Section prior to soliciting priced bids; and

(d) to award the contract to the lowest responsive and responsible bidder in accordance with the competitive sealed bidding procedures.

(s) Pre-Bid Conferences in Multi-Step Sealed Bidding. Prior to the submission of unpriced technical offers, a pre-bid conference as contemplated by Section 3109(h) (Pre-Bid Conference) may be conducted by the Procurement Officer. The Procurement Officer may also hold a conference of all potential bidders in accordance with Section 3109(h) at any time during the evaluation of the unpriced technical offers.

(t) Procedure for Phase One of Multi-Step Sealed Bidding.

(1) **Form.** Multi-step sealed bidding shall be initiated by the issuance of an Invitation for Bids in the form required by §3109(c) (The Invitation for Bids) except as hereinafter provided. In addition to the requirements set forth in §3109(c), the multi-step Invitation for Bids shall state:

(a) that unpriced technical offers are requested;

(b) whether priced bids are to be submitted at the same time as unpriced technical offers; if they are, such priced bids shall be submitted in a separate sealed envelope;

(c) that it is a multi-step sealed bid procurement, and priced bids will be considered only in the second phase and only from bidders whose unpriced technical offers are found acceptable in the first phase;

(d) the criteria to be used in the evaluation of the unpriced technical offers;

(e) that the territory, to the extent the Procurement Officer finds necessary, may conduct oral or written discussions of the unpriced technical offers;

(f) that bidders, may designate those portions of the unpriced technical offers which contain trade secrets or other proprietary data which are to remain confidential; and

(g) that the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be finally acceptable and shall meet the requirements of the Invitation for Bids.

(2) **Amendments to the Invitation for Bids.** After receipt of unpriced technical offers, amendments to the Invitation for Bids shall be distributed only to bidders who submitted unpriced technical offers, and they shall be permitted to submit new unpriced technical offers or to amend those submitted. If, in the opinion of the Procurement Officer, a contemplated amendment will significantly change the nature of the procurement, the Invitation for Bids, shall be cancelled in accordance with §3115 (Cancellation of Solicitations; Rejection of Bids or Proposals) of this Chapter and a new Invitation for Bids issued.

(3) **Receipt and Handling of Unpriced Technical Offers.** Unpriced technical offers shall not be opened publicly, but shall be opened in front of two or more procurement officials. Such offers shall not be disclosed to unauthorized persons. Bidders may request

nondisclosure of trade secrets and other proprietary data identified in writing.

(4) **Evaluation of Unpriced Technical Offers.** The unpriced technical offers submitted by bidders shall be evaluated solely in accordance with the criteria set forth in the Invitation for Bids. The unpriced technical offers shall be categorized as:

- (a) acceptable;
- (b) potentially acceptable, that is, reasonably susceptible of being made acceptable; or
- (c) unacceptable. The Procurement Officer shall record in writing the basis for finding an offer unacceptable and make it part of the procurement file.

The Procurement Officer may initiate Phase Two of the procedure if, in the Procurement Officer's opinion, there are sufficient acceptable unpriced technical offers to assure effective price competition in the second phase without technical discussions. If the Procurement Officer finds that such is not the case, the Procurement Officer shall issue an amendment to the Invitation for Bids or engage in technical discussions as set forth in Subsection 3109(t)(5) of this Section.

(5) **Discussions of Unpriced Technical Offers.** The Procurement Officer may conduct discussions with any bidder who submits an acceptable or potentially acceptable technical offer. During the course of such discussions, the Procurement Officer shall not disclose any information derived from one unpriced technical offer to any other bidder. Once discussions are begun, any bidder who has not been notified that its offer has been finally found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established by the Procurement Officer. Such submission may be made at the request of the Procurement Officer or upon the bidder's own initiative.

(6) **Notice of Unacceptable Unpriced Technical offer.** When the Procurement Officer determines a bidder's unpriced technical offer to be unacceptable, such offeror shall not be afforded an additional opportunity to supplement its technical offer.

(u) **Mistakes during Multi-Step Sealed Bidding.** Mistakes may be corrected or bids may be withdrawn during Phase One at any time. During Phase Two, mistakes may be corrected or withdrawal permitted in accordance with §3109(m) (Mistakes in Bids).

(v) **Procedure for Phase Two.**

(1) **Initiation.** Upon the completion of Phase One, the Procurement Officer shall either:

(a) open priced bids submitted in Phase One (if priced bids were required to be submitted) from bidders whose unpriced technical offers were found to be acceptable; or

(b) if priced bids have not been submitted, technical discussions have been held, or amendments to the Invitations for Bids have been issued, invite each acceptable bidder to submit a price bid.

(2) **Conduct.** Phase Two shall be conducted as any other competitive sealed bid procurement except:

(a) as specifically set forth in §3109(r) (Multi-Step Sealed Bidding) through this Section.

(b) no public notice need be given of this Invitation to submit priced bids because such notice was previously given;

(c) after award the unpriced technical offer of the successful bidder shall be disclosed as follows. The Procurement Officer shall examine written requests of confidentiality for trade secrets and

proprietary data in the technical offer of such bidder to determine the validity of any such requests. If the parties do not agree as to the disclosure of data, the Procurement Officer shall inform the bidder in writing what portions of the unpriced technical offer will be disclosed and that unless the bidder protests under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations, the offer will be so disclosed. Such technical offer shall be opened to public inspection subject to any continuing prohibition on the disclosure of confidential data; and

(d) unpriced technical offers of bidders who are not awarded the contract shall not be opened to public inspection unless the Procurement Officer determines in writing that public inspection of such offers is essential to assure confidence in the integrity of the procurement process; provided, however, that the provisions of Subsection 3109(v)(2)(c) of this Section shall apply with respect to the possible disclosure of trade secrets and proprietary data.

§3110.1 Procurement from Nonprofit Corporations. A contract may be awarded for a supply or service without going through the competitive sealed bid procedure when the contractor is a non-profit corporation employing sheltered or disabled workers.

As a condition of the award of the contract the contractor must certify that labor on the project will be performed by disabled persons except that supervisory personnel do not have to be disabled. Furthermore, the supply or service must be available within the period required by the procurement: authority. contractor awarded a contract pursuant to this Section shall not be required to post any of the bonds required under Sections 33109(c)(3) and 3109(c)(4).

SOURCE: Section 3-203 in existing regulations were repealed by P.L. 18-8:8. This material replaces previous material. New material added to meet the requirements of 5 GCA §5001(d) and §5217. 3-203.01 through 3-203.17 also repealed by P.L. 18-8:8)

§3111. Small Purchases^(a) Application. In accordance with 5 GCA §5213 (Small Purchases) of the Guam Procurement Act, this Section is established for procurement of less than **\$15,000** for supplies or services and less than **\$50,000** for construction.

(b) Authority to Make Small Purchases.

(1) **Amount.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may use this Section if the procurement is to be less than **\$15,000** for supplies or services and less than **\$50,000** for construction. If these methods are not used, the other methods of source selection provided in 5 GCA §5210 (Methods of Source Selection) of the Guam Procurement Act and these Regulations shall apply.

(2) **Delegation.** Delegation of authority to make small purchases is provided for under §2105 (Delegation of Procurement Authority) of these Regulations.

(3) **Existing Territorial Contract for Items.** Supplies, services or construction items which may be obtained under current territorial contracts shall be procured under such agreements in accordance with the terms of such contracts. Further, supplies, services, or construction items available from territorial stocks shall not be procured under this Section. Operational procedures and contract terms may provide for waivers or exceptions to this Subsection.

(4) **Available From One Business Only .** If the supply, service, or construction item is available from only one business, the sole source procurement method set forth in §3112 (Sole Source Procurement) of these regulations shall be used even if the procurement is a small purchase as specified in Subsection 3111(b) of this Section.

(5) **Division of Requirements.** Procurement requirements shall not be artificially divided to avoid

using the other source selection methods set forth in 5 GCA §5210 (Methods of Source Selection) of the Guam Procurement Act and these Regulations.

(c) Competition for Small Purchases of Supplies or Services Between \$500 and \$15,000.

(1) **Procedure.** Insofar as it is practical for small purchases of supplies or services between \$500 and \$15,000, no less than three positive written quotations from businesses shall be solicited, recorded and placed in the procurement file. Awards shall be made to the lowest responsible and responsive bidder.

(2) **Records.** The names of the business and authorized personnel submitting quotations to include the date and amount of each quotations shall be recorded and maintained as a public record.

(d) Competition for Small Purchases of Construction. For procurement of construction, as defined in 5 GCA §5030 (g) of the Guam Procurement Act, between \$500 and \$50,000 the procedures and records required in Section 3111(c) (Small Purchases of Supplies or Services Between \$500 and \$15,000) shall apply. For procurement of construction less than \$500, §3111(e) (Small Purchases of \$500 or Less) shall apply.

(e) Small Purchases of \$500 or Less. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall adopt operational procedures for making small purchases of less than \$500. Such operational procurators shall provide for obtaining adequate and reasonable competition and for making records to properly account for funds and to facilitate auditing of the Purchasing Agency.

(f) Small Purchases of Services Specified in §2112 (Authority to Contract and Certain Services and Approval of contracts) and §5108 (Architect-Engineer and Land Surveying Services) of these Regulations.

(1) **Conditions for Use** . If it is expected that the services of accountants, physicians, lawyers, dentists, architects, engineers, or land surveyors can be procured for less than \$15,000 and more than \$500, the methods specified in this Section may be used in lieu of the procedures specified in §3114 (Competitive Selection Procedures for Services Specified in §2112) and §5108 (Architect-Engineer and Land Surveying Services of these Regulations).

(2) **Examination for Qualifications and Negotiations**. Before contacting any person to perform the required services, the Procurement Officer shall examine any current statements of qualifications on file with the territory. Based on this examination, the Procurement Officer shall contact the most qualified firm and attempt to negotiate a contract for the required services at a fair and reasonable price. If no current statements of qualifications are on file or the statements on file are inadequate to determine the most qualified firm, technical proposals or statements of qualifications shall be solicited . A minimum of three firms shall be considered unless there are only one or two qualified firms; in the latter case, the Procurement Officer shall make a written determination justifying the consideration of only one or two firms. A price or fee shall not be solicited until the most qualified firm is chosen and only the most qualified firm will be requested to submit a price. If after negotiations, a fair and reasonable price cannot be agreed to, negotiations will be terminated with such firm and negotiations begun with the next most qualified firm. The process shall continue until a contract can be negotiated at a fair and reasonable price to the territory.

NOTE: Section amended to raise minimums for ‘small purchase’ and to add detail to regulations.

§3112. Sole Source Procurement. A contract may be awarded for a supply, service, or construction item without competition when the provisions of this Section are met, provided that the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or their designee above the level of Procurement Officer determines

in writing that there is only one source for the required supply, service, or construction item.

(a) **Application.** The provisions of this Section apply to all sole source procurement unless emergency conditions exist as defined in §3113 (Emergency Procurement) of these Regulations.

(b) **Conditions for use of Sole source Procurement.** Sole source procurement is not permissible unless a requirement is available from only a single supplier. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror for that item. The following are examples of circumstances which could necessitate sole source procurement:

(1) where the compatibility of equipment, accessories, or replacement parts is the paramount consideration;

(2) where a sole supplier's item is needed for trial use or testing;

(3) where a sole supplier's item is to be procured for resale;

(4) where public utility services are to be procure;

(5) where supplies are offered through bankruptcy or receivership sales, or other disposition at lower than prevailing market prices.

The determination as to whether a procurement shall be made as a sole source shall be made by the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or designee of such officer. Such determination and the basis therefor shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness. In cases of reasonable doubt, competition should be solicited. Any request by a using agency that a procurement be restricted

to one potential contractor shall be accompanied by an explanation as to why no other will be suitable or acceptable to meet the need.

(c) **Negotiation in Sole Source Procurement.** The procurement officer shall conduct negotiations, as appropriate, as to price, delivery, and terms.

(d) **Record of Sole Source Procurement .** For the purpose of complying with 5 GCA §5248 (Record of Procurement Actions Taken Under 5 GCA §5214 (Sole Source Procurement) and 5 GCA §5215 (Emergency Procurement)) of the Guam Procurement Act, a record listing all contracts made under sole source procurement shall be maintained for a period of five (5) years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract;
- (3) a listing of the supplies, services, or construction procured under each contract; and
- (4) the identification number of each contract file.

A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§3112.1 Blanket Purchase Agreements.

§3112.11 In General.

a. A blanket purchase agreement (1) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with qualified sources of supply and is to be used only if the services or supplies cannot be properly identified as to the quantity and the type of services or supplies required.

b. BPAs should be authorized and approved by the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency after a written determination is made that a blanket purchase is in the best interest of the government of Guam.

c. The use of BPAs does not exempt the agency from the responsibility for keeping obligations and expenditures within available funds.

§3112.12 Establishment of Blanket Purchase Agreements. (a) The following are circumstances under which BPAs may be approved:

1. If there is a wide variety of items in a broad class of goods (e.g. hardware) that are generally purchased but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

2. In any other case in which the writing of numerous purchase orders can be avoided through the use of this procedure.

b. A BPA shall be established with a purchase order.

c. A BPA shall show accounting and appropriation data.

d. BPAs should be made with firms from which numerous individual purchases will likely be made in the given period. For example, if past experience has shown that certain firms are dependable and have prices considerably lower than other firm as dealing in the same commodities, and if numerous purchases at or below the small purchase amount limitations are usually made from such suppliers, it would be advantageous to establish BPAs with those firms.

e. All competitive sources should be given an equal opportunity to furnish supplies or services under BPAs.

Therefore, if not impossible, then to the extent practical, BPAs for items of the same type should be placed concurrently with at least three separate suppliers to assure equal opportunity.

f. If it is determined that BPAs would be advantageous, suppliers should be contacted to make the necessary arrangements for securing maximum discounts, documenting the individual purchase transactions, periodic billing, and other necessary details. However, quotations for the price of the supplies or services themselves are generally unnecessary.

g. A BPA may be limited to furnishing individual items or commodity group; or classes, or it may be unlimited for all items or services that the source of supply is in a position to furnish.

h. BPAs shall contain the following terms and conditions:

1. *Description of Agreement* A statement that the supplier shall furnish supplies or services, described in general terms, if and when requested by the department's authorized representative during the specified period and within a stipulated aggregate amount, if any.

2. *Extent of Obligation.* A statement that the government is obligated only to the extent of authorized purchases actually made under the BPA.

3. *Pricing.* A statement that the prices to the Government of Guam shall be as low or lower than those charged the supplier's most favored customer for comparable quantities under similar terms and conditions, in addition to any discounts for prompt payment.

4. *Purchase limitation* A statement that specifies the dollar limitation for each individual purchase under the BPA.

5. *Notice of individuals authorized to purchase under the BPA.* A statement that a list of individuals authorized to purchase under the BPA, identified either by title of position or by name of individual, organizational component, and the dollar limitation per purchase for each position title or individual shall be furnished to supplier by the requesting department.

6. *Delivery tickets.* A requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines or other periodicals, shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information:

(i) Name of supplier.

(ii) BPA Number.

(iii) Date of Purchase.

(iv) Itemized list of supplies or services furnished.

(v) Quantity, unit price, and extension of each item, less applicable discounts (unit prices and extensions need not be shown when incompatible with the use of automated systems; provided, that the invoice is itemized to show this information).

(vi) Date of delivery or shipment.

7. *Invoices.* One of the following statements (except that the statement in paragraph (h)(7)(iii) of

this section should not be used if the accumulation of the individual invoices by the Government materially increases the administrative costs of this purchase method):

(i) A summary invoice shall be submitted at least monthly or upon expiration of this BPA, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipt copies of the delivery tickets.

(ii) An itemized invoice shall be submitted at least monthly or upon expiration of this BPA, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. These invoices need not be supported by copies of delivery tickets.

(iii) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated; provided, that-

(A) A consolidated payment will be made for each specified period; and

(B) The period of any discounts will commence on the final date of the billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later.

(iv) An invoice for subscriptions or other charges for newspapers, magazines, or other periodicals shall show the starting and ending dates and shall state either that ordered subscriptions have been placed in effect or will be placed in effect upon receipt of payment.

§3112.13. Purchases under Blanket Purchase Agreements. (a) The use of a BPA does not authorize purchases that are not otherwise authorized by law or by regulation.

(b) Individual purchases under BPAs shall not exceed \$15,000 for supplies or services or \$50,000 for construction.

(c) The existence of a BPA does not justify purchasing from only one source. Whenever possible, the Chief Procurement Officer, the Director of Public Works, or the head of a purchasing agency must provide for equal distribution of the blanket purchase to at least three separate vendors.

(d) If there is an insufficient number of BPAs to ensure maximum practicable competition for a particular purchase, the Chief Procurement Officer, the Director of Public Works, or the purchasing agent shall

–

(1) solicit information from other sources and make the purchases as appropriate; and

(2) Establish additional BPAs to facilitate future purchases if –

(i) Recurring requirements for the same or similar items or services seem likely,

(ii) Qualified sources are willing to accept BPAs, and

(iii) It is otherwise practical to do so.

§3112.14. Review Procedures. (a) The Chief Procurement Officer, the Director of Public Works, or the Purchasing Agency, shall review a sufficient random sample of the BPA files at least annually to ensure that authorized procedures are being followed.

(b) The Chief Procurement Officer, the Director of Public Works, or the Purchasing Agency, that entered into the BPA for the Government shall –

(i) Ensure that each BPA is reviewed at least annually and, if necessary, updated at that time, and

(ii) Maintain awareness of changes in market conditions, sources of supply, and any other pertinent factors that may warrant making new arrangements with different suppliers or modifying existing arrangements.

§3112.15 Completion of Blanket Purchase Agreements. An individual BPA is considered complete when the purchases under it equal the total dollar limitation, if any, or when its stated time period expires.

SOURCE: §§3112.1 through 3112.15 added in 1/1/1999.

§3113. Emergency Procurement. Notwithstanding any other provision of the Guam Procurement Act, the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or their designee may make or authorize others to make emergency procurement when there exists a threat to public health, welfare, or safety under emergency conditions as defined in Subsection 3113(b) of regulations promulgated by the Procurement Policy Office; provided that such emergency procurement shall be made with such competition as is practicable under the circumstances, and further provided that the procurement agent must solicit at least three informal price quotations, and if time allows must give notice to all contractors from the qualified bidders' list who have provided the needed supplies and services to the Government of Guam within the preceding 12 months, and must award the procurement to the firm with the best offer, as determined by evaluating cost and delivery time. No emergency procurement or combination of emergency procurements may be made

for an amount of goods or supplies greater than the amount of such goods and supplies which is necessary to meet the emergency for the 30-day period immediately following the procurement. A written determination of the basis for the emergency and the selection of the particular contractor shall be included in the contract file. The requirements for a written determination or the emergency shall be met if the procurements are being made on the basis of the Governor's declaration of an emergency situation by Executive Order if such Order states that emergency procurement may be resorted to for the purposes of the Order. Unless authorized by an Executive Order declaring an emergency, no emergency procurement may be made except on a certification made under penalty or perjury by the requesting department or agency. Certified copies of the certificate shall be sent prior to award and as a condition thereof, to the Governor and Speaker of the Legislature. The certificate shall contain the following:

- (1) a statement of facts giving rise to the emergency;
- (2) the factual basis of the determination that an emergency procurement is necessary; and
- (3) a statement that emergency procurement is not being used solely for the purpose of avoidance of the provisions of this Chapter.

In addition to any other requirements, the Governor must approve, in writing, all authorizations for emergency procurements.

SOURCE: Modified to conform to 5 GCA §5215. Eff. 1/1/1999.

§3113.1. Purchase of Drugs by Generic Names. As used in §§3112.21 and 3112.22, *generic drug* means the chemical or generic name, as determined by the United States Adopted Names (USAN) and accepted by the Federal Food & Drug Administration

(FDA), of those drug products having the same active chemical ingredients.

SOURCE: Added to comply with 5 GCA 5270. Eff. 1/1/1999).

§3113.2. Government to Purchase Drugs from Manufacturer. Whenever possible, the Chief Procurement Officer or his designee, shall purchase drugs, generic or otherwise, directly from the manufacturer so as to ensure and maximize economy.

SOURCE: Added to comply with 5 GCA §5270. Eff 1/1/1999.

§3113.3. Authority. All purchases of drugs directly from the manufacturer shall cite this section as authority, and each purchase order document shall reflect the following statement – “REF: 5 GCA §5258.”

§3114. Competitive Selection Procedures for Services Specified in §2112 (Authority to Contract for Certain Services and Approval of Contracts) of these Regulations. (a) **Application.** The provisions of this Section apply to every procurement of the services of accountants, physicians, lawyers, dentists, and other professionals as specified in §2112 (Authority to Contract for Certain Services and Approval of Contracts) of these Regulations.

(b) **Conditions for use of Competitive Selection Procedures.** Except as authorized under 5 GCA §5214 (Sole Source Procurement) or 5 GCA §5215 (Emergency Procurement) of the Guam Procurement Act, competitive selection procedures shall be used for all procurement of the services listed in Section 3114(a) (Application) in excess of \$5,000. Any procurement of such services not in excess of this amount may be procured in accordance with Section 3111 (Small Purchases) of this Chapter.

(c) **Determination Required Prior to Use of Competitive Selection Procedures** For the purposes of procuring the services specified in §3114(a)

(Application), any using agency of the territory may act as a Purchasing Agency except as otherwise provided by law. (The Purchasing Agency shall consult with the Chief Procurement Officer or a designee of such office when procuring such services). However, the Chief Procurement Officer may, in his or her discretion, procure services for a using agency when requested. In either case, the head of the using agency or a designee of such officer shall determine in writing, prior to announcing the need for any such services:

(1) that the services to be acquired are services specified in §3114(a);

(2) that a reasonable inquiry has been conducted, which shall include requesting the appropriate Personnel Services Department to report on the availability of such personnel, and the territory does not have the personnel nor resources to perform the services required under the proposed contract;

(3) the nature of the relationship to be established between the using agency and the contractor by the proposed contract; and

(4) that the using agency has developed, and fully intends to implement, a written plan for utilizing such services which will be included in the contractual statement of work.

(d) **Statement of Qualifications.** When the services specified in §3114(a) (Application) are needed on a recurring basis, the Procurement Officer shall actively solicit persons engaged in providing such services to submit annual statements of qualifications in a prescribed format which shall include the following information:

(1) technical education and training;

(2) general or special experience, certifications, licenses, and membership in professional associations, societies, or boards;

(3) an expression of interest in providing a particular service specified in §3114(a); and

(4) any other pertinent information requested by the Procurement Officer.

Persons may amend statements of qualifications at any time by filing a new statement.

(e) Public Notice in Competitive Selection Procedures. Notice of the need for services specified in Section 3114(a) (Application) be made by the Procurement Officer in the form of a Request for Proposals at least ten (10) days before the proposals are due. Adequate public notice shall be given as provided in §3109(f) (Public Notice), and additionally shall consist of distributing Requests for Proposals to persons interested in performing the services required by the proposed contract.

(f) Request for Proposals.

(1) Contents. The Request for Proposals shall be in the form specified by the Procurement Officer and contain at least the following information:

(A) the type of services required;

(B) a description of the work involved;

(C) an estimate of when and for how long the services will be required;

(D) the type of contract to be used;

(E) a date by which proposals for the performance of the services shall be submitted;

(F) a statement that the proposals shall be in writing;

(G) a statement that offerors may designate those portions of the proposals which contain trade secrets or other proprietary data which may remain confidential;

(H) a statement of the minimum information that the proposal shall contain, to include:

(i) the name of the offeror, the location of the offeror's principal place of business and, if different, the place of performance of the proposed contract;

(ii) if deemed relevant by the Procurement Officer, the age of the offeror's business and average number of employees over a previous period of time, as specified in the Request for Proposals;

(iii) the abilities, qualifications, and experience of all persons who would be assigned to provide the required services;

(iv) a listing of other contracts under which services similar in scope, size, or discipline to the required services were performed or undertaken within a period of time, as specified in the Request for Proposals;

(v) a plan giving as much detail as is practical explaining how the services will be performed; and

(vi) the factors to be used in the evaluation and selection process and their importance.

(2) **Evaluation.** Proposals shall be evaluated only on the basis of evaluation factors stated in the Request for Proposals. The following factors may be appropriate to use in conducting the evaluation. The relative importance of these and other factors will vary

according to the type of services being procured. The minimum factors are:

(A) the plan for performing the required services;

(B) ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the personnel proposed to be assigned to perform the services;

(C) the personnel, equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting, and

(D) a record of past performance of similar work.

(g) **Pre-Proposal Conferences** . Pre-proposal conferences, as appropriate, may be conducted in accordance with §3109(h) (Pre-Bid Conferences). Such a conference may be held anytime prior to the date established for submission of proposals.

(h) Receipt and Handling of Proposals.

(1) **Registration.** Proposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date. Proposals shall not be opened publicly nor disclosed to unauthorized persons, but shall be opened in the presence of two or more procurement officials. A Register of Proposals shall be established which shall include for all proposals, the name of each offeror, the number of modifications received, if any, and a description sufficient to identify the services offered. The Register of Proposals shall be opened to public inspection only

after award of the contract. Proposals of offerors who are not awarded the contract shall not be opened to public inspection.

(2) **Requests of Nondisclosure of Data.** If the offeror selected for award has requested in writing the nondisclosure of trade secrets and other proprietary data so identified, the head of the agency conducting the procurement or a designee of such office shall examine the request in the proposal to determine its validity prior to entering negotiations. If the parties do not agree as to the disclosure of data in the contract, the head of the agency conducting the procurement or a designee of such officer shall inform the offeror in writing what portion of the proposal will be disclosed and that, unless the offeror withdraws the proposals or protests under 5 GCA Chapter 5 Article 9 (Legal and Contractual Remedies) of the Guam Procurement Act, the proposal will be so disclosed.

(i) **Discussion.**

(1) **Discussions Permissible.** The head of the agency conducting the procurement or a designee of such officer shall evaluate all proposals submitted and may conduct discussions with any offeror. The purposes of such discussions shall be to:

(A) determine in greater detail such offeror's qualifications, and

(B) explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.

(2) **No Disclosure of Information** Discussions shall not disclose any information derived from proposals submitted by other offerors, and the agency conducting the procurement shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the

offeror awarded the contract shall be opened to public inspection except as otherwise provided in the contract. (See §3114(h)(1), Receipt and Handling of Proposals, Registration).

(3) **Modification or Withdrawal of Proposals.** Proposals may be modified or withdrawn at any time prior to the conclusion of discussions.

(j) **Selection of the Best Qualified Offerors** . After conclusion of validation of qualifications, evaluation, and discussion as provided in §3114(i) (Discussions), the head of the agency conducting the procurement or a designee of such officer shall select, in the order of their respective qualification ranking, no fewer than three acceptable offerors (or such lesser number if less than three acceptable proposals were received) deemed to be the best qualified to provide the required services.

(k) **Submission of Cost or Pricing Data.** The offeror determined to be best qualified shall be required to submit cost or pricing data to the head of the agency conducting the procurement at a time specified prior to the commencement of negotiations in accordance with §3118 (Cost or Pricing Data) of these Regulations.

(l) **Negotiation and Award of Contract.**

(1) **General.** The head of the agency conducting the procurement or a designee of such officer shall negotiate a contract with the best qualified offeror for the required services at compensation determined in writing to be fair and reasonable.

(2) **Elements of Negotiation.** Contract negotiations shall be directed toward:

(A) making certain that the offeror has a clear understanding of the scope of work, specifically, the essential requirements involved in providing the required services;

(B) determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time; and

(C) agreeing upon compensation which is fair and reasonable, taking into account the estimated value of the required services, and the scope, complexity, and nature of such services.

(3) Successful Negotiation of Contract with Best Qualified Offeror . If compensation, contract requirements, and contract documents can be agreed upon with the best qualified offeror, the contract shall be awarded to that offeror.

(4) Failure to Negotiate Contract With Best Qualified Offeror.

(A) If compensation, contract requirements, or contract documents cannot be agreed upon with the best qualified offeror, a written record stating the reasons therefor shall be placed in the file and the head of the agency conducting procurement or a designee of such officer shall advise such offeror of the termination of negotiations which shall be confirmed by written notice within three days.

(B) Upon failure to negotiate a contract with the best qualified offeror, the head of the agency conducting the procurement or the designee of such officer may enter into negotiations with the next most qualified offeror. If compensation, contract requirements, and contract documents can be agreed upon, then the contract shall be awarded to that offeror. If negotiations again fail, negotiations shall be terminated as provided in Subsection 3114(1)(4)(a) of this Section and commence with the next qualified offeror.

(5) Notice of Award. Written notice of award shall be public information and made a part of the contract file.

(6) Failure to Negotiate Contract with Offerors Initially Selected as Best Qualified. Should the head of the agency conducting the procurement or a designee of such officer be unable to negotiate a contract with any of the offerors initially selected as the best qualified offerors, offers may be resolicited or additional offerors may be selected based on original, acceptable submissions in the order of their respective qualification ranking and negotiations may continue in accordance with Subsection 3114(1)(4) of this Section until an agreement is reached and the contract awarded.

(m) Memorandum of Evaluation and Negotiation. At the conclusion of negotiations resulting in the award of the contract, the head of the agency conducting the procurement or a designee of such officer shall prepare a memorandum setting forth the basis of award including:

(1) how the evaluation factors stated in the Request for Proposals were applied to determine the best qualified offerors; and

(2) the principal elements of the negotiations including the significant considerations relating to price and the other terms of the contract.

All memoranda shall be included in the contract file and be available for public inspection.

(n) Approval of Contracts for Legal Services. As provided by §2111 (Authority to Contract for Certain Service, Approval of Contracts for Legal Services) of these Regulations, no contract for the services of legal counsel may be awarded without the approval of the Attorney General.

(o) Reports. The head of each using agency shall submit annually to the Chief Procurement Officer a listing of all contracts awarded under §3114 of these Regulations in the preceding fiscal year. The report shall identify the parties to

the contract, the contract amount, duration, and the services to be performed thereunder.

§3115. Cancellation of Invitations for Bids or Requests for Proposals.

(a) **Scope of This Section.** The provisions of this Section shall govern the cancellation of any solicitations whether issued by the territory under competitive sealed bidding, competitive sealed proposals, small purchases, or any other selection method, and rejection of bids or proposals in whole or in part.

(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.

(c) **Cancellation of Solicitation - Notice.** Each solicitation issued by the territory shall state that the solicitation may be cancelled as provided in these Regulations.

(d) Cancellation of Solicitation: Rejection of All Bids or Proposals.

(1) Prior to Opening.

(A) As used in this Section, *opening* means the date set for opening of bids, receipt of unpriced technical offers in multi-step sealed bidding.

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SOURCE: Reference to "Competitive Sealed Proposals" removed to conform to law. (1/1/1999)

(B) Prior to opening, a solicitation may be cancelled in whole or in part when the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that such action is in the territory's best interest for reasons including but not limited to:

(i) the territory no longer requires the supplies, services, or construction;

(ii) the territory no longer can reasonably expect to fund the procurement; or

(iii) proposed amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

(C) When a solicitation is cancelled prior to opening, notice of cancellation shall be sent to all businesses solicited.

(D) The notice of cancellation shall:

(i) identify the solicitation;

(ii) briefly explain the reason for cancellation; and

(iii) where appropriate, explain that an opportunity will be given to compete on any resolicitation or any future procurement of similar supplies, services, or construction.

(2) After Opening.

(A) After opening, but prior to award, all bids or proposals may be rejected in whole or in part when the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that such action is in the territory's best interest for reasons including, but not limited to:

(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 or 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 at clearly unreasonable prices; or

(vi) there is reason to believe that the bids or proposals may not have been independently arrived at in open competition, may have been collusive, and may have been submitted in bad faith.

(B) A notice of rejection should be sent to all businesses that submitted bids or proposals, and it shall conform to Subsection 3115(d)(1)(d) of this Section.

(3) **Documentation.** The reasons for cancellation or rejection shall be made part of the procurement file and shall be available for public inspection.

(e) Rejection of Individual Bids or Proposals.

(1) **General.** This Section applies to rejection of individual bids or proposals in whole or in part.

(2) **Notice in Solicitation.** Each solicitation issued by the territory shall provide that any bid or proposal may be rejected in whole or in part when in the best interest of the Territory as provided in these Regulations.

(3) Reason for Rejection.

(A) **Bids.** As used in this Subsection, *bid* means any bid submitted in competitive sealed bidding or in the second phase of multi-step sealed bidding and includes submissions under §3111 (Small Purchases) of these Regulations if no changes in offers are allowed after submission. Reasons for rejecting a bid include but are not limited to:

(i) the business that submitted the bid is nonresponsive as determined under §3116(e) (Written Determination of Nonresponsibility Required) of this Chapter;

(ii) the bid is not responsive, that is, it does not conform in all material respects to the Invitation for Bids; See §3109(n)(2) (Bid Evaluation and Award, Responsibility and Responsiveness) of this Chapter; or

(iii) the supply, service, or construction item offered in the bid is unacceptable by reason of its failure to meet the requirements of the specifications or permissible alternates or other acceptability criteria set forth in the Invitation for Bids. (See §3109(n)(3) Bid Evaluation and Award, Product Acceptability) of this Chapter.

(B) **Proposals.** As used in this Subsection, *proposal* means any offer submitted in response to any solicitation, including an offer under §3111 (Small Purchases), except a bid as defined in Subsection 3115(e)(3)(a) of this Section. Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the territory's stated requirements may be revised or clarified after proposals are submitted. This flexibility must be considered in determining whether reasons exist for rejecting all or any part of a proposal. Reasons for rejecting proposals include but are not limited to:

(i) the business that submitted the proposals is nonresponsible as determined under §3116 (Responsibility of Bidders and Offerors) of these Regulations;

(ii) the proposals ultimately (that is, after any opportunity has passed for altering or clarifying the proposal) fails to meet the announced requirements of the territory in some material respect; or

(iii) the proposed price is clearly unreasonable.

(4) **Notice of Rejection.** Upon request, unsuccessful bidders or offerors shall be advised of the reasons therefor.

(f) **All or None Bids or Proposals.** Only when provided by the solicitation may a bid or proposal limit acceptance to the entire bid or proposal offering. Otherwise, such bids or proposals shall be deemed to be nonresponsive. If the bid or proposal is properly so limited, the territory shall not reject part of such bid or proposal and award on the remainder.

(g) **Disposition of Bids or Proposals.** When bids or proposals are rejected, or a solicitation cancelled after bids

or proposals are received, the bids or proposals which have been opened shall be retained in the procurement file, or if unopened, returned to the bidders or offerors upon request, or otherwise disposed of.

§3116. Responsibility of Bidders and Offerors. (a) Determination of Nonresponsibility . A written determination of Nonresponsibility of a bidder or offeror shall be made in accordance with this Section. The unreasonable failure of a bidder or offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such bidder or offeror.

(b) Right of Nondisclosure. Information furnished by a bidder or offeror pursuant to this Section shall not be disclosed outside of the General Services Agency, the Director of Public Works, or the head of a Purchasing Agency, without prior written consent by the bidder or offeror.

(1) Application. A determination of responsibility or nonresponsibility shall be governed by this Section.

(2) Standards of Responsibility.

(A). Standards. Factors to be considered in determining whether the standard of responsibility has been met include whether a prospective contractor has:

(i) available the appropriate financial, material, equipment, facility, and personnel resources and expertise, or the ability to obtain them, necessary to indicate its capability to meet all contractual requirements;

(ii) a satisfactory record of performance;

(iii) a satisfactory record of integrity;

(iv) qualified legally to contract with the territory; and

(v) supplied all necessary information in connection with the inquiry concerning responsibility.

(B) Information Pertaining to Responsibility.

The prospective contractor shall supply information requested by the Procurement Officer concerning the responsibility of such contractor. If such contractor fails to supply the requested information, the Procurement Officer shall base the determination of responsibility upon any available information or may find the prospective contractor nonresponsible if such failure is unreasonable.

(3) Ability to Meet Standards. The prospective contractor may demonstrate the availability of necessary financing, equipment, facilities, expertise, and personnel by submitting upon request:

(A) evidence that such contractor possesses such necessary items;

(B) acceptable plans to subcontract for such necessary items; or

(C) a documented commitment from, or explicit arrangement with, a satisfactory source to provide the necessary items.

(4) Duty Concerning Responsibility. Before awarding a contract, the Procurement Officer must be satisfied that the prospective contractor is responsible.

(5) Written Determination of Nonresponsibility Required. If a bidder or offeror who otherwise would

have been awarded a contract is found nonresponsible, a written determination of nonresponsibility setting forth the basis of the finding shall be prepared by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. A copy of the determination shall be sent promptly to the nonresponsible bidder or offeror. The final determination shall be made part of the procurement file.

§3117. Prequalification of Suppliers. Prospective suppliers may be prequalified for particular types of supplies, services, and construction. Solicitation mailing lists of potential contractors shall include, but shall not be limited to, such prequalified suppliers.

(a) Prequalification.

(1) **General.** Prospective contractors may be prequalified for bidder lists, but distribution of the solicitation shall not be limited to prequalified contractors, nor may a prospective contractor be denied award of a contract simply because such contractor was not prequalified. The fact that a prospective contractor has been prequalified does not necessarily represent a finding of responsibility.

(2) **Qualified Products Lists.** This Section is not applicable to qualified products lists which are treated in §4103(b)(2) (Procedures for the Development of Specifications, Special Additional Procedures) of Chapter 4 (Specifications) of these Regulations.

§3118. Cost or Pricing Data. (a). **Scope of Regulation on Cost or Pricing Data.** This Section sets forth the pricing policies which are applicable to contracts of any type and any price adjustments thereunder when cost or pricing data are required to be submitted. The provisions of this Section requiring submission of cost or pricing data do not apply to a contract let by competitive sealed bidding (including multi-step bidding) or small purchases. However, cost or pricing data may be required under a contract let by

competitive sealed bidding when price adjustments are subsequently made in such a contract and, to this extent, those provisions would apply. See Section 3118(b) (Requirement for Cost or Pricing Data) for when the contractor may be required to submit cost or pricing data.

(b) Requirement for Cost or Pricing Data.

(1) **Submission of Cost or Pricing Data.** Except as provided in Subsection 3118(b)(2) of this Section, cost or pricing data is required to be submitted in support of a proposal when:

(A) any contract expected to exceed \$100,000 is to be awarded by competitive sealed proposals, by sole source procurement, by competitive selection, or under 5 GCA Article 5, of Chapter 5 of the Guam Procurement Act, (Architect-Engineer and Land Surveying Services).

(B) adjusting the price of any contract, including a contract awarded by competitive sealed bidding, whether or not cost or pricing data were required in connection with the initial pricing of the contract, if the adjustment involves aggregate increases and/or decreases in costs plus applicable profits expected to exceed \$100,000. (For example, the requirement applies to a \$30,000 net modification resulting from a reduction of \$70,000 and an increase of \$40,000 when the reduction and increase are related.) However, this requirement shall not apply when unrelated and separately priced adjustments for which cost or pricing data would not be required if considered separately are consolidated for administrative convenience. The price shall also be adjusted to reflect non-payment by the contractor of any taxes which would have been paid were it not for the exclusion provided by Section 16543.1016 (Gross Receipts Tax) as added by 5 GCA §5232(c) of the Guam Procurement Act;
or

(C) The Procurement Officer makes a written determination that the circumstances warrant requiring submission of cost or pricing data provided, however, cost or pricing data shall not be required where the contract award is made pursuant to competitive sealed bidding. However, generally cost or pricing data should not be required where the contract or modification is less than \$25,000. Moreover, when less than complete cost analysis (for example, analysis of only specific factors) will provide a reasonable pricing result on awards under \$100,000 without the submission of complete cost or pricing data, the Procurement Officer shall request only that data considered adequate to support the limited extent of the cost analysis needed and need not require certification.

(2) **Exceptions.** Cost and pricing data need not be submitted or certified:

(A) where the contract price is based on:

(i) adequate price competition;

(ii) established catalogue prices or market prices; except as provided by §3118(c)(3)(c); or

(iii) prices set by law or regulation; or

(B) when the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing to waive the applicable requirement for submission of cost or pricing data under Subsection 3118(b)(1)(a), (b), or (c) of this Section in a particular pricing action and the reasons for such waiver are stated in the determination. A copy of such determination shall be kept in the contract file and made available to the public upon request.

If, after cost or pricing data were initially requested and received, it is determined that adequate price competition does exist, the data need not be certified.

(c) *Meaning of Terms Adequate Price Competition, Established Catalogue Prices or Market Prices, and Prices Set by Law or Regulation.*

(1) **Application.** As used in the exceptions set forth in §3118(b)(2) (Requirement for Cost or Pricing Data, Exceptions) the terms *adequate price competition, established catalogue prices or market prices, and prices set by law or regulations* shall be construed in accordance with the following definitions.

(2) **Adequate Price Competition.** Price competition exists if competitive sealed proposals are solicited and at least two responsible offerors independently compete for a contract to be awarded to the responsible offeror submitting the lowest evaluated price by submitting priced offers (or best and final offers) meeting the requirements of the solicitation. If the foregoing conditions are met, price competition shall be presumed to be “adequate” unless the Procurement Officer determines in writing that such competition is not adequate.

(3) **Established Catalogue Prices or market Prices.**

(A) See 5 GCA §5201(b) (Definitions, Established Catalogue Price of the Guam Procurement Act), for the definition of established catalogue price. (This definition is quoted in §1106(24) of these Regulations).

(B) *Established Market Price* means a current price, established in the usual and ordinary course of trade between buyers and sellers, which can be substantiated from sources which are independent of the manufacturer or supplier and may be an indication of the reasonableness of price.

(C) If, despite the existence of an established catalogue price or market price, and after consultation with the prospective contractors, the Procurement Officer considers that such price is not reasonable, cost or pricing data may be requested. Where the reasonableness of the price can be assured by a request for cost or pricing data limited to data pertaining to the differences in the item or services being procured and those listed in the catalogue or market, procured and those listed in the catalogue or market, requests should be so limited.

(4) **Prices Set by Law or Regulation.** The price of a supply or service is set by law or regulation if some governmental body establishes the price that the offeror or contractor may charge the territory and other customers.

(d) Submission of Cost or Pricing Data and Certification.

(1) **Time and Manner.** When a cost or pricing data are required, they shall be submitted to the Procurement Officer prior to beginning price negotiations at any reasonable time and in any reasonable manner prescribed by the Procurement Officer. When the Procurement Officer requires the offeror or contractor to submit cost or pricing data in support of any proposal, such data shall either be actually submitted or specifically identified in writing.

(2) **Obligation to Keep Data Current.** The offeror or contractor is required to keep such submission current until the negotiations are completed.

(3) **Time for Certification.** The offeror or contractor shall certify as soon as practicable after agreement is reached on price that, to the best of his knowledge and belief, the cost or pricing data submitted are accurate, complete, and current as of a mutually determined date prior to reaching an

agreement. Certification shall be made using the certificate set forth in §3118(e) (Certificate of Current Cost or Pricing Data) of these Regulations.

(4) **Refusal to Submit Data.** A refusal by the offeror to supply the required data shall be referred to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, whose duty shall be to determine in writing whether to disqualify the noncomplying offeror, to defer award pending further investigation, or to enter into the contract. A refusal by a contractor to submit the required data to support a price adjustment shall be referred to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency who shall determine in writing whether to further investigate the price adjustment, not to allow any price adjustment, or to set the amount of the price adjustment, subject to the contractor's rights under Chapter 9 (Legal and Contractual Remedies) of these Regulations.

(e) **Certificate of Current Cost or Pricing Data.**

(1) **Form of Certificate.** When cost or pricing data must be certified, a certificate substantially as set forth below shall be included in the contract file along with any award documentation required under these Regulations. The offeror or contractor shall be required to submit the certificate as soon as practicable after agreement is reached on the contract price or adjustment.

CERTIFICATE OF CURRENT COST OR

PRICING

This is to certify that, to the best of my knowledge and belief, cost or pricing data as defined in §3101(a) of the Guam Procurement Regulations submitted, either actually or by specific identification in writing (See §3118(d)) to the Procurement Officer in support of¹,

are accurate, complete, and current as of
(date)(month)(year).....²

This certification includes the cost or pricing data
supporting any advance agreement(s) between the
offeror and the territory which are part of the proposal.

FIRM.....

NAME.....

TITLE.....

DATE OF EXECUTION.....³

(End of Certificate)

¹Describe the proposal, quotation, request for price
adjustment or other submission involved, giving
appropriate identifying number (e.g., RFP No. _____).

²The effective date shall be a mutually determined date
prior to, but as close to the date when price
negotiations were concluded and the contract price was
agreed to as possible. The responsibility of the offeror
or contractor is not limited by the personal knowledge
of the offeror's or contractor's negotiator if the offeror
or contractor had information reasonably available at
the time of agreement, showing that the negotiated
price is not based on accurate, complete, and current
data.

³This date should be as soon after the date when the
price negotiations were concluded and the contract
price was agreed to as practical.

(2) **Representation as to Accuracy of Cost or
Pricing Data.** Although the certificate pertains to *cost or
pricing data*, it is not to be construed as a representation

as to the accuracy of the offeror's or contractor's judgment on the estimated portion of future costs or projections. It does, however, constitute a representation as to the accuracy of the data upon which the offeror's or contractor's judgment is based. A Certificate of Current Cost or Pricing Data shall not substitute for examination and analysis of the offeror's or contractor's proposal.

(3) **Inclusion of Notice and Contract Clause.** Whenever it is anticipated that a Certificate of Current Cost or Pricing Data may be required, notice of this requirement shall be included in the solicitation. If such a certificate is required, the contract shall include a clause giving the territory a contract right to a reduction in the price as provided in §3118(f) (Defective Cost or Pricing Data).

(4) **Exercise of Option.** The exercise of an option at the price established in the initial negotiation in which certified cost or pricing data were used does not require recertification or further submission of data.

(f) **Defective Cost or Pricing Data.**

(1) **Overstated Cost or Pricing Data.** If certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or noncurrent as of the date stated in the certificate, the territory is entitled to an adjustment of the contract price, including profit or fee or any exclusion of taxes (Gross Receipts Tax) pursuant to §19543.1016 as added by 5 GCA §5232(c) of the Guam Procurement Act, to exclude any significant sum by which the price, including profit or fee or any exclusion of taxes (Gross Receipts Tax) pursuant to Section 19543.1016 as added by 5 GCA §5232(c) of the Guam Procurement Act was increased because of the defective data. Judgmental errors made in good faith concerning the estimated portions of future costs or projections do not constitute defective data. It is presumed that overstated cost or pricing data increased the contract price in the amount of the defect plus related overhead and profit or fee. Therefore, unless

there is a clear indication that the defective data were not used or relied upon, the price should be reduced in such amount. In establishing that the defective data caused an increase in the contract price, the Procurement Officer is not expected to reconstruct the negotiation by speculating as to what would have been the mental attitudes of the negotiating parties if the correct data had been submitted at the time of agreement on price.

(2) Off-Setting Understated Cost or Pricing Data.

In determining the amount of a downward adjustment, the contractor shall be entitled to an off-setting adjustment for any understated cost or pricing data submitted in support of price negotiations for the same pricing action up to the amount of the territory's claim for overstated cost or pricing data arising out of the same pricing action.

(3) Dispute. If the contractor and the Procurement Officer cannot agree as to the existence of defective cost or pricing data or amount of adjustment due to defective cost or pricing data, the Procurement Officer shall set an amount in accordance with Subsections 3118(f)(1) and 3118(f)(2) of this Section and the contractor may appeal this decision as a contract controversy under Chapter 9 (Legal and Contractual Remedies) of these Regulations.

(g) Price Analysis Techniques. Price analysis is used to determine if a price is reasonable and acceptable. It involves an evaluation of the prices for the same or similar items, services, or construction. Examples of price analysis criteria include, but are not limited to:

(1) price submissions of prospective bidders or offerors in the current procurement;

(2) prior price quotations and contract prices charged by the bidder, offeror, or contractor;

- (3) prices published in catalogues or price lists;
- (4) prices available on the open market; and
- (5) in-house estimates of cost.

In making such analysis, consideration must be given to any differing terms and conditions.

(h) **Cost Analysis Techniques.** Cost analysis includes the appropriate verification of cost or pricing data, and the use of this data to evaluate:

- (1) specific elements of costs;
- (2) the necessity for certain costs;
- (3) the reasonableness of amounts estimated for the necessary costs;
- (4) the reasonableness of allowances for contingencies;
- (5) the basis used for allocation of indirect costs;
- (6) the appropriateness of allocations of particular indirect costs to the proposed contract; and
- (7) the reasonableness of the total cost or price.

(i) **Evaluations of Costs or Pricing Data.** Evaluations of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent territorial price and cost estimates. They shall also include consideration of whether such costs are reasonable and allocable under the pertinent provisions of Chapter 7 (Cost Principles) of these Regulations.

§3119. Types of Contracts. (a) **Scope of Section.** This Section contains descriptions of types of contracts and limitations as to when they should be utilized by the territory in its procurement.

(b) **Prohibition of Cost- Plus-A-Percentage-of-Cost- Contracting.** Except for a cost-plus-a-percentage-of-cost contract, which is prohibited by 5 GCA §5235 (Types of Contracts) of the Guam Procurement Act, the use of any type of contract is permissible.

(c) **Policy Regarding Selection of Contract Types.**

(1) **General.** The selection of an appropriate contract type depends on factors such as the nature of supplies, services, or construction to be procured, the uncertainties which may be involved in contract performance, and the extent to which the territory or the contractor is to assume the risk of the cost of performance of the contract. Contract types differ in the degree of responsibility assumed by the contractor.

The objective when selecting a contract type is to obtain the best value in needed supplies, services, or construction in the time required and at the lowest cost or price to the territory. In order to achieve this objective, the Procurement Officer, before choosing a contract type, should review those elements of the procurement which directly affect the cost, time, risk, and profit incentives bearing on the performance.

Among the factors to be considered in selecting any type of contract are:

(A) the type and complexity of the supply, service, or construction item being procured;

(B) the difficulty of estimating performance costs such as the inability of the territory to develop definitive specifications, to identify the risks to the contractor inherent in the nature of the

work to be performed, or otherwise to establish clearly the requirements of the contract;

(C) the administrative costs to both parties;

(D) the degree to which the territory must provide technical coordination during the performance of the contract;

(E) the effect of the choice of the type of contract on the amount of competition to be expected;

(F) the stability of material of commodity market prices or wage levels;

(G) the urgency of the requirement; and

(H) the length of contract performance.

(2) Use of Contract Types not Herein Described.

The provisions of this Section 3119 described and defined the principal contract types. Any other type of contract, except cost-plus-a-percentage of cost, may be used provided the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that such use is in the territory's best interest.

(d) Types of Fixed-Price Contracts.

(1) **General.** A fixed-price contract places responsibility on the contractor for the delivery of the product or the complete performance of the services or construction in accordance with the contract terms at a price that may be firm or may be subject to contractually specified adjustments. The fixed-price contract is appropriate for use when the extent and type of work necessary to meet territorial requirements can be reasonably specified and the cost can be reasonably estimated, as is generally the case for construction or

standard commercial products. A fixed-price type of contract is the only type of contract that can be used in competitive sealed bidding.

(2) **Firm Fixed-Price Contract.** A firm fixed-price contract provides a price that is not subject to adjustment because of variations in the contractor's cost of performing the work specified in the contract. It should be used whenever prices which are fair and reasonable to the territory can be established at the outset. Bases upon which firm fixed prices may be established include:

(A) adequate price competition for the contract;

(B) comparison of prices in similar prior procurement in which prices were fair and reasonable;

(C) establishment of realistic costs of performance by utilizing available cost or pricing data and identifying uncertainties in contract performance; or

(D) use of other adequate means to establish a price.

(3) **Fixed-Price Contract with Price Adjustment.**

(A) A fixed price contract with price adjustment provides for variation in the contract price under special conditions defined in the contract, other than customary provisions authorizing price adjustments due to modifications to the work. The formula or other basis by which the adjustment in contract price can be made shall be specified in the solicitation and the resulting contract. Adjustment allowed may be upward or downward only or both upward and downward.

Examples of conditions under which adjustments may be provided in fixed-price contracts are:

(i) changes in the contractor's labor agreement rates as applied to industry or area wide (such as may be found in some territorial contracts);

(ii) changes due to rapid and substantial price fluctuations, which can be related to an accepted index (such as contracts for gasoline, heating oils, and dental gold alloy); and

(iii) in requirement contracts:

A. when a general price change applicable to all customers occurs;

B. when a general price change alters the base price (such as a change in a manufacturer's published price list or posted price to which a fixed discount is applied pursuant to the contract to determine the contract price).

(B) If the contract permits unilateral action by the contractor to bring about the condition under which a price increase may occur, the contract shall reserve to the territory the right to reject the price increase and terminate without cost the future performance of the contract. The contract shall also require that notice of any such price increase shall be given within such time prior to its effective date as is specified in the contract. These restrictions shall not apply to fixed-price cost incentive contracts which are covered in §3119(f)(2) (Cost Incentive Contracts, Fixed-Price Cost Incentive Contract) and fixed-price performance incentive contracts, which are covered in §3119(g) (Performance Incentive Contracts).

(e) Types of cost-Reimbursement Contracts.

(1) **General.** The cost-reimbursement type contract provides for payment to the contractor of allowable costs incurred in the performance of the contract as determined in accordance with Chapter 7 (Cost Principles) of these Regulations and as provided in the contract. This type of contract establishes at the outset an estimated cost for the performance of the contract and a dollar ceiling which the contractor may not exceed (except at its own expense) without prior approval or subsequent ratification by the Procurement Officer and, in addition, may provide for payment of a fee. The contractor agrees to perform as specified in the contract until the contract is completed or until the costs reach the specified ceiling, whichever first occurs. This type of contract is appropriate when the uncertainties involved in contract performance are of such magnitude that the cost of contract performance cannot be estimated with sufficient certainty to realize economy by use of any type of fixed-price contract. In addition, a cost-reimbursement contract necessitates appropriate monitoring by territory personnel during performance so as to give reasonable assurance that the objectives of the contract are being met. It is particularly suitable for research, development, and study type contracts.

(2) **Determination Prior to use** . A cost-reimbursement type contract may be used only when the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or a designee of either officer determines in writing that:

(A) such a contract is likely to be less costly to the territory than any other type or that it is impracticable to obtain otherwise the supplies, services, or construction;

(B) the proposed contractor's accounting system will permit timely development of all necessary cost data in the form required by the specific contract type contemplated; and

(C) the proposed contractor's accounting system is adequate to allocate costs in accordance with generally accepted accounting principles.

(3) **Cost Contract.** A cost contract provides that the contractor will be reimbursed for allowable costs incurred in performing the contract, but will not receive a fee.

(4) **Cost-Plus-Fixed Fee Contract.** This is a cost-reimbursement type contract which provides for payment to the contractor of an agreed fixed fee in addition to reimbursement of allowable incurred costs. The fee is established at the time of contract award and does not vary whether or not the actual cost of contract performance is greater or less than the initial estimated cost established for such work. Thus, the fee is fixed but not the contract amount because the final contract amount will depend on the allowable costs reimbursed. The fee is subject to adjustment only if the contract is modified to provide for an increase or decrease in the scope of work specified in the contract. The cost-plus-fixed-fee contract can be either a Completion Form or Term Form.

(A) The Completion Form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specific end-product. This form of contract normally requires the contractor to complete and deliver the specified end product (in certain instances, final report of research accomplishing the goal or target) as a condition for payment of the entire fixed-fee established for the work and within the estimated cost if possible; however, in the event the work cannot be completed within the estimated cost, the territory can elect to require more work and effort from the contractor without increase in fee provided it increases the estimated cost.

(B) The Term Form is one which describes the scope of work to be done in general terms and

which obligates the contractor to devote a specified level of effort for a stated period of time. Under this form, the fixed fee is payable at the termination of the agreed period of time upon certification that the contractor has exerted the level of effort specified in the contract in performing the work called for, and that such performance is considered satisfactory by the territory.

(C) The Completion Form of Contract, because of differences in obligation assumed by the contractor, is to be preferred over the Term Form whenever the work itself or specific milestones can be defined with sufficient precision to permit the development of estimates within which prospective contractors can reasonably be expected to complete the work. A milestone is a definable point in a program when certain objectives can be said to have been accomplished.

(D) In no event should the Term Form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time.

(f) Costs Incentive Contracts.

(1) **General.** A cost incentive type of contract provides for the reimbursement to the contractor of allowable costs incurred up to the ceiling amount and establishes a formula whereby the contractor is rewarded for performing at less than target cost (that is, the parties' agreed best estimate of the cost of performing the contract) or is penalized if it exceeds target cost. The profit or fee under such a contract will vary inversely with the actual, allowable costs of performance and consequently is dependent on how effectively the contractor controls cost in the performance of the contract.

(2) **Fixed-Price Cost Incentive Contract.** In a fixed-price cost incentive contract, the parties establish at the outset a target cost, a target profit (that is, the profit which will be paid if the actual cost of performance equals the target cost), a formula which provides a percentage increase or decrease of the target profit depending on whether the actual cost of performance is less than or exceeds the target cost, and a ceiling price. After performance of the contract, the actual cost of performance is arrived at based on the total incurred allowable costs as determined in accordance with Chapter 7 (Cost Principles) of these Regulations and as provided in the contract. The final contract price is then established in accordance with the formula using the actual cost of performance. The final contract price may not exceed the ceiling price. The contractor is obligated to complete performance of the contract, and, if actual costs exceed the ceiling price, the contractor suffers a loss.

(3) **Cost-Reimbursement Contract with Cost Incentive Fee.** In a cost reimbursement contract with cost incentive fee, the parties establish at the outset a target cost; a target fee; a formula for increase or decrease of the fee depending on whether actual cost of performance is less than or exceeds the target cost, with maximum and minimum fee limitations; and a cost ceiling which represents the maximum amount which the territory is obligated to reimburse the contractor. The contractor continues performance until the work is complete or costs reaches the ceiling specified in the contract, including any modification thereof, whichever first occurs. After performance is complete or costs reaches the ceiling, the total incurred, allowable costs reimbursed in accordance with Chapter 7 (Cost Principles) of these Regulations and as provided in the contract are applied to the formula to establish the incentive fee payable to the contractor.

(4) **Determinations Required.** Prior to entering into any cost incentive contract, the Procurement Officer shall make the written determination required by 5 GCA §5236 (Approval of Accounting System) of the Guam Procurement Act. Prior to entering any

cost-reimbursement contract with cost incentive fee, the Procurement Officer shall make the written determination required by §3119(e)(2) (Types of Cost-Reimbursement Contracts, Determination Prior to Use).

(g) **Performance Incentive Contracts.** In a performance incentive contract, the parties establish at the outset a pricing basis for the contract, performance goals, and a formula which varies the profit or the fee if the specified performance goals are exceeded or not met. For example, early completion may entitle the contractor to a bonus while late completion may entitle the territory to a price decrease.

(h) **Time and Materials Contracts: Labor Hour Contracts.**

(1) **Time and Materials Contracts.** Time and materials contracts provide an agreed basis for payment for materials supplied and labor performed. Such contracts shall, to the extent possible, contain a stated ceiling or an estimate that shall not be exceeded without prior territory approval and shall be entered into only after the Procurement Officer determines in writing that:

(A) territory personnel have been assigned to closely monitor the performance of the work; and

(B) in the circumstances, it would not be practicable to use any other type of contract to obtain needed supplies, services, or construction, in the time required, and at the lowest cost or price to the territory.

(2) **Labor Hour Contracts.** A labor hour contract provides only for the payment of labor performed. It shall contain the same ceiling as provided in Subsection 3119(h)(1) of this Section. Prior to the award of such contract, the Procurement Officer shall make

the determinations as required in Subsection 3119(h)(1) of this Section.

(i) Definite Quantity and Indefinite Quantity Contracts.

(1) Definite Quantity. A definite quantity contract is a fixed-price contract that provides for delivery of a specified quantity of supplies or services either at specified times or when ordered.

(2) Indefinite Quantity. An indefinite quantity contract is a contract for an indefinite amount of supplies or services to be furnished at specified times, or as ordered, that establishes unit prices of a fixed-price type. Generally, an approximate quantity is stated in the solicitation. The contract may provide a minimum quantity the territory is obligated to order and may also provide for a maximum quantity that limits the territory's obligation to order. Each indefinite quantity contract proposed to be entered into by the Chief Procurement Officer, the Director of Public Works, or the head of the purchasing agency indicating the rationale for using this type of contract and the reasons why another contract form will not suffice. Such contracts will be reviewed every 6 months for a determination of the continued need for such a contract.

In an effort to ascertain that supplies and services are procured competitively, indefinite quantity contracts shall not be used more than twice per fiscal year for such supplies and services. Should the department or agency continue to require the supplies or services, the procurement for such supplies or services must comply with §3109 (Competitive Sealed Bidding) or §3111. (Small Purchases.)

SOURCE: Clarified (1/1/1999).

(3) Requirements Contracts. A requirements contract is an indefinite quantity contract for supplies

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or services that obligates the territory to order all the actual requirements of the designated using agencies during a specified period of time. The obligation to order the territory's actual requirements is limited by the provisions of Uniform Commercial Code of Guam, §2306 (quoted below). For the protection of the territory and the contractor, requirements contracts shall include the following:

(A) a provision which requires the territory and any other users named in the solicitation to order their actual requirements of the supplies or services covered. However, the territory may reserve in the solicitation and in the resulting contract the right to take bids separately if a particular quantity requirement arises which exceeds the territory's normal requirements or an amount specified in the contract;

(B) two exemptions from ordering under the contract when:

(i) the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency approves a finding that the supply or service available under the contract will not meet a nonrecurring, special need of the territory; or

(ii) supplies are produced or services are performed incidental to the territory's own programs as may be available that can satisfy the need.

Uniform Commercial Code of Guam (13 GCA)
§2306 states:

§2306... Output, Requirements and
Exclusive Dealings

(1) A term which measure the quantity by the output of the seller or the requirements of the buyer means such actual output or requirements as may occur in good faith, except that no quantity unreasonably disproportionate to any stated estimate or in the absence of a stated estimate to any normal or otherwise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.

(j) Leases.

(1) **Description.** A lease is a contract for the use of equipment or other supplies or real property under which title will not pass to the territory at any time. Section 3119(k) (Option Provisions) applies to a lease with purchase option where title may pass to the territory.

(2) **Use.** A lease may be entered into provided:

(A) it is in the best interest of the territory;

(B) all conditions for renewal and costs of termination are set forth in the lease; and

(C) the lease is not used to circumvent normal procurement procedures.

(k) Option Provisions.

(1) **Contract Provision.** When a contract is to contain an option for renewal, extension, or purchase, notice of such provision shall be included in the solicitation. Exercise of the option is always at the territory's discretion only, and not subject to agreement or acceptance by the contractor.

(2) **Exercise of Option.** Before exercising any option for renewal, extension or purchase, the Procurement Officer should attempt to ascertain whether a competitive procurement is practical, in terms of pertinent competitive and cost factors, and would be more advantageous to the territory than renewal or be more advantageous to the territory than renewal or extension of the existing contract. A written record of the Procurement Officer's findings and determination shall be made and maintained as part of the contract file.

SOURCE: Clarification . (1/1/1999)

(3) **Lease with Purchase Option .** A purchase option in a lease may be exercised only if the lease containing the purchase option was awarded under competitive sealed bidding or competitive sealed proposals, or the leased supply or facility is the only supply or facility that can meet the territory's requirements, as determined in writing by an officer above the level of the Procurement Officer. Before exercising such an option the Procurement Officer shall:

(A) investigate alternative means of procuring comparable supplies or facilities; and

(B) compare estimated costs and benefits associated with the alternative means and the exercise of such option, for example, the benefit of buying new state-of-the-art equipment compared to the estimated, initial savings associated with exercise of a purchase option.

§3120. Approval of Accounting Systems. 5 GCA §5236 (Approval of Accounting System) of the Guam Procurement Act is quoted in Section 3119 (Types of Contracts) and implementation of that statutory provision is integrated into these Regulations.

§3121. Multi-Term Contracts. (a) **General.** A multi-term contract is appropriate when it is in the best interest of the territory to obtain uninterrupted services extending over more than one fiscal period, where the performance of such services involves high start-up costs, or where a changeover of service contractors involves high phase-in/phase-out costs during a transition period. The multi-term method of contracting is also appropriate when special production refers to production for contract performance which requires alteration in the contractor's facilities or operations involving high start-up costs. The contractual obligation of both parties in each fiscal period succeeding the first is subject to the appropriation and availability of funds therefor. The contract shall provide that, in the event that funds are not available for any succeeding fiscal period, the remainder of such contract shall be cancelled and the contractor shall be reimbursed the reasonable value of any nonrecurring costs incurred but not amortized in the price of the supplies delivered or services performed under the contract.

(b) **Objective.** The objective of the multi-term contract is to promote economy and efficiency in procurement by obtaining the benefits of sustained volume production and consequent low prices, and by increasing competitive participation in procurement which involve special production with consequent high start-up costs and in the procurement of services which involve high start-up costs or high phase-in/phase-out costs during change-over of service contractors.

(c) **Multi-Term Contract Regulation Inapplicable**This Section 3121 (Multi-Term Contracts) applies only to contracts for supplies or services described in Subsection 3121(a)(1) of this Section and does not apply to any other contract including, but not limited to, contracts for construction and leases (including leases of real property).

(d) **Conditions for Use of Multi-Term Contracts.** A multi-term contract may be used when it is determined in writing by the Procurement Officer that:

(1) special production of definite quantities or the furnishing of long term services are required to meet territorial needs; and

(2) a multi-term contract will serve the best interest of the territory by encouraging effective competition or otherwise promoting economies in territory procurement.

The following factors are among those relevant to such determination:

(i) firms which are not willing or able to compete because of high start-up costs or capital investment in facility expansion will be encouraged to participate in the competition when they are assured of recouping such costs during the period of contract performance;

(ii) lower production costs because of large quantity or service requirements, and substantial continuity of production or performance over a longer period of time, can be expected to result in lower unit prices;

(iii) stabilization of the contractor's work force over a longer period of time may promote economy and consistent quality; or

(iv) the cost and burden of contract solicitation, award, and administration of the procurement may be reduced.

(e) **Multi-Term Contract.**

(1) **Solicitation.** The solicitation shall state:

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(A) the amount of supplies or services required for the proposed contract period;

(B) that a unit price shall be given for each supply or service, and that such unit prices shall be the same throughout the contract (except to the extent price adjustments may be provided in the solicitation and resulting contract);

(C) that the multi-term contract will be cancelled only if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first; however, this does not affect either the territory's rights or the contractor's rights under any termination clause in the contract;

(D) that the Procurement Officer must notify the contractor on a timely basis that the funds are, or are not, available for the continuation of the contract for each succeeding fiscal period;

(E) whether bidders or offerors may submit prices for:

(i) the first fiscal period only;

(ii) the entire time of performance only; or

(iii) both the first fiscal period and the entire time of performance;

(F) that a multi-term contract may be awarded and how award will be determined including, if prices for the first fiscal period and entire time of performance are submitted, how such prices will be compared; and

(G) that, in the event of cancellation as provided in Subsection 3121(c)(1)(C) of this Section, the contractor will be reimbursed the

unamortized, reasonably incurred, nonrecurring costs.

(2) **Award.** Award shall be made as stated in the solicitation and permitted under the source selection method utilized. Care should be taken when evaluating multi-term prices against prices for the first fiscal period that award on the basis of prices for the first period does not permit the successful bidder or offeror to “buy in”, that is, give such bidder or offeror an undue competitive advantage in subsequent procurement.

(3) **Cancellation.**

(A) Cancellation, as used in multi-term contracting, means the cancellation of the total requirements for the remaining portion of the contract because funds were not appropriated or otherwise made available. The contract for the first fiscal period shall not be cancelled. Cancellation results when the Procurement Officer:

(i) notifies the contractor of nonavailability of funds for contract performance for any fiscal period subsequent to the first; or

(ii) fails to notify the contractor by the date set forth in the contract, unless the parties agree to extend such date, that funds are available for performance of the succeeding fiscal period and funds which may be used for the contract have not been appropriated or otherwise made available.

(B) These provisions on cancellation of multi-term contracts do not limit the rights of the territory or the contractor under any termination clause of the contract if the contract is terminated pursuant to that clause rather than cancelled as provided in this Subsection.

§3122. Multiple Source Contracting. (a) Incremental Award.

(1) **General.** An incremental award is an award of portions of a definite quantity requirement to more than one contractor. Each portion is for a definite quantity and the sum of the portions is the total definite quantity required. An incremental award may be used only when awards to more than one bidder or offeror for different amounts of the same item are necessary to obtain the total quantity or the required delivery.

(2) **Intent to Use .** If an incremental award is anticipated prior to issuing a solicitation, the territory shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

(3) **Determination Required.** The Procurement Officer shall make a written determination setting forth the reasons for the incremental award, which shall be made a part of the procurement file.

(b) **Multiple Award.**

(1) **General.** A multiple award is an award of an indefinite quantity contract for one or more similar supplies or services to more than one bidder or offeror when the territory is obligated to order all of its actual requirements for the specified supplies or services from those contractors. The obligation to order the territory's actual requirements is limited by the provisions of Uniform Commercial Code of Guam, §2306(1). (See end of Subsection 3119(i)(3) for Code quotation.)

(2) **Limitations on Use.** A multiple award may be made when award to two or more bidders or offerors for similar products is necessary for adequate delivery, service, or product compatibility. Any multiple award shall be made in accordance with the provisions of Section 3109 (Competitive Sealed Bidding). Section 3110 (Competitive Sealed proposals). Section 3111 (Small Purchases), and Section 3113 (Emergency

Procurement), as applicable. Multiple awards shall not be made when a single award will meet the territory's needs without sacrifice of economy or service. Awards shall not be made for the purpose of dividing the business, making available product or supplier selection to allow for user preference unrelated to utility or economy, or avoiding the resolution of tie bids. Any such awards shall be limited to the least number of suppliers necessary to meet the valid requirements of using agencies.

(3) **Contract and Solicitation Provisions.** All eligible users of the contract shall be named in the solicitation, and it shall be mandatory that the actual requirements of such users that can be met under the contract be obtained in accordance with the contract, provided, that:

(A) the territory shall reserve the right to take bids separately if a particular quantity requirement arises which exceeds its normal requirement or an amount specified in the contract;

(B) the territory shall reserve the right to take bids separately if the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency approves a finding that the supply or service available under the contract will not meet a nonrecurring special need of the territory; and

(C) the contract shall allow the territory to procure supplies produced, or services performed, incidental to the territory's own programs as may be available when such supplies or services satisfy the need.

(4) **Intent to Use.** If a multiple award is anticipated prior to issuing a solicitation, the territory shall reserve the right to make such an award and the criteria for award shall be stated in the solicitation.

(5) **Determination Required.** The Procurement Officer shall make a written determination setting forth the reasons for a multiple award, which shall be made a part of the procurement file.

§3123. Inspections. (a) **Right to Inspect Plant.** The territory may at reasonable times, inspect the part of the plant or place of business of a contractor or any subcontractor which is related to the performance of any contract awarded or to be awarded by the territory.

(1) **Inspection of Plant Site.** Circumstances under which the territory may perform inspections include, but are not limited to, inspections of the contractor's plant or site in order to determine:

(A) whether the standards set forth in §3116(b) (Standards of Responsibility) have been met or are capable of being met; and

(B) if the contract is being performed in accordance with its terms.

(b) **Access to Plant or Place of Business.** The territory may enter a contractor's or subcontractor's plant or place of business to:

(1) inspect supplies or services for acceptance by the territory pursuant to the terms of a contract;

(2) audit cost or pricing data or audit the books and records of any contractor or subcontractor pursuant to 5 GCA §5241(b) (Right to Audit Records) of the Guam Procurement Act, which is quoted in §3124 (Audits); and

(3) investigate in connection with an action to debar or suspend a person from consideration for award of contracts pursuant to §9102 (Authority to Debar or Suspend) of these Regulations.

(c) Inspection and Testing of Supplies and Services.

(1) **Solicitation and Contractual Provisions.** Territorial contracts may provide that the territory may inspect supplies and services at the contractor or subcontractor's facility and perform tests to determine whether they conform to solicitation requirements, or, after award, to contract requirements, and are, therefore, acceptable. Such inspection and test shall be conducted in accordance with the terms of the solicitations and contract.

(2) **Procedures for Trial Use and Testing.** The Chief Procurement Officer or the Director of Public Works (with respect to procurement construction) may establish operational procedures governing the testing and trial use of equipment, materials, and other supplies by any territorial agency, and the application of resulting information and data to specifications or procurement.

(d) Conduct of Inspections.

(1) **Inspectors.** Inspections or tests shall be performed so as not to unduly delay the work of the contractor or subcontractor. No inspector other than the Procurement Officer may change any provision of the specifications or the contract without written authorization of the Procurement Officer. The presence or absence of an inspector shall not relieve the contractor or subcontractor from any requirements of the contract.

(2) **Location.** When an inspection is made in the plant or place of business of a contractor or subcontractor, such contractor or subcontractor shall provide without charge all reasonable facilities and assistance for the safety and convenience of the person performing the inspection or testing.

(3) **Time.** Inspection or testing of supplies and services performed at the plant or place of business of any contractor or subcontractor shall be performed at reasonable times.

(e) **Inspection of Construction Projects.** On-site inspection of constructions shall be performed in accordance with the terms of the contract.

§3124. Right to Audit Records. (a) **Audit of Cost or Pricing Data.** The territory may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to 5 GCA §5232 (Cost or Pricing Data) of the Guam Procurement Act, to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order, or contract modification for which cost or pricing data is required, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract, unless a shorter period is otherwise authorized in writing.

(b) **Contract Audit.** The territory shall be entitled to audit the books and records of a contractor or any subcontractor under any negotiated contract or subcontract other than a firm fixed-price contract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years from the date of final payment under the subcontract, unless a shorter period is otherwise authorized in writing.

(1) **Statutory Authority to Audit.** Pursuant to §3124 (Right to Audit Records) of these Regulations, the territory may, at reasonable times and places, audit the books and records of a contractor, prospective contractor, subcontractor, or prospective subcontractor which are related to:

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(A) the cost or pricing data submitted under §3118 (Cost or Pricing Data) of these Regulations; and

(B) a territorial contract, including subcontracts, other than a firm fixed-price contract, awarded pursuant to the following sections of these Regulations:

(i) Section 3110 (Competitive Sealed Proposals);

(ii) Section 3112 (Sole Source Procurement);

(iii) Section 3113 (Emergency Procurement);

(iv) Section 3114 (Competitive Selection Procedures for Services Specified in §2112); or

(v) Section 5108 (Architect-Engineer and Land Surveying Services).

(2) **Auditors: Audit Reports.** Audits requested under this subpart shall be performed by the Officer of the Chief Procurement Officer, or the Director of Public Works. An audit report shall be prepared in accordance with §3124(d) (Cost or Pricing Data Audit Report) or §3124(f) (Contract Audit Report). Such report shall be made available to the party audited upon request.

(3) **Cost or Pricing Data Audit.**

(A) **General.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, or such officer's designee may require an audit of cost or pricing data that has been submitted under 5 GCA §5232 (Cost Data or

Price Data and Analysis) of the Guam Procurement Act.

(B) **Conditions for an Audit.** An audit should be required when in respect to the contractor, prospective contractor, subcontractor, or prospective subcontractor, there is:

1. a question as to the adequacy of accounting policies or cost systems;

2. a substantial change in the methods of levels of operation;

3. previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;

4. a lack of cost experience due to the procurement of new supply, or construction;
or

5. other evidence that an audit is in the territory's best interests as determined by the Chief Procurement Officer, Director of Public Works, the head of the Purchasing Agency, or such officer's designee.

(4) **Cost or Pricing Data Audit Report.** When the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or such officer's designee requires an audit under §3124(c) (Cost or Pricing Data Audit) the auditor shall submit a written report to the officer by an agreed upon date.

(5) **Contract Audit.**

(A) **Types of Contracts Audited.** Under the authority of §3124(a) (Statutory Authority to Audit), the type of contract under which books and records should be audited is that in which price is

based on costs or is subject to adjustment based on costs or that in which auditing would be appropriate to assure satisfactory performance such as a time and materials contract.

(B) **Conditions for an Audit** The requirements of a contract audit may be warranted when a question arises in connection with:

1. the financial condition, integrity, and reliability of the contractor or subcontractor;
2. any prior audit experience;
3. the adequacy of the contractor's or subcontractor's accounting system;
4. the number or nature of invoices or reimbursement vouchers submitted by the contractor or subcontractor for payment;
5. the use of federal assistance funds;
6. the fluctuation of market prices affecting the contract; or
7. any other situation when the Procurement Officer finds that such an audit is necessary for the protection of the territory's interest.

The scope of the audit may be limited by the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or such officer's designee.

(6) **Contract Audit Report** . Where the Chief Procurement Officer, the director of Public Works, the head of a Purchasing Agency, or such officer's designee

requires a contract audit under §3124(e) (Contract Audit), the auditor shall submit a written report to the officer by an agreed upon date.

(7) Retention of Books and Records.

(1) Relating to Cost and Pricing Data. Any contractor who receives a contract, change order, or contract modification for which cost or pricing data is required under 5 GCA §5232 (Cost or Pricing Data) of the Guam Procurement Act, shall maintain such books and records that relate to such cost or pricing data for three (3) years from the date of final payment under the contract. See Section 3124(1), (Right to Audit Records, Audit of Cost or Pricing Data) of these Regulations.

(2) Relating to Territorial Contracts. Books and records that relate to a territorial contract, including subcontracts, other than a firm fixed-price contract, awarded under any method set forth in §3123(a) (Statutory Authority to Audit) shall be maintained:

(A) by a contractor, for three (3) years from the date of final payment under the prime contract; and

(B) by a subcontractor, for three (3) years from the date of final payment under the subcontract.

(See §3124(2), (Right to Audit Records, Contract Audit) of these Regulations.)

§3125. Finality of Determinations. The determinations required by 5 GCA §5211(f), (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards), 5 GCA §5211, (Competitive Sealed Proposals, Conditions for Use), 5 GCA §5212, (Competitive Sealed Proposals, Award), 5 GCA §5214 (Sole Source Procurement), 5 GCA §5215 (Emergency Procurements), 5 GCA §5216(e),

(Competitive Selection Procedures for Services Specified in 5 GCA §5217, Award), 5 GCA §5230(a), (Responsibility of Bidders and Offerors, Determination of Non-Responsibility), 5 GCA §5232(c), (Cost or Pricing Data, Cost or Pricing Data Not Required), 5 GCA §5235, (Types of Contracts), 5 GCA §5236, (Approval of Accounting System), and 5 GCA §5237(b), (Multi-Term Contracts, Determination Prior to Use) are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law. (See 5 GCA §5245 of the Guam Procurement Act.)

§3126. Reporting of Anticompetitive Practices. When for any reasons collusion or other anticompetitive practices are suspected among any bidders or offerors, a notice of the relevant facts shall be transmitted to the Attorney General and the Territorial Prosecutor. (See 5 GCA §5246 of the Guam Procurement Act.)

(a) **Anticompetitive Practices.** For the purposes of this Section, an anticompetitive practice is a practice among bidders or offerors which reduces or eliminates competition or restrains trade. An anticompetitive practice can result from an agreement or understanding among competitors to restrain trade such as submitting collusive bids or proposals, or result from illicit business actions which have the effect of restraining trade, such as controlling the resale price of products or an improper collective refusal to bid. Indications of suspected anticompetitive practices include, but are not limited to, identical bids or proposals, rotated low bids or proposals, sharing of the business, *tie-in* sales, resale price maintenance, and group boycotts. See §3126(e) (Other Anticompetitive Practices).

(b) **Independent Price Determination.** Every solicitation shall provide that by submitting a bid or offer, the bidder or offeror certifies that the price submitted was independently arrived at without collusion.

(c) **Detection of Anticompetitive Practices.** In order to assist in ascertaining whether or not an anticompetitive practice may have occurred or may be occurring, the Procurement Officer should be alerted and sensitive to

conditions of the market place and will often find it necessary to study past procurement including, as appropriate, the following:

(1) a study of the bidding history of a supply, service, or construction item over a period of time sufficient to determine any significant bidding patterns or changes;

(2) a review of similar territorial contract awards over a period of time; or

(3) consultation with outside sources of information, such as bidders or offerors who have competed for similar territorial business in the past, but who are no longer competing for such business.

(d) **Identical Bidding and Price Fixing** . The term *identical bidding* means the submission by bidders or offerors of the same total price or the same price on a particular line item. The submission of identical bids may or may not signify the existence of collusion. In some instances, price controls imposed by State or Federal governments result in the submission of identical bids. Identical bids for supplies are more likely to occur in the absence of collusion if:

(1) the supply is a commodity with a well-established market price or a brand name with a *suggested retail price*;

(2) the quantity being purchased is small in relation to the supplier's total sales;

(3) early delivery is required; or

(4) transportation expenses are low relative to total costs.

In seeking to determine whether collusion has taken place, the Procurement Officer should view the identical

bids against present and past pricing policies of the bidders or offerors, the structure of the industry involved including comparisons of prices f.o.b. shipping point and f.o.b. destination, and nature of the supply, service, or construction involved, such as whether it is a basic chemical or metal. Identical bids may also result from resale price maintenance agreements which are described in §3126(e)(3) (Other Anticompetitive Practices, Resale Price Maintenance). Any other attempt by bidders or offerors to fix prices should also be reported.

(e) Other Anticompetitive Practices.

(1) **General.** The practices which are described in Subsection 3126(e)(2) through Subsection 3126(f)(6) of this Section and which the Procurement Officer suspects might be anticompetitive shall be reported in accordance with §3126(f) (Reporting Suspected Anticompetitive Practices).

(2) **Rotated Low Bids or Proposals.** Rotated low bids or proposals result where all bidders or offerors participating in the collusive scheme submit bids and by agreement alternate being the lowest bidder or offeror. To aid in determining whether rotation may be occurring, the Procurement Officer must review past similar procurement in which the same bidders or offerors have participated.

(3) **Resale Price Maintenance .** The practice of resale price maintenance consists of an agreement between a manufacturer and a distributor or a dealer to fix the resale price of a supply. A Procurement Officer should consider the possibility that such an agreement exists where prices offered adhere to an established pattern, such as a published price schedule, and when identical bidding occurs.

(4) **Sharing of the Business.** Sharing of the business occurs where potential bidders or offerors allocate business among themselves based on the customers or the territory involved. Thus, a

Procurement Officer might discover that a potential bidder or offeror is not participating in a territorial procurement because a particular territorial agency, or a particular territory has not been allocated to such bidder or offeror by the producer or manufacturer.

(5) ***Tie-In Sales*** *Tie-in* sales are those in which a bidder or offeror attempts to sell one supply or service only upon the condition that the Procurement Officer purchase another particular supply or service.

(6) **Group Boycott.** A group boycott results from an agreement between competitors not to deal with another competitor or not to participate in, for instance, a territorial procurement until the boycotting competitor's conditions are met by the boycotted competitor or the territory. The boycott of a competitor by other competitors may have an effect on the market structure or price of a supply, service, or construction item needed by the territory.

(f) **Reporting Suspected Anticompetitive Practices.** The Chief Procurement Officer, or the Director of Public Works, in consultation with the Attorney General, shall develop procedures including forms, for reporting suspected anticompetitive practices. A Procurement Officer who suspects that an anticompetitive practice has occurred or may be occurring shall follow these procedures.

§3127. Retention of Procurement Records. All procurement records shall be retained and disposed of in accordance with records retention guidelines and schedules approved by the Attorney General. All retained documents shall be made available to the Attorney General or a designee upon request and proper receipt therefore. (See Section 5 GCA §5247 of the Guam Procurement Act.)

§3128. Record of Procurement Actions Taken Under §3112 (Sole Source Procurement) and §3113 (Emergency Procurement) (See 5 GCA §5248 of the Guam Procurement Act.)

(a) **Contents of Record** The Chief Procurement Officer, or the Director of Public Works shall maintain a record listing all contracts made under §3112 (Sole Source Procurement) or §3113 (Emergency Procurement), of these Regulations, for a minimum of five years. The record shall contain:

- (1) each contractor's name;
- (2) the amount and type of each contract; and
- (3) a listing of the supplies, services, or construction procured under each contract.

(b) **Submission to Legislature.** A copy of such record shall be submitted to the Legislature on an annual basis. The record shall be available for public inspection.

§3129. Record of all (other) Procurement Actions The Chief Procurement Officer, the Director of Public works, or the Purchasing shall maintain a complete record of each procurement. The record shall include the following:

- (1) the date, time, subject matter and names of participants at any meeting including government employees that are in any way related to a particular procurement.
- (2) a log of all communications between government employees and any member of the public, potential bidder, vendor or manufacturer which is in any way related to the procurement;
- (3) sound recordings of all pre-bid conferences; negotiations arising from a request for proposals and discussions with vendors concerning small purchase procurement;
- (4) brochures and submittals of potential vendors, manufacturers or contractors, and all drafts, signed and

dated by the draftsman, and other papers or materials used in the development of specifications; and

(5) the requesting department's determination of need.

SOURCE: Added to Comply with 5 GCA §5250. (1/1/1999)

§3130. Certification of Records. No procurement award shall be made unless the Chief Procurement Officer, the Director of Public Works or the head of a Purchasing Agency certifies in writing under penalty of perjury that he has maintained the record required by §3129 of these regulations and that it is complete and available for public inspection. The certificate is itself a part of the record.

SOURCE: Added to conform to 5 GCA §5250. (1/1/1999)

§3131. Public Record. The record, required by Section 3129 (Record of other Procurement Actions) of this Chapter is a public record and, subject existing laws and regulations, any person or persons may inspect and copy any portion of the record.

SOURCE: Added to comply with 5 GCA §5251. (1/1/1999)

§3132. Rules for Procurement Records. As required by 5 GCA §5252, these rules are declared by the Policy Office to:

1. protect the integrity of the bidding process;
2. protect the confidentiality of trade secrets;
3. establish reasonable charges for copying papers;
4. provide for and establish reasonable charges for transcription of sound recordings;
5. require public access to the record at the earliest possible time; and

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6. not require that the record be complete or that the procurement award be made before inspection and copying are permitted.

SOURCE: Added to comply with 5 CGA §5252. (1/1/1999)

CHAPTER 4
SPECIFICATIONS

- §4101. Definition of Terms Used in this Chapter.
- §4102. Regulation.
- §4103. Preparation of Specifications.
- §4104. Excepted Items
- §4105. Relationship with Using Agencies
- §4106. Maximum Practicable Competition.
- §4107. Specifications Prepared by Architects and Engineers
- §4108. Publication of Specification Sources.
- §4109. Salient Features.

« **§4101. Definition of Terms Used in this Chapter.**

(a) Definitions.

(1) *Brand Name Specification* means a specification limited to one or more items by manufacturers' names or catalogue numbers.

(2) *Brand Name or Equal Specification* means a specification which uses one or more manufacturer's name or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet territorial requirements, and which provides for the submission of equivalent products.

(3) *Qualified Products List* means an approved list of supplies, services, or construction items described by model or catalogue numbers, which prior to competitive solicitation, the territory has determined will meet the applicable specification requirements.

(4) *Specification* means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service, or construction item for delivery (5 GCA §5260 of the Guam Procurement Act). Unless the context requires otherwise, the terms *specification* and *purchase description* are used interchangeably throughout these Regulations.

(5) *Specification for a Common or General Use Item* means a specification which has been developed and approved

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for repeated use in procurement in accordance with the provisions of §4103(b)(2)(a), (Procedures for the Development of Specifications, Special Additional Procedures) of these Regulations.

§4102. Regulation. This Chapter sets forth regulations governing the preparation, maintenance, and content of specifications for suppliers, services, and construction required by the territory, pursuant to 5 GCA §5261 of the Guam Procurement Act.

(a) General Purposes and Policies.

(1) **Purpose.** The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the territory's needs in a cost effective manner, taking into account, to the extent practicable, the costs of ownership and operation as well as initial acquisition costs. It is the policy of the territory that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the objective of clearly describing the territory's requirements.

(2) **Use of Functional or Performance Descriptions.** Specifications shall, to the extent practicable, emphasize functional or performance criteria while limiting design or other detailed physical descriptions to those necessary to meet the needs of the territory. To facilitate the use of such criteria, using agencies shall endeavor to include as a part of their purchase requisitions the principal functional or performance needs to be met. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is often not practicable in construction, apart from the procurement of supply type items for a construction project.

(3) **Preference for Commercially Available Products.** It is the general policy of this territory to procure standard commercial products whenever practicable. In developing specifications, accepted commercial

standards shall be used and unique requirements shall be avoided, to the extent practicable.

(b) **Availability of Documents.** Except as provided in Subsection 4103(b)(2)(d) (Procedures for the Development of Specifications, Special Additional Procedures) regarding testing and confidential data, specifications and any written determination or other document generated or used in the development of a specification shall be available for public inspection.

Î **§4103. Preparation of Specifications.** The Chief Procurement Officer and the Director of Public Works shall prepare, issue, revise, maintain, and monitor the use of specifications for supplies, services, and construction required by the territory, in accordance with 5 GCA §5262 of the Guam Procurement Act.

(a) Authority to Prepare Specifications.

(1) **Statutory Authority of the Chief Procurement Officer and the Director of Public Works, and other Agencies.** The Chief Procurement Officer and the Director of Public Works is authorized in 5 GCA §5262 (Duties of the Chief Procurement Officer and the Director of Public Works) of the Guam Procurement Act, to prepare specifications subject to the authority granted Purchasing Agencies in 5 GCA §5263 (Exempted Items) of the said Act. (See Section 4104, (Exempted Items) of these Regulations. The Chief Procurement Officer or the Director of Public Works may delegate in writing the authority to prepare and utilize specifications to purchasing agencies and using agencies for any type of supplies, services, or construction provided such delegations may be revoked by the Chief Procurement Officer or Director of Public Works.

(2) **Authority to Contract for Preparation of Specifications.**

(a) When a written determination is made by the Chief Procurement Officer or the Director of Public Works, or the head of a Purchasing Agency authorized to prepare such specifications that there

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will be no substantial conflict of interest involved and it is otherwise in the best interest of the territory, a contract to prepare specifications for territory use in procurement of supplies or services may be entered into provided such officer retains the authority to finally approve the specifications.

(b) Whenever it is determined under 5 GCA §5302 (Responsibility for Selection of Methods of Construction Contracting Management) of the Guam Procurement Act that the appropriate method of construction contracting management involves allowing specifications to be prepared by other than territorial personnel, a contract may be entered into for such preparation provided the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency retains the authority to finally approve the specifications.

(c) **Small Purchase and Emergency Authority.** If a specification for general or common use or qualified products list exists for an item to be procured under §3111 (Small Purchases), it shall be used except as otherwise provided by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. If no such specification exists, purchasing and using agencies are hereby granted the authority to prepare specifications for use in such purchases. In an emergency under §3113 (Emergency Procurement), any necessary specifications may be utilized by the purchasing or using agency without regard to the provisions of this Chapter.

(b) Procedures for the Development of Specifications.

(1) Provisions of General Application.

(a) **Application of Section.** This Section applies to all persons who may prepare a specification for territorial use, including the Chief Procurement Officer, the Director of Public Works, the head of a

Purchasing Agency, the head of a using agency, and the designees of such officers.

(b) Specification of Alternates May Be Included. A specification may provide alternate descriptions of supplies, services, or construction items where two or more design, functional, or performance criteria will satisfactorily meet the territory's requirements.

(c) Contractual Terms Not to be Included. To the extent feasible, a specification shall not include any solicitation or contract term or condition such as a requirement for time or place of bid opening, time of delivery, payment, liquidated damages, or qualification of bidders.

(d) Use of Existing Specifications. If a specification for a common or general use item has been developed in accordance with Subsection 4103(b)(2)(a) of this Section or a qualified products list has been developed in accordance with Subsection 4103(b)(2)(d) of this Section for a particular supply, service, or construction item, it shall be used unless the Chief Procurement Officer or the Director of Public Works or the head of a Purchasing Agency makes a written determination that its use is not in the territory's best interest and that another specification shall be used.

(2) Special Additional Procedures.

(a) Specifications for Common or General Use Items.

(i) Preparation and Utilization. A specification for common or general use shall, to the extent practicable, be prepared to be utilized when:

(A) a supply, service, or construction item is used in common by several using agencies or used repeatedly by one using agency, and the characteristics of the

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supply, service, or construction item, as commercially produced or provided, remain relatively stable while the frequency or volume of procurement is significant.

(B) the territory's recurring needs require uniquely designed or specially produced items; or

(C) the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to prepare such specifications finds it to be in the territory's best interest.

(D) In the event a using agency requests the preparation of a specification for a common or general use item, the Chief Procurement Officer or the Director of Public Works shall prepare such a specification if such officer determines the conditions in Subsection 4103(b)(2)(a)(i)(A), (B), or (C) of this Section have been met.

(ii) **Comments on the Draft.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency preparing a specification for a common or general use item shall provide the using agencies, and a reasonable number of manufacturers and suppliers as such officer deems appropriate, an opportunity to comment on the draft specification.

(iii) **Final Approval.** Final approval of a proposed specification for a common or general use item shall be given only by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to give such approval.

(iv) **Revisions.** Revisions to specifications for common or general use items which do not change the technical elements of the specifications, but which are necessary for clarification may be made upon approval of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to approve such specifications. Interim revisions for a particular procurement which change the technical elements of the specification may be made by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to approve such a specification. All other revisions shall be made in accordance with Subsections 4103(b)(2)(a)(ii) accordance with Subsections 4103(b)(2)(a)(ii) and 4103(b)(2)(a)(iii) of this Section.

(v) **Cancellation.** A specification for a common or general use item may be cancelled by the Chief Procurement Officer, the Director of Public Works, or by the head of a Purchasing or Using Agency authorized to give final approval of such specifications.

(b) Brand Name or Equal Specification.

(i) **Applicability of this Subsection.** This Subsection 4103(b)(2)(b) shall apply whenever brand names are used in specifications except as provided in Subsection 4103(b)(2)(c) of this Section.

(ii) **Use.** Brand name or equal specifications may be prepared to be used when the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that:

(A) no specification for a common or general use item or qualified products list is available;

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(B) time does not permit the preparation of another form of specification, not including a brand name specification;

(C) the nature of the product or the nature of the territory's requirements makes use of a brand name or equal specification suitable for the procurement;
or

(D) use of a brand name or equal specification is in the territory's best interest.

(iii) Designation of Several Brand Names. Brand name or equal specifications shall seek to designate three or as many different brands as are practicable as "or equal" references and shall further state that substantially equivalent products to those designated will be considered for award.

(iv) **Required Characteristics.** Unless the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to finally approve specifications determines that the essential characteristics of the brand names included in the specifications are commonly known in the industry or trade, brand name or equal specifications shall include a description of the particular design, functional, or performance characteristics which are required.

(v) **Nonrestrictive Use of Brand Name or Equal Specifications.** Where a brand name or equal specification is used in a solicitation, the solicitation shall contain explanatory language that the use of a brand name is for the purpose of describing the standard of quality, performance, and characteristics desired and is not intended to limit or restrict competition.

(c) Brand Name Specification.

(i) **Use.** Since use of a brand name specification is restrictive, it may be used only when the Procurement Officer or the Director of Public Works makes a written determination that only the identified brand name item or items will satisfy the territory's needs.

(ii) **Competition.** The Procurement Officer and the Director of Public Works shall seek to identify sources from which the designated brand name item or items can be obtained and shall solicit such sources to achieve whatever degree of competition is practicable. If only one source can supply the requirement, the procurement shall be made under §3112 (Sole Source Procurement).

(iii) **Reports.** The Procurement Officer and Director of Public Works shall submit (monthly) reports to the Chief Procurement Officer stating any brand name specification used; the number of suppliers solicited; the identity of these suppliers; the supplier awarded the contract; and the contract price.

(d) Qualified Products List.

(i) **Use.** A qualified products list may be developed with the approval of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing or Using Agency authorized to develop qualified products lists, when testing or examination of the supplies or construction items prior to issuance of the solicitation is desirable or necessary in order to best satisfy territorial requirements.

(ii) **Comments, Final Approval, Revisions, and Cancellations** Comments on, final approval of, and revisions to the proposed criteria and methodology for establishing and maintaining

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a qualified products list, and the cancellation thereof, shall follow the procedure of Subsection 4103(b)(2)(a)(ii) through 4103(b)(2)(a)(v) of this Section applicable to specifications for common or general use items.

(iii) **Solicitation.** When developing a qualified products list, a representative group of potential suppliers shall be solicited in writing to submit products for testing and examination to determine acceptability for inclusion on a qualified products list. Any potential supplier, even though not solicited, may offer its products for consideration.

(iv) **Testing and Confidential Data.** Inclusion on a qualified products list shall be based on results of tests or examinations conducted in accordance with prior published requirements. Except as otherwise provided by law, trade secrets, test data, and similar information provided by the supplier will be kept confidential when requested in writing by the supplier. However, qualified products lists test results shall be made public, but in a manner so as to protect the confidentiality of the identity of the competitors by, for example, using numerical designations.

§4104. Excepted Items. Specifications for supplies, services, or construction items procured under 5 GCA §5121 (Authority to Contract for Certain Services), or exempted pursuant to 5 GCA §5124 (Exemptions) of the Guam Procurement Act, may be prepared by a Purchasing Agency in accordance with the provisions of this Chapter and regulations promulgated hereunder.

(a) **Authority to Prepare Specifications Exempted Items.** §4104 (Exempted Items) of these Regulations grants Purchasing Agencies authority to prepare specifications for the services of accountants, physicians, lawyers, and dentists and other professionals, and for works of art for museum and public display; published books, books or other regular publications published by any government agency, maps, periodicals, and technical pamphlets; and architect-engineer

and land surveying services as defined in 5 GCA §5301 of the Guam Procurement Act.

§4105. 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 utilized its own specification (5 GCA §5264 of the Guam Procurement Act).

§4106. 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 (5 GCA §5265 of the Guam Procurement Act).

(a) **Nonrestrictiveness Requirement.** All specifications shall be written in such a manner as to describe the requirements to be met, without having the effect of exclusively requiring a proprietary supply, service, or construction item, or procurement from a sole source, unless no other manner of description will suffice. In that event, a written determination shall be made that it is not practicable to use a less restrictive specification.

§4107. Specifications Prepared by Architects and Engineers. The requirement of this Chapter 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 (5 GCA §5266 of the Guam Procurement Act)

(a) **Specifications Prepared by Other Than Territorial Personnel.** The requirements of this Chapter shall apply to all specifications prepared by other than territorial personnel, including, but not limited to, those prepared by consultants, architects, engineers, designers, and other draftsmen of specifications for public contracts. Contracts for the preparation of specifications by other than territorial personnel shall require the specification writer to adhere to such requirements. When persons other than territorial personnel prepare specification, the territory shall not be

relieved from the comment and review requirements of this Chapter.

§4108. Publication of Specification Sources. 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: Added to comply with 5 GCA §5267. (1/1/1999)

§4109. 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 government of Guam'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 the requirements and specifying the reason that similar products lacking those features would not meet minimum requirements for the item.

(c) Purchase descriptions shall describe the salient technical requirements or desired performance characteristics of supplies or services to be procured without including restrictions which do not significantly affect the technical requirements or performance characteristics.

SOURCE: Added to comply with 5 GCA §5268. (1/1/1999)

CHAPTER 5
PROCUREMENT OF CONSTRUCTION ARCHITECT-ENGINEER
AND LAND SURVEYING SERVICES

- §5101. Reserved.
- §5102. Responsibility for Selection of Methods of Construction Contracting Management.
- §5103. Bid Security (Requirement).
- §5104. Contract Performance and Payment Bonds.
- §5105. Bond Forms and Copies.
- §5106. Contract Clauses and Their Administration.
- §5107. Fiscal Responsibility.
- §5108. Architect-Engineer and Land Surveying Services.

§5101. Reserved.

§5102. Responsibility for Selection of Methods of Construction Contracting Management. (1) Application of Regulation and General Policy.

(a) **Application.** This Section contains provisions applicable to the selection of the appropriate method of management for construction contracts, that is, the contracting method and configuration that will most likely result in timely, economical, and otherwise successful completion of the construction project.

(b) **Flexibility.** It is intended that the Director of Public Works or the head of the Purchasing Agency, acting through the Procurement Officer, have sufficient flexibility in formulating the project delivery approach in a particular project to fulfill the territory's needs. In each instance, consideration commensurate with the project's size and importance should be given to all the appropriate and effective means of obtaining both the design and construction of the project. The methods for achieving those purposes set forth in this Section are not to be construed as an exclusive list.

(c) **Selecting the method of Construction Contracting.** In selecting the construction contracting method, the Director of Public Works or the head of the Purchasing Agency should consider the results achieved on similar projects in the past and the methods used. Consideration should be given to all appropriate and effective methods and their comparative advantages and disadvantages and how they might be adapted or combined to fulfill territorial requirements.

(d) **Use of Regulation.** This Regulation is intended to guide territory personnel in selecting the appropriate contracting method. It is not intended to create any third party rights.

(2) **Lease, Buy, or Building.** Before initiating a construction project, consideration shall be given to leasing or buying existing building space as well as to constructing new space. As appropriate the Director of Public Works and the head of the Using Agency should participate in deciding whether to lease, buy, or build. Factors to consider when choosing between these three alternatives include, but are not limited to:

- (a) whether the territory's requirements will be continuing or temporary;
- (b) the need for territorial control over the building;
- (c) the adequacy of available space to fit territorial needs;
- (d) to the extent they are reasonably known or ascertainable, the life-cycle costs associated with leasing, buying, or building;
- (e) which method can most timely meet and continue to meet territorial requirements;
- (f) the need to physically separate and distinguish territory facilities from private facilities;
- (g) the dislocation of existing tenants, both commercial and residential, that may result; and
- (h) environmental affects.

(3) **General Description.**

(a) **Use of Descriptions.** The following descriptions are to provide a common vocabulary for use in the context of this regulation and for general discussion concerning the construction contracting activities of this territory. The methods described are not all mutually exclusive and often may be combined on one project. These descriptions are not intended to be fixed in respect to all construction projects of the territory. In each project these descriptions may be adapted to fit the circumstances of that project. However, the Procurement Officer should endeavor to ensure that these terms are described adequately in appropriate contracts, are not used in a misleading manner, and are understood by all relevant parties. Significant deviations from the descriptions provided in these Regulations should be explicitly noted.

(b) **Single Prime Contractor.** The single prime contractor method of contracting is typified by one business (general contractor) contracting with the territory to timely complete an entire construction project in accordance with plans and specifications

provided by the territory. Often these plans and specifications are prepared by a private architectural firm under contract to the territory. Further, while the general contractor may take responsibility for successful completion of the project, much of the work may be performed by specialty contractors with whom the prime contractor has entered into subcontracts.

(c) **Multiple Prime Contractors.** Under the multiple prime contractor method, the territory or the territory's agent contracts directly with a number of specialty contractors to complete portions of the project in accordance with territory plans and specifications. The territory or its agent may have primary responsibility for successful completion of the entire project, or the contracts may provide that one of the multiple prime contractors has this responsibility.

(d) **Design Build or Turnkey.** In a design-build or turnkey project, a business contracts directly with the territory to meet the territory's requirements as described in a set of performance specifications by constructing a facility to its own plans and specifications. Design responsibility and construction responsibility both rest with the design-build contractor. This method can include instances where the design-build contractor supplies the site as part of the package.

(e) **Construction Manager.** A construction manager is a person experienced in construction that has the ability to evaluate and to implement plans and specifications as they affect time, cost, and quality of construction and ability to coordinate the design and construction of the project, including the administration of change orders. The territory contracts with a qualified construction manager to act for the territory in the construction project as specified in the construction management contract. At times, the construction manager may become the single prime contractor, or may guarantee that the project will be completed on time and will not exceed a specified maximum price. At such times, the construction manager will become responsible, just as any single prime contractor, to complete the project at or below the specified price.

(f) **Sequential Design and Construction.** Sequential design and construction denotes a method in which design of substantially the entire structure is completed prior to beginning the construction process.

(g) **Phased Design and Construction.** Phased

design and construction denotes a method in which construction is begun when appropriate portions have been designed, but before substantial design of the entire structure has been completed. This method is also known as "fast-track construction".

(4) Criteria for Selecting Construction contracting Methods.

(a) **Territory Requirements.** Before choosing the construction contracting method to use, a careful assessment must be made by the Director of Public Works or the head of an Agency, of requirements the project must satisfy and those other characteristics that would be desirable. In addition to those set forth in Subsections 5102(4)(b) and 5102(4)(c) of this Section, some of the factors to consider are:

- (1) when the project must be ready to be occupied;
- (2) the type of project - for example, housing, offices, or heavy or specialized construction such as highway or water treatment;
- (3) the extent to which the territory's requirements and the ways in which they are to be met are known;
- (4) the location of the project and whether a contractor's site may be used; and
- (5) the size, scope, complexity, and economics of the project.

(b) Territory Resources.

(1) The amount and type of financing available for the project is relevant to the selection of the appropriate construction contracting method including:

- (i) whether the budget is fixed or flexible;
- (ii) what the source of funding is, for example, general or special appropriation, federal assistance monies, public improvement bonds, or general obligation bonds.

(2) Proper selection of a contracting method depends upon a realistic appraisal of the availability, qualifications, and experienced territorial personnel can bring to the project and, of equal importance, how much time such personnel can devote to the project.

(3) When examining resources for a proposed construction project, the availability of outside consultants may be considered. Such consultants

may be able to handle tasks and supply valuable expertise otherwise unavailable to the territory.

(c) **Prospective Contractors.** Choice of the proper construction contracting method entails not only the internal examination described in Subsection 5102(4)(a) and 5102(4)(b) of this Section, but must take into account the characteristics, experience, and availability of the contractors who can work on the project. The design firms the territory may contract with to prepare the plans and specifications must be evaluated as a group to determine whether they can efficiently divide the work into specialty packages if multiple prime contractor are to be used, or design the project in phases appropriate to use of phased design and construction. Prospective construction contractors must also be appraised as a group to determine whether they have the capability and willingness to bid on the construction project as designed and as required by the contracting method chosen. Similarly, if the contracting method involves use of consultants, an evaluation of the availability of qualified consultants should also be made. If the design-build method or some variation of it is considered, availability of firms capable of both designing and constructing the facility must be ascertained. In respect to all of the potential contractors, it is important to consider the amount of competition current in the market for the particular type of territory contract and whether a price can be obtained that is fair and reasonable when considered together with the benefit to the territory potentially obtainable from such a contract.

(d) **Chief Engineer's Determination.** The Chief Engineer shall make a written determination that must be approved by the Director of Public Works or the head of an agency. The determination shall describe the construction contracting method chosen and set forth the facts and conclusions which led to the selection of that method. This determination need only support the contracting method selected. It shall, however, demonstrate that the territory's requirements, its resources, and the various groups of potential contractors were all considered in making the selection.

(5) Single Prime Contractor.

(a) **Use with Sequential Design and Construction.** When sequential design and construction is used with a single prime contractor, comprehensive plans and

specifications that are precise enough to allow prospective prime (general) contractors to submit a competitive sealed bid should be prepared. The contractor awarded the contract takes responsibility for the coordination of the specialty subcontractors and timely completion of the project at the price specified in the contract. The architect-engineer, the territory project manager, and if used, the construction manager shall monitor the progress of the project and otherwise represent the territory's interest all as set forth in the pertinent contracts.

(b) **Advantages.** The primary advantage of the single prime contractor method is that the territory can look to one prime contractor who has principal responsibility for completing the project. The single prime contractor method may also give the territory contractual insulation from many subcontractor claims. Also, when sequential design and construction is used, the territory is given a fixed price for completion of the entire project before the construction has begun.

(c) **Disadvantages.** The single prime contractor method removes specialty contractors from direct territory control. This method is likely to entail including in the cost of the total project the prime contractor's potential markup on each specialty contract. On the other hand, the prime contractor's services in managing these contractors may well offset any possible markup by eliminating the need for a construction manager.

(d) **Use with Phased Design and Construction.** A single prime contractor may also be used with phased design and construction through the letting by the territory of the early construction phases to specialty contractors, and the letting of a portion of the project to a prime contractor when the plans and specifications are sufficiently complete to allow bids to be made. If found advantageous after letting the prime contract, the territory may transfer or assign to the contractor the administration of the specialty contracts it let earlier, as provided in the contract.

(e) **Advantages and Disadvantages of Use with Phased Design and Construction.** Using a single prime contractor with phased design and construction has the advantages of having a single prime contractor responsible for the entire job and also allowing construction to begin before all of the design is completed. The disadvantages are that the territory or its

construction manager must supervise and coordinate the work of the early specialty contractors, and the prime contractor will not be able to choose those early specialty contractors and may have to work with someone the prime contractor would not have chosen. As a consequence, the territory may be exposed to more claims based upon assertions of mismanagement, and the prime contractor bids may be proportionately higher than they would have been otherwise.

(f) **Contractual Provisions.** The rights, duties, and responsibilities of the territory representatives, the architect-engineer, the general prime contractor, and, if applicable, the construction manager and any specialty contractors who contract with the territory must be carefully detailed. If phased design and construction is used, administration of on-going specialty contracts let before the prime contract will have to be transferred or assigned to the prime contractor. The terms of this assignment or transfer (including the duties of the territory to ensure that the specialty contractors are at a certain point of completion at the time of assignment), what liability to the specialty contractors remains with the territory after assignment, if any, and what duties and responsibilities the general prime contractor has with respect to the assigned specialty contractors must all be set forth in the specialty contracts and the contract with the prime contractor.

(6) Multiple Prime Contractors.

(a) **Use.** Multiple prime contractors may be used with sequential design and construction by splitting the plans and specifications into packages pertinent to recognized trade specialties. The territory may undertake to manage and coordinate their work or contract with a construction manager to do so. The contracts may provide that responsibility for successful completion of the entire project rests with the territory, the territory's agent, or one of the multiple prime contractors. The contracts shall specify where this responsibility shall rest. Multiple prime contractors may be used effectively with phased design and construction only if the architect-engineer's work is closely coordinated with the specialty contractors' work. The specialty contractors may either contract directly with the territory or with its construction manager.

(b) **Advantages.** The multiple prime contractors method can lessen the prime contractor's markup, if any,

on the specialty contractors' contracts and gives the territory much greater control over the contractors doing the work. It permits the territory to be more involved in the selection of specialty contractors, allows the territory to prescribe how they will compete for the contract, and give the territory more flexibility in deciding when to enter the construction market and with what size contracts.

(c) **Disadvantages.** The multiple prime contractor method places all the risks of managing and coordinating the construction work with the territory. The territory or its representatives must actively and aggressively supervise the project to ensure timely and successful completion. A contract that merely requires specialty contractors to cooperate and to coordinate their work is insufficient. To undertake this responsibility successfully requires vesting clear authority in a territory representative to quickly make decisions essential to the continuation of the project.

(d) **Contractual Provisions.** Whenever multiple prime contractors are used, the contract between the territory and each prime contractor must clearly state the scope of each contractor's responsibility, when the portions of its work are to be completed, and provide a system of timely reports on progress of the contractor's work and problems encountered. The contract should also specify that each contractor is liable for damages caused other contractors and the territory whether because of delay or otherwise. Such clauses should not, however, attempt to relieve the territory of liability where it fails to properly coordinate and manage the project. Further, the duties and authority of the territory representative, the architect-engineer, and, if one is employed, the construction manager with respect to the specialty contractors should be clearly delineated in all the parties' contracts.

(7) Design Build or Turnkey.

(a) **Use.** The design-build or turnkey method gives the contractor maximum control of the construction project consistent with territory needs. The territory prepares a set of performance specifications including functional criteria, any life-cycle cost considerations, and other evaluation factors. The territory shall also specify the degree of detail necessary in a design proposal. The contractor is selected on the basis of its design proposal, proposed price, and other stated

evaluation criteria. It may be appropriate to use a multi-step process to lessen the number of firms submitting final design proposals to reduce administrative burden and to keep preparation costs down. In appropriate circumstances, it may be advantageous to provide in the solicitation for payment to all or any of the firms of proposal preparation costs or a stipulated stipend to ensure adequate continuing competition. After award, the contractor completes the design, subject to review by the territory or its architect-engineer as set forth in the contract, and constructs the project. The contractor chooses whether to phase the project. Upon completion, the territory either accepts or rejects the project depending on how well the contractor has met the specifications.

(b) **Advantages.** In the design-build method, a fixed price for the project is established early. Another advantage is that the contractor designs and builds the project with its own forces. Consequently, the duty and risk of proper management of project design and construction lies with the contractor. It also allows the contractor to design and perform in a manner best suited to its operations and experience. It may give the territory earlier definition of the project. This method is most appropriate when the territory will not need to be deeply involved in the project's design and construction.

(c) **Disadvantages.** Less control over the design and construction process is one of the disadvantages in design-build. The contract is awarded on the basis of a design proposal, not a complete set of plans and specifications. The territory's needs may not be met if the specifications are deficient, if the contractor's design proposals are not carefully evaluated, and if the design and construction process is not carefully monitored to ensure that both the specifications and the design proposals are being followed.

(d) **Contractual Provisions.** Careful preparation of the specifications evaluation criteria is crucial to successful use of the design-build method. The contract documents should also delineate clearly the territory's rights to inspect plans and specifications and the construction work in progress. They should also indicate precisely what constitutes completion of the project by the contractor.

(8) Construction Manager.

(a) **Use in Planning and Design Phases.** A

construction manager may bring valuable practical construction perspective to the territory in both the planning and design phases of the project. For purposes of this Section, the planning phase encompasses the activities involved in determining territory requirements, selecting the construction contracting management method, selecting an architect-engineer, and establishing progress schedules. During design, the construction manager reviews plans and makes suggestions to cut construction costs that may relate to the practicality of construction, market conditions in the construction industry, and items which should be ordered early. A construction manager would also assist in phasing the design and construction process.

(b) **Use in Construction Phase.** Once construction commences the construction manager's role may be limited to monitoring construction progress, and inspecting and otherwise representing the territory's interest if sequential design and construction with a single prime contractor is used. If the project is constructed by the phased design construction method or the multiple prime contractors method, the construction manager will be responsible for the supervision and management of their work and may let contracts to the specialty contractors pursuant to the management contract with the territory. In a project using phased design, the construction manager may also give the territory a guaranteed maximum price for completion of the project prior to completion of all the drawings and specifications. To the extent the construction manager is the territory's representative, the manager may assist in the final inspection and acceptance of the project by the territory.

(c) **Advantages.** The construction manager adds construction expertise to the territory's team. Several benefits of this are:

(1) the selection of the construction contract management technique, project design, and other crucial decisions in the early phases of the project can be made with a better understanding of their impact upon construction;

(2) the construction manager can manage the work of the various construction contractors as the territory's representative instead of using a single prime contractor whose interests may not coincide with those of the territory. In this way, the territory

may gain more control of the actual construction project.

(d) **Disadvantages.** The construction manager's fee is added cost to the construction project. On smaller construction projects of less than \$3 million, construction management may not be cost effective.

(e) **Contractual provisions.** It is imperative that the construction management contract clearly set forth the duties and authority of the construction manager in respect to all the participants in the project. The contract should also attempt to define the possible liability of the territory and the construction manager for failure to properly coordinate the specialty contractors' work.

(9) Sequential Design and Construction.

(a) **Use.** The initial step in using sequential design and construction is to gather a team to design the project and provide a complete set of drawings and specifications to use in awarding the construction contract or contracts. This team may include a construction manager who, in addition to reviewing the plans as they develop, may assist in separating them into packets if multiple prime contractors are to be used. Except for redesign necessitated by changes in territory requirements or problems encountered during construction, design is complete at the time construction has begun.

(b) **Advantages.** A project using sequential design and construction proceeds in clearly defined steps which may aid in financing and gaining any necessary approvals as well as aiding in managing the entire project. Complex or unique projects can be completely thought through and planned before construction has begun. Also, before any construction has begun, a fixed price for the project can be established.

(c) **Disadvantages.** Sequential design and construction requires a longer time to complete the project than phased design and construction. The complete package of drawings and specifications also freezes design decisions months or years before occupancy which will reduce flexibility.

(10) Phased Design and Construction.

(a) **Use.** Phased design and construction may be used when the architect-engineer, working with the construction manager, if one is used, can settle on the major design decisions and then do the detail design work in the sequence necessary to construct the project.

This design process then allows construction to begin before design is complete for the entire project (of course, design is complete on those portions being constructed). Construction should only be begun after the territory's requirements are set, the overall (schematic) design is complete, and the complete drawings and specifications for the first construction phase are ready. (It may be possible to start site preparation prior to this stage). A construction manager is often necessary to assist in packaging the various specialty contracts and to manage the work under these contracts.

(b) **Advantages.** Phased design and construction can result in reduced project completion time. It can also allow reduction in the scope of the project if prices on early portions indicate the project may exceed the budget. In a sequential project such redesign might delay the entire project. It also gives the territory added flexibility in deciding when to let the various specialty contracts to take advantage of market conditions.

(c) **Disadvantages.** In phased design and construction, portions of the project are begun before later portions are completely designed. Major changes in these later portions may necessitate costly changes in the early portions and result in costly delays to many other specialty contractors. The territory bears the risks both for at least some coordination of specialty contractors and for ensuring that design of later portions does not adversely affect earlier ones. Neither of these risks need be assumed by the territory in sequential design and construction.

(d) **Contractual Provisions.** The contract must clearly establish the architect-engineer's duty to design to allow phasing, and the contracts with the specialty contractors must clearly delineate their scope of work and duties to other contractors and the territory. Further, the management's rights of the territory and its construction manager, if one is used, must be set forth.

§5103. Bid Security (Requirement). (1) Requirement for Bid Security. Bid security shall be required for all competitive sealed bidding for construction contracts when the price is estimated by the Director of Public Works to exceed \$25,000. Bid security shall be a bond provided by a surety company authorized to do business in this territory, or the equivalent in cash, or otherwise supplied in a form satisfactory to the territory. Nothing herein prevents the requirement of such

bonds on construction contracts under \$25,000 when the circumstances warrant (5 GCA §5303 of the Guam Procurement Act).

(2) **Withdrawal of Bids.** After the bids are opened, they shall be irrevocable for the period specified in the Invitation for Bids, except as provided in 5 GCA §5211(f) of the Guam Procurement Act, (Competitive Sealed Bidding, Correction or Withdrawal of Bids; Cancellation of Awards). If a bidder is permitted to withdraw its bid before award, no action shall be had against the bidder or the bid security.

(3) Bid Security (General)

(a) **General.** Invitation for Bids on territory construction contracts shall require the submission of bid security in an amount equal to at least 15% of the amount of the bid, at the time the bid is submitted. If a contractor fails to accompany its bid with the required bid security, the bid shall be deemed nonresponsive, in accordance with §3109(n)(2) (Bid Evaluation and Award, Responsibility and Responsiveness) of these Regulations except as provided by Subsection 5103(a)(3) of this Section.

(b) **Purpose.** Bid security protects the territory against the failure or refusal of the low bidder to supply the necessary performance and payment bonds, as required, and to proceed with performance under the contract.

(c) **Acceptable Bid Security.** Acceptable bid security shall be limited to:

(1) an annual or one-time bid bond in a form satisfactory to the territory underwritten by a company licensed to issue bid bonds in this territory; or

(2) a bank certified check or cash.

(d) **Nonsubstantial Failure to Comply.** If a bid does not comply with the security requirements of this Section, the bid shall be rejected as nonresponsive, unless the failure to comply is determined by the Director of Public Works, the head of a Purchasing Agency, or the designee of such officer to be nonsubstantial where:

(1) only one bid is received, and there is not sufficient time to rebid the contract;

(2) the amount of the bid security submitted, though less than the amount required by the Invitation for Bids, is equal to or greater than the difference in the price stated in the next higher

acceptable bid; or

(3) the bid guarantee becomes inadequate as a result of the correction of a mistake in the bid or bid modification in accordance with §3109(m) (Mistakes in Bids) of these Regulations, if the bidder increases the amount of guarantee to required limits within forty-eight (48) hours after the bid opening.

§5104. Contract Performance and Payment Bonds. (1)
Performance Bonds.

(a) **General.** A performance bond satisfactory to the territory, executed by a surety company authorized to do business in this territory or otherwise secured in a manner satisfactory to the territory, is required for all contracts in excess of \$25,000 in the amount of 100% of the contract price. The performance bond shall be delivered by the contractor to the territory at the same time the contract is executed. If a contractor fails to deliver the required performance bond, the contractor's bid shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next lowest bidder in accordance with §3109(n)(2) (Bid Evaluation and Award, Responsibility and Responsiveness) of these Regulations.

(b) **Purpose.** A performance bond indemnifies the territory against loss resulting from the failure of the contractor to perform a construction contract in accordance with the plans and specifications.

(c) **Reduction of Amount Prior to Solicitation.** The Director of Public Works or the head of a Purchasing Agency may reduce the amount of the performance bond required prior to solicitation to not less than 50% of the contract price if, after completing appropriate analysis, it is determined in writing by the Director of Public Works or the head of a Purchasing Agency to be less costly or more advantageous to the territory to self-insure a part of the performance of the contractor. An analysis may be made for groups of contracts, for example, contracts in excess of \$10 million, or may be made on particular contracts, as the Director of Public Works or the head of a Purchasing Agency chooses. A copy of the analysis shall be available for public inspection.

(d) **Reduction of Amount During Performance.** If permitted by the contract and solicitation, the Director of Public Works or the head of a Purchasing Agency may reduce the amount of the performance bond as work is

completed if such officer determines in writing that such reduction is in the best interest of the territory.

(2) Payment Bonds.

(a) **General.** A payment bond satisfactory to the territory, executed by a surety company authorized to do business in this territory or otherwise secured in a manner satisfactory to the territory is required for all construction contracts in excess of \$25,000, in the amount of 100% of the contract price. The payment bond shall be delivered by the contractor to the territory at the same time the contract is executed. If a contractor fails to deliver the required payment bond, the contractor's bid shall be rejected, its bid security shall be enforced, and award of the contract shall be made to the next lowest bidder in accordance with §3109(n)(2) (Bid Evaluation and Award, Responsibility and Responsiveness) of these Regulations.

(b) **Purpose.** A payment bond guarantees payment and protection for those furnishing labor and materials to the contractor or its subcontractors for the work bonded.

(c) **Reduction of Amount Prior to Solicitation.** Prior to solicitation the Director of Public Works or the head of a Purchasing Agency may reduce the amount of the payment bond to not less than 50% of the contract price if a written determination is made that it is in the best interest of the territory to do so. Factors to be considered in order to make such a determination include, but are not limited to:

- (1) the value and number of subcontracts to be awarded by the contractor; and
- (2) the value of the contract.

(d) **Reduction of Amount During Performance.** During performance, the Director of Public Works or the head of a Purchasing Agency may reduce the required coverage of the payment bond as payments are made by the contractor.

§5105. Bond Forms and Copies.

(1) Forms.

(a) **Bid Bond.** The required bid bond shall be in substantially the following form:

BID BOND

BOND NO. _____

KNOW ALL MEN BY THESE PRESENTS, that we, _____, as Principal, hereinafter called the Principal, and Bonding Company, a corporation duly organized under the laws of the Territory of Guam, as Surety, hereinafter

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called the Surety, are held and firmly bound unto the Territory of Guam for the sum of _____ Dollars (\$_____), for payment of which sum well and truly to be made, the said Principal and the said Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for (identify project by number and brief description

NOW, THEREFORE, if the Territory of Guam shall accept the bid of the Principal and the Principal shall enter into a Contract with the Territory of Guam in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Territory of Guam the difference not to exceed the penalty hereof between the amounts specified in said bid and such larger amount for which the Territory of Guam may in good faith contract with another party to perform work covered by said bid or an appropriate liquidated amount as specified in the Invitation for Bids then this obligation shall be null and void, otherwise to remain in full force and effect. Signed and sealed this ____ day of _____, 19__.

(Principal) (Seal)

(Witness)

(Title)

(Witness)

(Surety) (Seal)

(Title)

BY: _____

(Attorney-in-Fact)

(b) Performance Bond. The required performance bond shall be in substantially the following form:

PERFORMANCE BOND

BOND NO. _____

KNOW ALL MEN BY THESE PRESENTS that (here insert full name and address or legal title of Contractor) as Principal, hereinafter called Contractor, and (Bonding Company), a corporation duly organized under the laws of the Territory of Guam as Surety, hereinafter called Surety, are held and firmly

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bound unto the Territory of Guam as Obligee, in the amount of (Full Amount) Dollars (\$_____), for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators; successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Contractor has by written agreement dated _____, 19___, entered into a contract with the Territory of Guam for (describe project and insert project number) in accordance with drawings and specifications prepared by (here insert full name and address or legal title of architect) which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said Contract then this obligation shall be null and void; otherwise it shall remain in full force and effect. The Surety hereby waives notice of any alteration or extension provided the same is within the scope of the contract. Whenever Contractor shall be and is declared by the Territory of Guam to be in default under the Contract, the Territory of Guam having performed territorial obligations thereunder, the Surety may promptly remedy the default or shall promptly:

1) Complete the Contract in accordance with its terms and conditions; or

2) Obtain a bid or bids for completing the Contract in accordance with its terms and conditions, and upon determination by the Territory of Guam and the Surety jointly of the lowest responsive, responsible bidder, arrange for a contract between such bidder and the Territory of Guam, and make available as work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price", as used in this paragraph shall mean the total amount payable by the Territory of Guam to Contractor under the Contract and any amendments thereto, less the amount properly paid by the Territory of Guam to Contractor. No right of action shall accrue on this bond to or for the use of any person or corporation other than the Territory of Guam or successors of the Territory of Guam.

Signed and sealed this ____ day of _____, 19__.

(Principal) (Seal)

(Witness)

(Title)

(Witness)

(Bonding Company)

(Title)

BY: _____

(Attorney-in-Fact)

(c) Payment Bond. The required payment bond shall be in substantially the following form:

LABOR AND MATERIAL PAYMENT BOND

Bond No. _____

KNOW ALL MEN BY THESE PRESENTS that (here insert full name and address or legal title of Contractor) as Principal, hereinafter called Principal, and (Bonding Company), a corporation duly organized under the laws of the Territory of Guam, as Surety, hereinafter called Surety, are held and firmly bound unto the Territory of Guam as Oblige, hereinafter called Territory, for the use and benefit of claimants as herein below defined, in the amount of (Full Amount) Dollars (\$_____) for the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated _____, 19__, entered into a contract with the Territory for (describe project and insert project number) in accordance with drawings and specifications prepared by (here insert full name and address or legal title of Architect) which contract is by reference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1) A claimant is defined as one having a direct contract with the Principal or with a Subcontractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service, or rental of equipment directly applicable to the Contract.

2) The above-named Principal and Surety hereby jointly and severally agree with the territory that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may

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sue on this bond for use of such claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon. The Territory shall not be liable for the payment of any costs or expenses of any such suit.

3) No suit or action shall be commenced hereunder by any claimant:

a) Unless claimant, other than one having a direct contract with the Principal, shall have given written notice to any two of the following: the Principal, the territory, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be personally served or served by mailing the same by registered mail or certified mail, postage prepaid, in an envelope addressed to the Principal at any place the Principal maintains an office or conducts its business.

b) After the expiration of one (1) year following the date on which the last of the labor was performed or material was supplied by the party bringing suit.

c) Other than in a court of competent jurisdiction for the county or district in which the construction contract was to be performed.

4) The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics' liens which may be filed of record against said improvement, whether or not claim for the amount of such lien be presented under and against this bond.

Signed and sealed this ____ day of _____, 19__.

(Principal) (Seal)

(Witness)

(Title)

(Witness)

(Bonding Company)

(Title)

BY: _____
(Attorney-in-Fact)

(2) Certified Copies of Bonds. Any person may request

and obtain from the territory a certified copy of a bond upon payment of the cost of reproduction of the bond and postage, if any. A certified copy of a bond shall be prima facie evidence of the contents, execution and delivery of the original (5 GCA §5305(b) of the Guam Procurement Act).

§5106. Contract Clauses and Their Administration. (1) Introduction. The contract clauses presented in this Section are promulgated for use in construction contracts in accordance with 5 GCA §5306 (Contract Clauses and Their Administration) of the Guam Procurement Act. Alternative clauses are provided in one instance to permit accommodation of differing contract situations.

(2) **Revisions to Contract Clauses.** The clauses set forth in this Section may be varied for use in a particular contract when, pursuant to the provisions of 5 GCA §5306(d) (Contract Clauses and Their Administration, Modification of Required Clauses) of the Guam Procurement Act, the Director of Public Works or the head of a Purchasing Agency makes a written determination describing the circumstances justifying the variation or variations.

Any material variations from these clauses shall be described in the solicitation documents in substantially the following form:

"Clause No. _____, entitled _____, is not a part of the general terms and conditions of this contract, and has been replaced by Special Clause No. _____, entitled _____. Your attention is specifically directed to this clause."

(3) changes Clauses *Changes*.

(a) **Change Order.** The Director of Public Works or the head of a Purchasing Agency, at any time, and without notice to the sureties, in a signed writing designated or indicated to be a change order, may order:

(1) changes in the work within the scope of the contract; and

(2) changes in the time for performance of the contract that do not alter the scope of the contract.

(b) **Adjustments of Price or Time for Performance.** If any such change order increases or decreases the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this

contract.

Failure of the parties to agree to an adjustment shall not excuse a contractor from proceeding with the contract as changed, provided that the territory promptly and duly make such provisional adjustments in payments or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(c) **Written Certification.** The contractor shall not perform any change order in excess of \$5,000 unless it bears, or the contractor has separately received, a written certification, signed by appropriate fiscal officer or other responsible official that funds are available therefor; and, if acting in good faith, the contractor may rely upon the validity of such certification.

(d) **Time Period for Claim.** Within 30 days after receipt of a written change order under Paragraph (1) (Change Order) of this clause, unless such period is extended by the Director of Public Works or the head of the Purchasing Agency in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the territory is prejudiced by the delay in notification.

(e) **Claim Barred After Final Payment.** No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

(f) **Claims Not Barred.** In the absence of such a change order, nothing in this clause shall restrict the contractor's right to pursue a claim arising under the contract, if pursued in accordance with the clause entitled "Claims Based on a Director of Public Work's or the Head of a Purchasing Agency's Actions or Omissions Clause' or for breach of contract."

(4) **Variations in Estimated quantities Clause.** The following clause shall be inserted only in those construction contracts which contain estimated quantity items:

"VARIATIONS IN ESTIMATED QUANTITIES

(1) Variations Requiring Adjustments. Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than 15% above or below the estimated quantity stated in this contract, an adjustment in the contract price shall be made upon demand of either party. The adjustment shall be based

upon any increase or decrease in costs due solely to the variation above 115% or below 85% of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Director of Public Works or the head of the Purchasing Agency shall, upon receipt of a timely written request for an extension of time, prior to the date of final settlement of the contract, ascertain the facts and make such adjustment for extending the completion date as in the judgment of the Director of Public Works or the head of the Purchasing Agency the findings justified.

(2) Adjustments of Price. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

(5) Suspension of Work Clause.

"SUSPENSION OF WORK

(a) **Suspension for Convenience.** The Director of Public Works or the head of the Purchasing Agency may order the contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as the Director of Public Works or the head of the Purchasing Agency may determine to be appropriate for the convenience of the territory.

(b) **Adjustment of Cost.** If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Director of Public Works or the head of the Purchasing Agency in the administration of this contract, or by the failure of the Director of Public Works or the head of the Purchasing Agency to act within the time specified in this contract (or if no time is specified, within reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent:

(1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor; or

(2) for which an adjustment is provided for or excluded under any other provision of this contract.

(c) **Time Restriction on Claim.** No claim under this clause shall be allowed:

(1) for any costs incurred more than twenty (20) days before the contractor shall have notified the

Director of Public Works or the head of the Purchasing Agency in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) unless the claim is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

(d) **Adjustments of Price.** Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

(6) **Differing Site Conditions Clause.** Set forth below are alternative differing site conditions clauses to be used as appropriate.

(ALTERNATIVE A)

"DIFFERING SITE CONDITIONS: PRICE ADJUSTMENTS

(1) **Notice.** The contractor shall promptly, and before such conditions are disturbed, notify the Director of Public Works or the head of a Purchasing Agency of:

(a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract; or

(b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.

(2) **Adjustments of Price or Time for Performance.** After receipt of such notice, the Director of Public Works or the head of a Purchasing Agency shall promptly investigate the site, and if it is found that such conditions do materially so differ and cause an increase in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

(3) **Timeliness of Claim.** No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in this clause; provided, however, that the time prescribed therefor may be extended by the Director of Public Works or the head of

a Purchasing Agency in writing.

(4) **No Claim After Final Payment.** No claim by the contractor for an adjustment thereunder shall be allowed if asserted after final payment under this contract.

(5) **Knowledge.** Nothing contained in this clause shall be grounds for an adjustment in compensation if the contractor had actual knowledge of the existence of such conditions prior to the submission of bids.”

(END OF ALTERNATIVE A)

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(ALTERNATIVE B)

“SITE CONDITIONS CONTRACTOR'S RESPONSIBILITY

The contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor and other facilities required because of any unforeseen conditions (physical or otherwise) shall be wholly at the contractor's own cost and expense, anything in this contract to the contrary notwithstanding.”

(END OF ALTERNATIVE B)

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(7) **Price Adjustment Clause.**

PRICE ADJUSTMENT

(1) **Price Adjustment Methods.** Any adjustment in contract price pursuant to clauses in this contract shall be made in one or more of the following ways:

(a) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(b) by unit prices specified in the contract or subsequently agreed upon;

(c) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;

(d) in such other manner as the parties may mutually agree; or

(e) in the absence of an agreement between the parties, by a unilateral determination by the Director of Public Works or the head of the Purchasing Agency of costs attributable to the event or situation covered by the clause, plus

appropriate profit or fee, all as computed by the Director of Public Works or the head of the Purchasing Agency in accordance with generally accepted accounting principles and applicable sections under Chapter 7 (Cost Principles) of the Guam Procurement Regulations and subject to the provisions of Article 5, Chapter 5 of 5 GCA (Legal and Contractual Remedies) of the Guam Procurement Act.

(2) **Submission of Cost or Pricing Data.** The contractor shall submit cost or pricing data for any price adjustments subject to the provisions of §3118 (Cost or Pricing Data) of the Guam Procurement Regulations."

(8) Claims Based on the Director of Public Works or the Head of the Purchasing Agency's Actions or Omissions Clause.

"CLAIMS BASED ON THE DIRECTOR OF PUBLIC WORK'S OR THE HEAD OF A PURCHASING AGENCY'S ACTIONS OR OMISSIONS

(1) **Notice of Claim.** If any action or omission on the part of the Director of Public Works or the head of the Purchasing Agency, or designee of such officer, requiring performance changes within the scope of the contract constitutes the basis for a claim by the contractor for additional compensation, damages, or an extension of time for completion, the contractor shall continue with performance of the contract in compliance with the directions or orders of such officials, but by so doing, the contractor shall not be deemed to have prejudiced any claim for additional compensation, damages, or an extension of time for completion; provided:

(a) the contractor shall have given written notice to the Director of Public Works, the head of the Purchasing Agency, or designee of such officer:

(i) prior to the commencement of the work involved, if at that time the contractor knows of the occurrence of such action or omission;

(ii) within 30 days after the contractor knows of the occurrence of such action or omission, if the contractor did not have such knowledge prior to the

commencement of the work; or

(iii) within such further time as may be allowed by the Procurement Officer in writing.

This notice shall state that the contractor regards the act or omission as a reason which may entitle the contractor to additional compensation, damages, or an extension of time. The Procurement Officer or designee of such officer, upon receipt of such notice, may rescind such action, remedy such omission, or take such other steps as may be deemed advisable in the discretion of the Procurement Officer or designee of such officer.

(b) the notice required by Subparagraph (a) of this Paragraph describes as clearly as practicable at the time the reasons why the contractor believes that additional compensation, damages, or an extension of time may be remedies to which the contractor is entitled; and

(c) the contractor maintains and, upon request, makes available to the Procurement Officer within a reasonable time, detailed records to the extent practicable, of the claimed additional costs or basis for an extension of time in connection with such changes.

(2) **Limitations of Clause.** Nothing herein contained, however, shall excuse the contractor from compliance with any rules of law precluding any territorial officers and any contractors from acting in collusion or bad faith in issuing or performing change orders which are clearly not within the scope of the contract.

(3) **Adjustments of Price.** Any adjustment in the contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

(9) **Default - Delay - Time Extensions Clause.** The conditions contained in the following subsections do not apply to supply and other types of contracts where notice of liquidated damages will apply immediately upon notification of breach or default of the contract is provided in the bid terms or conditions; or in the purchase order itself. Instead, these conditions apply to construction contracts.

SOURCE: Paragraph added to clarify use of this subsection.
(1/1/1999)

"TERMINATION FOR DEFAULT FOR

NONPERFORMANCE OR DELAY - DAMAGES FOR
DELAY -TIME EXTENSIONS

(1) **Default.** If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will assure its completion within the time specified in this contract, or any extension thereof fails to complete said work within such time, or commits any other substantial breach of this contract, and further fails within fourteen (14) days after receipt of written notice from the Procurement Officer to commence and continue correction of such refusal or failure with diligence and promptness, the Procurement Officer may, by written notice to the contractor, declare the contractor in breach and terminate the contractor's right to proceed with the work or such part of the work as to which there has been delay. In such event the territory may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of, and utilize in completing the work, such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, the contractor and the contractor's sureties shall be liable for any damage to the territory resulting from the contractor's refusal or failure to complete the work within the specified time.

(2) **Liquidated Damages upon Termination.** If fixed and agreed liquidated damages are provided in the contract, and if the territory so terminates the contractor's right to proceed, the resulting damage will consist of such liquidated damages for such reasonable time as may be required for final completion of the work.

(3) **Liquidated Damages in Absence of Termination.** If fixed and agreed liquidated damages are provided in the contract, and if the territory does not terminate the contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(4) **Time Extension.** The contractor's right to proceed shall not be so terminated nor the contractor charged with resulting damage if:

(a) the delay in the completion of the work

arises from causes such as: acts of God; acts of the public enemy; acts of the territory, and any other territorial entity in either a sovereign or contractual capacity; acts of another contractor in the performance of a contract with the territory; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; provided, however, that no extension of time will be granted for a delay caused by a shortage of materials, unless the contractor furnished to the Procurement Officer proof that the contractor has diligently made every effort to obtain such materials from all known sources within reasonable reach of the work, and further proof that the inability to obtain such materials when originally planned did in fact cause a delay in final completion of the entire work which could not be compensated for by revising the sequence of the contractor's operations; and

(b) the contractor, within ten days from the beginning of any such delay (unless the Procurement Officer grants a further period of time before the date of final payment under the contract), notifies the Procurement Office in writing of the causes of delay. The Procurement Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the Procurement Officer, the findings of fact justify such an extension.

(5) **Erroneous Termination for Default.** If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the territory, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstance, this contract does not contain a clause

providing for termination for convenience of the territory, the contract shall be adjusted to compensate for such termination and the contract modified accordingly.

(6) **Additional Rights and Remedies.** The rights and remedies of the territory provided in this clause are in addition to any other rights and remedies provided by law or under this contract."

(10) **Liquidated Damages Clause.** The following clause may be used in construction contracts when it is difficult to determine with reasonable accuracy damage to the territory due to delays caused by late contractor performance or nonperformance.

"LIQUIDATED DAMAGES

When the contractor fails to complete the work or any portion of the work within the time or times fixed in the contract or any extension thereof, the contractor shall pay to the territory \$50 for contracts less than \$100,000 and \$100 for contracts \$100,000 and over per calendar day of delay pursuant to the clause of this contract entitle, "Termination for Default for Nonperformance or Delay - Damages for Delay - Time Extension."

(11) **Termination for Convenience Clause.**

"TERMINATION FOR CONVENIENCE

(1) **Termination.** The Procurement Officer may, when the interests of this territory so require, terminate this contract in whole or in part, for the convenience of the territory. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(2) **Contractor's Obligations.** The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. the Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the territory. The contractor must still complete the work not

terminated by the notice of termination and may incur obligations as necessary to do so.

(3) **Right to Construction and Supplies.** The Procurement Officer may require the contractor to transfer title and deliver to the territory in the manner and to the extent directed by the Procurement Officer:

(a) any completed construction; and

(b) such partially completed construction, supplies, materials, parts, tools, dies, jigs, fixtures, plans, drawing, information, and contract rights (hereinafter called "construction material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The contractor shall protect and preserve property in the possession of the contractor in which the territory has an interest. If the Procurement Officer does not exercise this right, the contractor shall use best efforts to sell such construction, supplies, and construction materials in accordance with the standards of 14 GCA §2706 (UCC). (See end of Subsection 6101(10)(d) for code quotation.) This in no way implies that the territory has breached the contract by exercise of the Termination for Convenience Clause.

(4) **Compensation.**

(a) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data, submitted to the extent required by Section 3118 (Cost or Pricing Data) of the Guam Procurement Regulations, bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(b) The Procurement Officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data submitted as required by §3118 (Cost or Pricing Data) of the

Guam Procurement Regulations and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the territory, the proceeds of any sales of construction, supplies, and construction materials under Paragraph (3) of this clause, and the contract price of the work not terminated.

(c) Absent complete agreement under Subparagraph (b) of this Paragraph, the Procurement Officer shall pay the contractor the following amounts, provided payments under Subparagraph (b) shall not duplicate payments under this Paragraph:

(i) with respect to all contract work performed prior to the effective date of the notice of termination, the total (without duplication of any items) of:

(A) the cost of such work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for completed portions of such work; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(B) cost of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c)(i)(A) of this Paragraph.

(C) the reasonable settlement costs of the contractor including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and

for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract. The total sum to be paid the contractor under this Paragraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of any sales of construction, supplies, and construction materials under Paragraph (3) of this clause, and the contract price of work not terminated.

(d) Cost claimed, agreed to, or established under Subparagraphs (b) and (c) of this Paragraph shall be in accordance with Chapter 7 (Cost Principles) of the Guam Procurement Regulations."

(12) Remedies Clause.

"REMEDIES

Any dispute arising under or out of this contract is subject to the provisions of Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations."

§5107. Fiscal Responsibility. Every contract modification, change order, or contract price adjustment under a construction contract with the territory in excess of \$5,000 shall be subject to prior written certification by the fiscal officer of the entity responsible for funding the project or the contract, or other official responsible for monitoring and reporting upon the status of the costs of the total project budget or contract budget, as to the effect of the contract modification, change order, or adjustment in contract price on the total project budget or total contract budget. In the event that the certification of the fiscal officer or other responsible official discloses a resulting increase in the total project budget and/or the total contract budget, the Director of Public Works or the head of a Purchasing Agency shall not execute or make such contract modification, change order, or adjustment in contract price unless sufficient funds are available therefor, or the scope of the project or contract is adjusted so as to permit the degree of completion that is

feasible within the total project budget and/or total contract budget as it existed prior to the contract modification, change order, or adjustment in contract price under consideration; provided, however, that with respect to the validity, as to the contractor, of any executed contract modification, change order, or adjustment in contract price which the contractor has reasonably relied upon, it shall be presumed that there has been compliance with the provisions of this Section (5 GCA §5307 of the Guam Procurement Act).

§5108. Architect-Engineer and Land Surveying Services. (1) **Application.** The provision of these Regulations applies to every procurement of services within the scope of the practice of architecture, professional engineering, or land surveying, as defined by the laws of this territory, except as authorized by §3111 (Small Purchases), §3112 (Sole Source Procurement), and §3113 (Emergency Procurement) of the Guam Procurement Regulations.

(2) **Policy.** It is the policy of this territory to:

(a) give public notice of all requirements for architect-engineer and land surveying services; and

(b) negotiate contracts for such services on the basis of demonstrated competence and qualification for the type of service required, and at fair and reasonable prices.

(c) **Source Selection.** For the purpose of acquiring the services, described in this Chapter the provisions of §3114 (Competitive Selection Procedures for Services, specified in §2112) of this Guam Procurement Regulations shall be followed.

CHAPTER 6

MODIFICATION AND TERMINATION OF CONTRACTS FOR SUPPLIES AND SERVICES

§6101 Contract Clauses and their Administration. (1)

Introduction. The following contract clauses are available for use in supply and service contracts at the discretion of the Chief Procurement Officer, or the head of a Purchasing Agency, or the designee of either officer in accordance with 5 GCA §5350 (Contract Clauses and Their Administration) of the Guam Procurement Act. Alternative clauses are provided in some instances to permit accommodation of differing contract situations.

(2) **Variations in contract Clauses.** If the clauses set forth in this Chapter are utilized, they may be varied for use in a particular contract when, pursuant to the provisions of 5 GCA §5350(d) (Contract Clauses and Their Administration, Modification of Clauses) of the Guam Procurement Act, the Chief Procurement Officer or the head of a Purchasing Agency makes a written determination describing the circumstances justifying the variation or variations.

Any material variation from these clauses shall be described in the solicitation documents in substantially the following form:

“Clause No. _____, entitled _____ is not a part of the general terms and conditions of this contract and has been replaced by Special Clause No. _____, entitled _____.”

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(3) Changes Clause.

(a) **Changes** Clause in Fixed Price Contracts. In fixed-price contracts the following clause may be inserted:

"CHANGES

(1) **Change Order.** By a written order, at any time, and without notice to surety, the Chief Procurement Officer or the head of a Purchasing Agency may, subject to all appropriate adjustments, make changes within the general scope of this contract in any one or more of the following:

(A) Drawings, designs, or specifications, if the supplies to be furnished are to be specially manufactured for the territory in accordance therewith;

(B) method of shipment or packing; or

(C) place of delivery.

(2) **Adjustments of Price or Time for Performance.** If any such change order increases or decreases the contractor's cost of, or the time required for performance of any part of the work under this contract, whether or not changed by the order, an adjustment shall be made and the contract

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modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract.

Failure of the parties to agree to an adjustment shall not excuse the contractor from proceeding with the contract as changed, provided that the territory promptly and duly make such provisional adjustments in payment or time for performance as may be reasonable. By proceeding with the work, the contractor shall not be deemed to have prejudiced any claim for additional compensation, or an extension of time for completion.

(3) **Time Period for Claim.** Within 30 days after receipt of a written change order under Paragraph (1) (Change Order) of this clause, unless such period is extended by the Procurement Officer in writing, the contractor shall file notice of intent to assert a claim for an adjustment. Later notification shall not bar the contractor's claim unless the territory is prejudiced by the delay in notification.

(4) **Claims Barred After Final Payment.** No claim by the contractor for an adjustment hereunder shall be allowed if notice is not given prior to final payment under this contract.

(5) **Other Claims not Barred.** In the absence of such a change order, nothing in this clause shall be

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deemed to restrict the contractor's right to pursue a claim arising under the contract if pursued in accordance with the clause entitled, "Claims Based on a Procurement Officer's Actions or Omissions, Notice of Claim Clause", or for breach of contract."

(b) Changes Clause in Cost Reimbursement Contracts. (RESERVED).

(4) Stop Work Order Clause.

(a) Use of Clause. The clause set forth in Subsection 6101(4)(c) of this Section is authorized for use in any fixed-price contract under which work stoppage may be required for reasons such as advancements in the state-of-the-art, production modifications, engineering changes, or realignment of programs.

(b) Use of Orders.

(1) Because stop work orders may result in increased costs by reason of standby costs, such orders shall be issued only with prior approval of the Chief Procurement Officer, or the head of a Purchasing Agency, or designees of either officer. Generally, use of a stop work order will be limited to situations in which it is advisable to suspend work pending a decision to proceed by the territory and a supplemental agreement providing for such suspension is not feasible. A stop work order may not be used in lieu of the issuance of a termination

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notice after a decision to terminate has been made.

(2) Stop work orders shall not exceed 90 consecutive days and shall include, as appropriate:

(i) a clear description of the work to be suspended;

(ii) instructions as to the issuance of further orders by the contractor for material or services;

(iii) guidance as to action to be taken on subcontracts; and

(iv) other instructions and suggestions to the contractor for minimizing costs.

Promptly after issuance, stop work orders should be discussed with the contractor and should be modified, if necessary, in the light of such discussions.

(3) As soon as feasible after a stop work order is issued:

(i) the contract will be terminated; or

(ii) the stop work order will be cancelled or

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extended in writing beyond the period specified in the order.

In any event, some such action must be taken before the specified stop work period expires. If an extension of the stop work order is necessary, it must be evidenced by a supplemental agreement. Any cancellation of a stop work order shall be subject to the same approvals as were required for the issuance of the order.

(c) **Clause.**

“STOP WORK ORDER

(1) **Order to Stop Work.** The Procurement Officer may, by written order to the contractor, at any time, and without notice to any surety, require the contractor to stop all or any part of the work called for by this contract. This order shall be for a specified period not exceeding 90 days after the order is delivered to the contractor, unless the parties agree to any further period. Any such order shall be identified specifically as a stop work order issued pursuant to this clause. Upon receipt of such an order, the contractor shall forthwith comply with its terms and take all reasonable steps to minimize the occurrence of costs allocable to the work covered by the order during the period of work stoppage. Before the stop work order expires, or within any further period to which the parties shall

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have agreed, the Procurement Officer shall either:

(i)cancel the stop work order; or

(ii) terminate the work covered by such order as provided in the "Termination for Default Clause" or the "Termination for Convenience Clause" of this contract.

(2) Cancellation or Expiration of the Order. If a stop work order issued under this clause is cancelled at any time during the period specified in the order, or if the period of the order or any extension thereof expires, the contractor shall have the right to resume work. An appropriate adjustment shall be made in the delivery schedule or contract price shall be modified in writing accordingly, if:

(i) the stop work order results in an increase in the time required for, or in the contractor's cost properly allocable to, the performance of any part of this contract; and

(ii) the contractor asserts a claim for such an adjustment within 30 days after the end of the period of work stoppage; provided that, if the Procurement Officer decides that the facts justify such action, any such claim asserted may be received and acted upon at any time prior to final payment under this contract.

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(3) **Termination of Stopped Work.** If a stop work order is not cancelled and the work covered by such order is terminated for default or convenience, the reasonable costs resulting from the stop work order shall be allowed by adjustment or otherwise.

(4) **Adjustments of Price.** Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the Price Adjustment Clause of this contract."

(5)(a) **Definite Quantity contracts.** The following clause is authorized for use in definite quantity supply or service contracts:

"VARIATION IN QUANTITY

Upon the agreement of the parties, the quantity of supplies or services or both specified in this contract may be increased by a maximum of ten percent (10%) provided:

(i) the unit prices will remain the same (except for any price adjustments otherwise applicable); and

(ii) the Procurement Officer makes a written determination that such an increase will either be more economical than awarding

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another contract or that it would not be practical to award another contract.”

(b) **Indefinite Quantity Contracts.** No clause is provided here because in indefinite quantity contracts the flexibility as the territory's obligation to order and the contractor's obligation to deliver should be designated to meet using agency needs while making the contract as attractive as possible to potential contractors, thereby attempting to obtain maximum practicable competition in order to assure the best economy for the territory. However, in each case, the contract should state:

(1) the minimum quantity, if any, the territory is obligated to order and the contractor to provide;

(2) whether there is a quantity the territory expects to order and how this quantity relates to any minimum and maximum quantities that may be ordered under the contract;

(3) any maximum quantity the territory may order and the contractor must provide; and

(4) whether the territory is obligated to order its actual requirements under the contract, or in the case of a multiple award as defined in §3122 (Multiple Source Contracting) of these Regulations that the territory will order its actual requirements from the contractors under the multiple award

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subject to any minimum or maximum quantity stated.

(6) Price Adjustment Clause.

"PRICE ADJUSTMENT

(a) Price Adjustment Methods. Any adjustment in contract price pursuant to a clause in this contract shall be made in one or more of the following ways:

(i) by agreement on a fixed price adjustment before commencement of the pertinent performance or as soon thereafter as practicable;

(ii) by unit prices specified in the contract or subsequently agreed upon;

(iii) by the costs attributable to the event or situation covered by the clause, plus appropriate profit or fee, all as specified in the contract or subsequently agreed upon;

(iv) in such other manner as the parties may mutually agree; or

(v) in the absence of agreement between the parties, by a unilateral determination by the Procurement Officer of the costs attributable to the

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event or situation covered by the clause, plus appropriate profit or fee, all as computed by the Procurement Officer in accordance with generally accepted accounting principles and applicable sections of the regulations promulgated under Chapter 7 (Cost Principles), subject to the provisions of Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations.

(b) **Submission of Cost or Pricing Data.** The contractor shall provide cost or pricing data for any price adjustments subject to the provisions of §3118 (Cost or Pricing Data) of the Guam Procurement Regulations.

(7) **Claims Based on a Procurement Officer's Actions or Omissions Clause.** The clause set forth in §5106(8) (Claims Based on a Procurement Officer's Actions or Omissions Clause) of these Regulations may be used in supply or service contracts.

(8) **Termination for Default Clause.**

"TERMINATION FOR DEFAULTS

(a) **Default.** If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the contractor in

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writing of the delay or non-performance and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform. In the event of termination in whole or in part the Procurement Officer may procure similar supplies or services in a manner and upon terms deemed appropriate by the Procurement Officer. The contractor shall continue performance of the contract to the extent it is not terminated and shall be liable for excess costs incurred in procuring similar goods or services.

(b) **Contractor's Duties.** Notwithstanding termination of the contract and subject to any directions from the Procurement Officer, the contractor shall take timely, reasonable, and necessary action to protect and preserve property in the possession of the contractor in which the territory has an interest.

(c) **Compensation.** Payment for completed supplies delivered and accepted by the territory shall be at the contract price. Payment for the protection and preservation of property shall be in an amount agreed upon by the contractor and the Procurement Officer; if the parties fail to agree, the Procurement Officer shall set an amount subject to the contractor's rights under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations. The territory may withhold from amounts due the contractor such sums as the Procurement Officer deems to be necessary to

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protect the territory against loss because of outstanding liens or claims of former lien holders and to reimburse the territory for the excess costs incurred in procuring similar goods and services.

(d) **Excuse for Nonperformance or Delayed Performance.** Except with respect to defaults of subcontractors, the contractor shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the contractor to make progress in the prosecution of the work hereunder which endangers such performance) if the contractor has notified the Procurement Officer within 15 days after the cause of the delay and the failure arises out of causes such as: acts of God; acts of the public enemy; acts of the territory and any other governmental entity in its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather. If the failure to perform is caused by the failure of a subcontractor to perform or to make progress, and if such failure arises out of causes similar to those set forth above, the contractor shall not be deemed to be in default, unless the supplies or services to be furnished by the subcontractor were reasonably obtainable from other sources in sufficient time to permit the contractor to meet the contract requirements. Upon request of the contractor, the Procurement Officer shall ascertain the facts and extent of such failure, and, if such officer determines that any failure to perform was occasioned by any one or more of the excusable causes, and that, but for the excusable cause, the contractor's progress and performance would

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have met the terms of the contract, the delivery schedule shall be revised accordingly, subject to the rights of the territory under the clause entitled (in fixed-price contracts, "Termination" for Convenience in cost-reimbursement contracts) "Termination". (As used in this Paragraph of this clause the term "subcontractor" means subcontractor at any tier.)

(e) **Erroneous Termination for Default.** If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the territory, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the territory, the contract shall be adjusted to compensate for such termination and the contract modified accordingly subject to the contractor's rights under Chapter 9 (Legal and Contractual Remedies) of the Guam Procurement Regulations.

(f) **Additional Rights and Remedies.** The rights and remedies provided in this clause are in addition to any other rights and remedies provided by law or under this contract."

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(9) Liquidated Damages Clause.

(a) **With Termination for Default Clause.** The following clause is authorized for use in supply or service contracts when it is difficult to determine with reasonable accuracy the amount of damage to the territory due to delays caused by late contractor performance or nonperformance and the contract contains the termination for default clause set forth in §6101(8) of this Chapter.

"LIQUIDATED DAMAGES

When the Contractor is given notice of delay or nonperformance as specified in Paragraph (l) (Default) of the Termination for Default Clause of this contract and fails to cure in the time specified, the contractor shall be liable for damages for delay in the amount of one-fourth of one-percent (1%) of outstanding order per calendar day from date set for cure until either the territory reasonably obtains similar supplies or services if the contractor is terminated for default, or until the contractor provides the supplies or services if the contractor is not terminated for default. To the extent that the contractor's delay or nonperformance is excused under Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination for Default Clause of this contract, liquidated damages shall not be due the territory. The contractor remains liable for damages caused other than by delay."

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(b) **In Other Situations.** If the contract will not have a termination for Default Clause or the liquidated damages are to be assessed for reasons other than delay, the Chief Procurement Officer or the head of a Purchasing Agency may approve the use of any appropriate liquidated damages clause.

(10) **Termination for convenience Clause.**

"TERMINATION FOR CONVENIENCE

(a) **Termination.** The Procurement Officer may, when the interest of the territory so require, terminate this contract in whole or in part, for the convenience of the territory. The Procurement Officer shall give written notice of the termination to the contractor specifying the part of the contract terminated and when termination becomes effective.

(b) **Contractor's Obligations.** The contractor shall incur no further obligations in connection with the terminated work and on the date set in the notice of termination the contractor will stop work to the extent specified. The contractor shall also terminate outstanding orders and subcontracts as they relate to the terminated work. The contractor shall settle the liabilities and claims arising out of the termination of subcontracts and orders connected with the terminated work. The Procurement Officer may direct the contractor to assign the contractor's right, title, and interest under terminated orders or subcontracts to the territory. The contractor

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must still complete the work not terminated by the notice of termination and may incur obligations as are necessary to do so.

(c) **Right to Supplies.** The Procurement Officer may require the contractor to transfer title and deliver to the territory in the manner and to the extent directed by the Procurement Officer:

- (1) any completed supplies; and
- (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing material") as the contractor has specifically produced or specially acquired for the performance of the terminated part of this contract.

The contractor shall, upon direction of the Procurement Officer, protect and preserve property in the possession of the contractor in which the territory has an interest. If the Procurement Officer does not exercise this right, the contractor shall use best efforts to sell such supplies and manufacturing materials in accordance with the standards of Uniform Commercial Code of Guam, §2706 (U.S.C.G. §2706 is quoted at the end of this §6101(10)(d) Utilization of this Section in no way implies that the territory has breached the contract by exercise of the Termination for Convenience

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Clause.

(d) Compensation.

(1) The contractor shall submit a termination claim specifying the amounts due because of the termination for convenience together with cost or pricing data to the extent required by §3118 (Cost or Pricing Data) of the Guam Procurement Regulations bearing on such claim. If the contractor fails to file a termination claim within one year from the effective date of termination, the Procurement Officer may pay the contractor, if at all, an amount set in accordance with Subparagraph (c) of this Paragraph.

(2) The Procurement Officer and the contractor may agree to a settlement provided the contractor has filed a termination claim supported by cost or pricing data to the extent required by §3118 (Cost or Pricing Data) of the Guam Procurement Regulations and that the settlement does not exceed the total contract price plus settlement costs reduced by payments previously made by the territory, the proceeds of any sales of supplies and manufacturing materials under Paragraph (3) of this clause, and the contract price of the work not terminated.

(3) Absent complete agreement under Subparagraph (b) of this Paragraph, the

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Procurement Officer shall pay the contractor the following amounts, provided payments agreed to under Subparagraph (b) shall not duplicate payments under this Subparagraph:

(i) contract prices for supplies or services accepted under the contract;

(ii) costs incurred in preparing to perform and performing the terminated portion of the work plus a fair and reasonable profit on such portion of the work (such profit shall not include anticipatory profit or consequential damages) less amounts paid or to be paid for accepted supplies or services; provided, however, that if it appears that the contractor would have sustained a loss if the entire contract would have been completed, no profit shall be allowed or included and the amount of compensation shall be reduced to reflect the anticipated rate of loss;

(iii) costs of settling and paying claims arising out of the termination of subcontracts or orders pursuant to Paragraph (2) of this clause. These costs must not include costs paid in accordance with Subparagraph (c) (ii) of this Paragraph;

(iv) the reasonable settlement costs of the contractor including accounting, legal, clerical,

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and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of property allocable to the terminated portion of this contract. The total sum to be paid the contractor under this Subparagraph shall not exceed the total contract price plus the reasonable settlement costs of the contractor reduced by the amount of payments otherwise made, the proceeds of any sales of supplies and manufacturing materials under Subparagraph (b) of this Paragraph, and the contract price of work not terminated.

(4) Cost claimed, agreed to, or established under Subparagraph (b) and (c) of this Paragraph shall be in accordance with Chapter 7 (Cost Principles) of the Guam Procurement Regulations.”

14 GCA §2796 (UCC) states:

”§2076. Seller's Resale Including Contract for Resale.

(1) Under the conditions stated in §2703 on seller's remedies, the seller may resell the goods

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concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with an incidental damages allowed under the provisions of this division (§2710), but less expenses saved in consequence of the buyer's breach.

(2) Except as otherwise provided in Subsection (3) or unless otherwise agreed resale may be at public or private sale including sale by way of one or more contracts to sell or identification to an existing contract of the seller. Sale may be as a unit or in parcels and at any time and place and on any terms, but every aspect of the sale including the method, manner, time, place and terms must be commercially reasonable. The resale must be reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

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(a) Only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) It must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) If the goods are not to be within the view of those attending the sale, the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) The seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (§2707) or a

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buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (Subsection 3) of §2711.”

(11) Termination Clause for Cost Reimbursement Contracts.

(12) Remedies Clause. The clause set forth in §5106(12) (Remedies Clause) of these Regulations may be used in supply or service contracts.

CHAPTER 7 COST PRINCIPLES

§7101. Cost Principles. (a) Definitions.

(1) *Actual Costs* are all direct and indirect costs which have been incurred for services rendered, supplies delivered, or construction built, as distinguished from allowable costs only.

(2) *Cost Objective* is any unit of work such as a function, an organizational subdivision, or a contract for which provision is made to accumulate and measure separately the cost of processes, products, jobs, capitalized projects, and similar items. A final cost objective is one that has allocated to it both direct and indirect costs and, in the contractor's accumulation system, is one of the final accumulation points.

(b) Applicability of Cost Principles.

(1) Application.

(a) The cost principles and procedures contained in this Chapter shall be used to determine the allowability of incurred costs for the purpose of reimbursing costs under contract provisions which provide for the reimbursement of costs, provided that any deviation from these cost principles may be made as provided in §7101(k) (Authority to Deviate from Cost Principles), of this Chapter.

(b) The cost principles and procedures set forth in this Chapter may be used as guidance in:

(i) the establishment of contract cost estimates and prices under contracts awarded on the basis of competitive sealed proposals where the award may not be based on adequate price competition (§3110); Sole Source Procurement (§3112); Competitive Selection Procedures (§3114); and architect-engineer and land surveying services (§5108) of these Regulations.

SOURCE: Spelling correction to *contract* in first line. (1/1/1999)

(ii) the establishment of price adjustments for contract changes including contracts that have been let on the basis of competitive sealed bidding or otherwise based on adequate price competition;

(iii) the pricing of termination for

convenience settlements; and

(iv) any other situation in which cost analysis is used. Cost analysis is defined in §3101(a)(2) of these Regulations.

(2) **Limitation.** These cost principles regulations are not applicable to:

(a) the establishment of prices under contracts awarded on the basis of competitive sealed bidding or otherwise based on adequate price competition rather than the analysis of individual, specific cost elements, except that this Chapter does apply to the establishment of adjustments of price for changes made to such contracts;

(b) prices which are fixed by law or regulation; and

(c) prices which are based on established catalogue prices, as defined in §1106(24) (Established Catalogue Price) of these Regulations, or established market prices.

(c) Allowable Costs.

(1) **General.** Any contract cost proposed for estimating purposes or invoiced for cost-reimbursement purposes shall be allowable to the extent provided in the contract and, if inconsistent with these cost principles, approved as a deviation under §7101(k) (Authority to Deviate from Cost Principles) of these Regulations.

The contract shall provide that the total allowable cost of a contract is the sum of the allowable direct costs actually incurred in the performance of the contract in accordance with its terms, plus the properly allocable portion of the allowable indirect costs, less any applicable credits (such as discounts, rebates, refunds, and property disposal income).

(2) **Accounting Consistency.** All costs shall be accounted for in accordance with generally accepted accounting principles and in a manner that is consistent with the contractor's usual accounting practices in charging costs to its other activities. In pricing a proposal, a contractor shall estimate costs in a manner consistent with its cost accounting practices used in accumulating and reporting costs.

(3) **When Allowable.** The contract shall provide that costs shall be allowed to the extent they are:

(a) reasonable, as defined in §7101(d)

(Reasonable Costs);

(b) allocable, as defined in §7101(e) (Allocable

costs);

(c) lawful under any applicable law;

(d) not unallowable under §7101(f)

(Treatment of Specific Costs) or §7101(g) (Costs Requiring Prior Approval to be Allowable as Direct Costs); and

(e) in the case of costs invoiced for reimbursement, actually incurred or accrued and accounted for in accordance with generally accepted accounting principles.

(d) **Reasonable Costs.** Any cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinarily prudent person in the conduct of competitive business in that industry. In determining the reasonableness of a given cost, consideration shall be given to:

(1) requirements imposed by the contract terms and conditions;

(2) whether the cost is of a type generally recognized as ordinary and necessary for the conduct of the contractor's business or the performance of the contract;

(3) the restraints inherent in, and the requirements imposed by, such factors as generally accepted sound business practices, arms' length bargaining, and federal and state laws and regulations;

(4) the action that a prudent business manager would take under the circumstances, including general public policy and considering responsibilities to the owners of the business, employees, customers, and the territory;

(5) significant deviations from the contractor's established practices which may unjustifiably increase the contract costs; and

(6) any other relevant circumstances.

(e) **Allocable Costs.**

(1) **General.** A cost is allocable if it is assignable or chargeable to one or more cost objectives in accordance with relative benefits received and if it:

(a) is incurred specifically for the contract;

(b) benefits both the contract and other work, and can be distributed to both in reasonable proportion to the benefits received; or

(c) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective may not be evident.

(2) **Allocation Consistency.** Costs are allocable as

direct or indirect costs. Similar costs (those incurred for the same purpose, in like circumstances) shall be treated consistently either as direct costs or indirect costs except as provided by these Regulations. When a cost is treated as a direct cost in respect to one cost objective, it and all similar costs shall be treated as a direct cost for all cost objectives. Further, all costs similar to those included in any indirect cost pool shall be treated as indirect costs. All distributions to cost objectives from a cost pool shall be on the same basis.

(3) **Direct Costs.** A direct cost is any cost which can be identified specifically with a particular final cost objective. A direct cost shall be allocated only to its specific cost objective. To be allowable, a direct cost must be incurred in accordance with the terms of the contract.

(4) **Indirect Costs.**

(a) An indirect cost is one identified with no specific final cost objective or with more than one final cost objective. Indirect costs are those remaining to be allocated to the several final cost objectives after direct costs have been determined and charged directly to the contract or other work as appropriate. Any direct costs of minor dollar amount may be treated as indirect cost, provided that such treatment produces substantially the same results as treating the cost as a direct cost.

(b) Indirect costs shall be accumulated into logical cost groups (or pools), with consideration of the reasons for incurring the costs. Each group should be distributed to cost objectives benefiting from the costs in the group. Each indirect cost group shall be distributed to the cost objectives substantially in proportion to the benefits received by the cost objectives. The number and composition of the groups and the method of distribution should not unduly complicate indirect cost allocation where substantially the same results could be achieved through less precise methods.

(c) The contractor's method of distribution may require examination when:

(i) any substantial difference exists between the cost patterns of the work performed under the contract and contractor's other work;

(ii) any significant change occurs in the

nature of the business, the extent of subcontracting, fixed asset improvement programs, inventories, the volume of sales and production, manufacturing processes, the contractor's products, or other relevant circumstances; or

(iii) indirect cost groups developed for a contractor's primary location are applied to off-site locations. Separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor's costs on the basis of the benefits accruing to the appropriate cost objectives.

(d) The base period for indirect cost allocation is the one in which such costs are incurred and accumulated for distribution to work performed in that period. Normally, the base period is the contractor's fiscal year. A different base period may be appropriate under unusual circumstances.

In such cases, an appropriate period should be agreed to in advance.

(f) Treatment of Specific Costs.

(1) **Advertising**

(a) Advertising costs are those incurred in using any advertising media when the advertiser has control over the form and content of what will appear, the media in which it will appear, or when it will appear. Advertising media include newspapers, magazines, radio, television, direct mail, trade papers, billboards, window displays, conventions, exhibits, free samples, and the like. All advertising costs except those set forth in Subsection 7101(f)(1)(b) of this Section are unallowable.

(b) The only allowable advertising costs are those for:

- (i) the recruitment of personnel;
- (ii) the procurement of scarce items;
- (iii) the disposal of scrap or surplus materials; and
- (iv) the listing of a business's name and location in a classified directory.

(2) **Bad Debts.** Bad debts include losses arising from uncollectible accounts and other claims, such as dishonored checks, uncollected employee advances, and related collection and legal costs. All bad debt costs are unallowable.

(3) Contingencies

(a) contingency costs are contributions to a reserve account for unforeseen costs. Such contingency costs are unallowable except as provided in Subsection 7101(f)(3)(b) of this Section.

(b) or the purpose of establishing a contract cost estimate or price in advance of performance of the contract, recognition of uncertainties within a reasonably anticipated range of costs may be required and is not prohibited by this Subsection. However, where contract clauses are present which serve to remove risks from the contractor, there shall not be included in the contract price a contingency factor for such risks. Further, contributions to a reserve for self-insurance in lieu of, and not in excess of, commercially available liability insurance premiums are allowable as an indirect charge.

(4) Depreciation and Use allowances

(a) Depreciation and use allowances, that is, the allowance made for fully depreciated assets, are allowable to compensate contractors for the use of buildings, capital improvements, and equipment or for the provision of such facilities on a standby basis for subsequent use when such facilities are temporarily idle because of suspensions or delays not caused by the contractor, not reasonably foreseeable, and not otherwise avoidable when the contract was awarded. Depreciation is a method of allocating the acquisition cost of an asset to periods of its useful life. Useful life refers to the asset's period of economic usefulness in the particular contractor's operation as distinguished from its physical life. Use allowances provide compensation in lieu of depreciation or other equivalent costs. Consequently, these two methods may not be combined to compensate contractors for the use of any one type of property.

(b) The computation of depreciation or use allowances shall be based on acquisition costs. When the acquisition costs are unknown, reasonable estimates may be used.

(c) Depreciation shall be computed using any generally accepted method, provided that the method is consistently applied and results in

equitable charges considering the use of the property. The straight-line method of depreciation is preferred unless the circumstances warrant some other method. However, the territory will accept any method which is accepted by the Internal Revenue Service.

(d) In order to compensate the contractor for use of depreciated, contractor-owned property which has been fully depreciated on the contractor's books and records and is being used in the performance of a contract, use allowances may be allowed as a cost of that contract. Use allowances are allowable, provide that they are computed in accordance with an established industry or government schedule or other method mutually agreed upon by the parties. If a schedule is not used, factors to consider in establishing the allowance are the original cost, remaining estimated useful life, the reasonable fair market value, and the effect of any increased maintenance or decreased efficiency.

(5) Entertainment

(a) Entertainment costs include costs of amusements, social activities, and incidental costs relating thereto, such as meals, beverages, lodging, transportation, and gratuities. Entertainment costs are unallowable.

(b) Nothing herein shall make unallowable a legitimate expense for employee morale, health, welfare, food service, or lodging costs; except that where a net profit is generated by such services, it shall be treated as a credit as provided in §7101(h) (Applicable Credits). This Section shall not make unallowable costs incurred for meetings or conferences, including, but not limited to, costs of food, rental facilities, and transportation where the primary purpose of incurring such cost is the dissemination of technical information or the stimulation of production.

(6) Fines and Penalties. Fines and penalties include all costs incurred as the result of violations of, or failure to comply with, federal and local laws and regulations. Fines and penalties are unallowable costs unless incurred as a direct result of compliance with specific provisions of the contract or written instructions of the Procurement Officer. To the extent that worker's compensation is considered by local law

to constitute a fine or penalty, it shall not be an unallowable cost under this Subsection.

(7) **Gifts, Contributions, and Donations.** A gift is property transferred to another person without the other person providing return consideration of equivalent value. Reasonable costs for employee morale, health, welfare, food services, or lodging are not gifts and are allowable. Contributions and donations are property transferred to a nonprofit institution which are not transferred to exchange for supplies or services of equivalent fair market value rendered by a nonprofit institution. Gifts, contributions, and donations are unallowable.

(8) **Interest Costs**

(a) Interest is generally an unallowable cost for purposes of determining the original contract price. Compensation for any interest expense incurred in connection with work originally contemplated under the contract will be deemed to be included in the fee or profit negotiated on the contract.

(b) Imputed interest on a contractor's expenditures made to pay allowable costs which are allocable to the performance of work required by change orders, suspension of work, or other acts of the territory requiring additional work over and above that required by the original contract (hereinafter called "Additional Work") shall be an allowable cost. Imputed interest is an allowable cost in relation to such Additional Work in a negotiated settlement, if one can be agreed upon, or to the extent that it is determined administratively or judicially that the territory is liable for such Additional Work. Such imputed interest shall be computed on expenditures from the date or dates on which the contractor made expenditures for the performance of such Additional Work until the date of payment therefor by the territory. The rate of interest shall be the prevailing prime rate charged by banks in this territory as determined by the Territorial Auditor or Comptroller, at the time or times the contractor made such expenditures for Additional Work. Imputed interest on the costs of Additional Work shall not be allowable to the extent that it is otherwise recovered as profit, fee, or as interest on contractor claims pursuant to § 9107 (Interest) of

these Regulations.

(9) Losses Incurred Under Other Contracts. A loss is the excess of costs over income earned under a particular contract. Losses may include both direct and indirect costs. A loss incurred under one contract may not be charged to any other contract.

(10) Material Costs

(a) Material costs are the costs of all supplies, including raw materials, parts, and components (whether acquired by purchase from an outside source or acquired by transfer from any division, subsidiary, or affiliate under the common control of the contractor), which are acquired in order to perform the contract. Material costs are allowable, subject to Subsection 7101(f)(10)(b) and Subsection 7101(f)(10)(c) of this Section. In determining material costs, consideration shall be given to reasonable spoilage, reasonable inventory losses, and reasonable overages.

(b) Material costs shall include adjustments for all available discounts, refunds, rebates, and allowances which the contractor reasonably should take under the circumstances, and for credits for proceeds the contractor received or reasonably should receive from salvage and material returned to suppliers.

(c) Allowance for all materials transferred from any division (including the division performing the contract), subsidiary, or affiliate under the common control of the contractor shall be made on the basis of costs incurred by the transferor (determined in accordance with this Chapter), except the transfer may be made at the established price provided the price of materials is not determined to be unreasonable by the Procurement Officer, the price is not higher than the transferor's current sales price to its most favored customer for a like quantity under similar payment and delivery conditions, and the price is established either:

(i) by the established catalogue price, as defined in § 1106(24), of these Regulations; or

(ii) by the lowest price offer obtained as a result of competitive sealed bidding or competitive sealed proposals conducted with other businesses that normally produce the item in similar quantities.

(11) Taxes

(a) Except as limited in Subsection 7101(11)(b) of this Section, all allocable taxes which the contractor is required to pay and which are paid and accrued in accordance with generally accepted accounting principles are allowable.

(b) The following costs are unallowable:

(i) federal, local income taxes and federal excess profit taxes;

(ii) all taxes from which the contractor could have obtained an exemption, but failed to do so, except where the administrative cost of obtaining the exemption would have exceeded the tax savings realized from the exemption;

(iii) any interest, fines, or penalties paid on delinquent taxes unless incurred at the written direction of the Procurement Officer; and

(iv) income tax accruals designed to account for the tax effects of differences between taxable income and pretax income as reflected by the contractor's books of account and financial statements.

(c) Any refund of taxes which were allowed as a direct cost under the contract shall be credited to the contract. Any refund of taxes which were allowed as an indirect cost under a contract shall be credited to the indirect cost group applicable to any contracts being priced or costs being reimbursed during the period in which the refund is made.

(d) Direct government charges for services, such as water, or capital improvements, such as sidewalks, are not considered taxes and are allowable costs.

(g) Costs Requiring Prior Approval to be Allowable as Direct Costs

(1) **General.** The costs described in Subsection 7101(g)(2) through 7101(g)(5) of this Section are allowable as direct costs to cost-reimbursement type contracts to the extent that they have been approved in advance by the Procurement Officer. In other situations the allowability of these costs shall be determined in accordance with general standards set out in these cost principles.

(2) **Pre-Contract Costs.** Pre-contract costs are

those incurred in anticipation of, and prior to, the effective date of the contract. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract; provided that, in the case of a cost-reimbursement type contract, a special provision must be inserted in the contract setting forth the period of time and maximum amount of cost which will be covered as allowable pre-contract costs.

(3) **Bid and Proposal Costs.** Bid and proposal costs are the costs incurred in preparing, submitting, and supporting bids and proposals. Reasonable ordinary bid and proposal costs are allowable as indirect costs in accordance with these cost principles regulations. Bid and proposal costs are allowable as direct costs only to the extent that they are specifically permitted by a provision of the contract or solicitation document. Where bid and proposal costs are allowable as direct costs, to avoid double accounting, the same bid and proposal costs shall not be charged as indirect costs.

(4) **Insurance**

(a) Ordinary and necessary insurance costs are normally allowable as indirect costs. Direct insurance costs are the costs of obtaining insurance in connection with performance of the contract or contributions to a reserve account for the purpose of self-insurance. Self-insurance contributions are allowable only to the extent of the cost to the contractor to obtain similar insurance.

(b) Insurance costs may be approved as a direct cost only if the insurance is specifically required for the performance of the contract.

(c) Actual losses which should reasonably have been covered by permissible insurance or were expressly covered by self-insurance are unallowable unless the parties expressly agree otherwise in the terms of the contract.

(5) **Litigation Costs.** Litigation costs include all filing fees, legal fees, expert witness fees, and all other costs involved in litigating claims in court or before an administrative board. Litigation costs incident to the contract are allowable as indirect costs in accordance with these cost principles regulations except that costs incurred in litigation by or against the territory are unallowable.

(h) Applicable Credits

(1) **Definitions and Examples.** Applicable credits are receipts or price reductions which offset or reduce expenditures allocable to contracts as direct or indirect costs. Examples include purchase discounts, rebates, allowances, recoveries or indemnification for losses, sale of scrap and surplus equipment and materials, adjustments for overpayment or erroneous charges, and income from employee recreational or incidental services and food sales.

(2) **Reducing Costs.** Credits shall be applied to reduce related direct or indirect costs.

(3) **Refund.** The territory shall be entitled to a cash refund if the related expenditures have been paid to the contractor under a cost-reimbursement type contract.

(i) Advance Agreements

(1) **Purpose.** Both the territory and the contractor should seek to avoid disputes and litigation arising from potential problems by providing in the terms of the solicitation and the contract the treatment to be accorded special or unusual costs which are expected to be incurred.

(2) **Form Required.** Advance agreements may be negotiated either before or after contract award, depending upon when the parties realize the cost may be incurred, but shall be negotiated before a significant portion of the cost covered by the agreement has been incurred. Advance agreements shall be in writing, executed by both contracting parties, and incorporated in the contract.

(3) **Limitation on Costs Covered.** An advance agreement shall not provide for any treatment of costs inconsistent with these costs principles regulations unless a determination has been made pursuant to §7101(k) (Authority to Deviate from Cost Principles), of these Regulations.

(j) Use of Federal Cost Principles

(1) **Cost Negotiations.** In dealing with contractors operating according to federal cost principles, such as Defense Acquisition Regulations, § 15, or Federal Procurement Regulations, Part 1-15, the Procurement Officer, after notifying the contractor, may use the federal cost principles as guidance in contract negotiations, subject to Subsection 7101(j)(2) of this Section.

(2) Incorporation of Federal Cost Principles:

Conflicts Between Federal Principles and this Chapter. All requirements set forth in federal assistance instruments applicable to contracts let by the territory under a federal assistance program must be satisfied. Therefore, to the extent that the cost principles which are specified in the assistance instrument conflict with the cost principles issued pursuant to Chapter 7 (Cost Principles) of these Regulations, the former shall control.

(k) **Authority to Deviate from Cost Principles.** When the best interest of the territory would be served by a deviation, the Procurement Officer may deviate from the cost principles set forth in these regulations; provided that a written determination shall be made by such officer specifying the reasons for the deviation. A copy of such determination shall be filed promptly with the Chief Procurement Officer and such determination shall be effective only upon approval by the Chief Procurement Officer and upon incorporation into the contract. However, all costs must be reasonable, lawful, allocable, and accounted for in accordance with generally accepted accounting principles to be reimbursed, and a deviation shall not contravene this principle.

CHAPTER 8
SUPPLY MANAGEMENT

§8101. Definition.

§8102. Supply Management and Disposition.

§8103. Allocations of Proceeds from Sale or Disposal of Surplus Supplies.

§8101. Definition.

(a) *Supplies*, for purposes of this Chapter, means tangible personal property owned by the territory.

§8102. Supply Management and Disposition. (a) **General.** Objectives of the territory's supply management program include preventing waste; continuing utilization of supplies; and obtaining a fair return of value upon disposal of supplies. In order to achieve these objectives, sound inspection, testing, warehousing, and inventory practices are called for, and effective means of transferring and disposing of property must be employed.

(b) **Quality Assurance, Inspecting and Testing.** The Chief Procurement Officer shall take such steps as deemed desirable to ascertain or verify that supplies, services, or construction items procured by such officer conform to specifications. In performing this duty, the Chief Procurement Officer may establish inspection and testing facilities, employ inspection personnel, enter into arrangements for the joint or cooperative use of laboratories and inspection and testing facilities, and contract with others for inspection or testing work as

needed. The Chief Procurement Officer may delegate authority for inspection and testing to using agencies.

(c) **Inventory Management.** The Chief Procurement Officer shall have general supervision of all inventories of tangible personal property, whether warehoused or in use, belonging to the territory or any of its agencies. This responsibility shall not, however, relieve any agency of accountability for tangible personal property and other supplies under its control. All warehouses and similar storage areas shall be inventoried at least annually.

(d) **Warehousing and Storage.** The Chief Procurement Officer shall exercise general supervision of any receiving, storage, and distribution facilities and services maintained and operated by the Office of the Chief Procurement Officer or using agencies.

(e) **Authority of the Chief Procurement Officer.** No using agency shall transfer, sell, trade-in, or otherwise dispose of supplies owned by the territory without written authorization of the Chief Procurement Officer.

(d) **Report of Supplies.** Using agencies shall notify the Chief Procurement Officer, on such forms and at such times as that officer may prescribe, of all excess supplies. In so doing, a using agency may suggest a dollar value per item or per lot that it desires to receive from any transfer or disposition of such excess supplies, but the suggestion shall not constitute the minimum sale or transfer amount. Any such figures shall not be public information prior to

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transfer or sale.

(e) **Transfer of Excess and Surplus Supplies.** Insofar as feasible and practical, the Chief Procurement Officer shall transfer excess supplies to other territorial agencies and other units of government. The price of the supply transferred shall be the fair market price based, where possible, on previous sales of similar products in the open market, or on an appraised value, and shall be one mutually agreed upon between the owning agency and the recipient, and approved by the Chief Procurement Officer. If agreement cannot be reached, the Chief Procurement Officer shall establish the price. When a supply is transferred to a political subdivision of the territory, the recipient shall agree in writing not to transfer title or otherwise dispose of the supply within 12 months without prior approval of the Chief Procurement Officer.

(h) Disposition of Surplus Supplies.

(1) **General Requirements.** Surplus supplies shall be offered through competitive sealed bids, public auction, established markets, or posted prices. It is recognized, however, that some types and classes of items can be sold or disposed of more readily and advantageously by other means, including barter. In such cases, and also where the nature of the supply or unusual circumstances call for its sale to be restricted or controlled, the Chief Procurement Officer may employ such other means, including appraisal, provided such officer makes a written determination that such procedure is advantageous to the territory.

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Only United States Postal money orders, certified checks, or cashiers' checks shall be accepted for sales of surplus property except cash or a personal check may be accepted for petty cash sales of less than \$100. A copy of all sales notifications or invoices shall be sent to the Comptroller, Division of Accounts, Department of Administration.

(2) Competitive Sealed Bidding.

(a) **Soliciting and Opening.** When making sales by competitive sealed bidding, notice of the sales should be given at least ten (10) days before the date set for opening bids. Notice shall be given by mailing a Request for Sale Bids to prospective bidders, including those bidders on lists maintained for this purpose, and by making the Request for Sale Bids publicly available. Newspaper advertisement may also be used. The Request for Sale Bids shall list the supplies offered for sale; designate their location and how they may be inspected; and state the terms and conditions of sale and instructions to bidders including the place, date, and time set for bid opening. Bids shall be opened publicly.

(b) **Award.** Award shall be made in accordance with the provisions of the Request for Sale Bids to the highest responsive and responsible bidder, provided that the price offered by such bidder is acceptable to the Chief Procurement Officer. Where such price is not

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acceptable, the Chief Procurement Officer may reject the bids in whole or in part and negotiate the sale provided the negotiated sale price is higher than the highest responsive and responsible bidder's price, or such officer may resolicit bids.

(3) **Auctions.** Supplies may be sold at auction. When appropriate, an experienced auctioneer should be used to cry the sale and assist in preparation of the sale. The solicitation to bidders should stipulate, at a minimum, all the terms and conditions of any sale; that a deposit may be required in order to participate in the bidding; that the purchaser must remove within a stated time all surplus supplies purchased; and that the territory retains the right to reject any and all bids.

(4) **Established Markets.** Established markets are places where supplies such as livestock and produce are regularly sold in wholesale lots and prices are set by open competition. Surplus supplies may be sold in established markets for such supplies.

(5) **Posted Prices.** Supplies may be sold at posted prices as determined by the Chief Procurement Officer when such prices are based on fair market value and the sale is conducted pursuant to written procedures established by the Chief Procurement Officer.

(6) **Trade-in.** Surplus supplies may be traded-in only when the Chief Procurement Officer determines

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the trade-in value is expected to exceed the value estimated to be obtained through the sale or other disposition of such supplies.

§8103. Allocations of Proceeds from Sale or Disposal of Surplus Supplies. (a) **Disposition of Proceeds.** Net proceeds from the disposition of excess or surplus supplies shall be credited to the General Fund, unless otherwise provided by law.

CHAPTER 9
LEGAL AND CONTRACTUAL REMEDIES

- §9101. Protest Resolution by the Chief Procurement Officer. The Director of Public Works, or the Head of a Purchasing Agency.
- §9101.1 Finality
- §9102. Debarment or Suspension by the Chief Procurement officer, the Director of Public Works, or the Head of a Purchasing Agency
- §9103. Regulations Governing the Settlement and Resolution of Contract and Breach of Contract Controversies
- §9104. Determination that Solicitation or Award Violates law
- §9105. Violations of Law Found Prior to Award
- §9106. Ratification, Termination, or Cancellation of Contract to Comply with the Law
- §9107. Interest
- §9108. Waiver of Sovereign Immunity
- §9109. Limitations on Actions 5 GCA (§5481 of the Guam Procurement Act)

§9101. Protest Resolution by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency. (a) Authority to resolve Protested Solicitations and Awards.

(1) Definitions.

(a) *Interested Party* means an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract and who files a protest.

(b) **Complaint to Procurement Officer.** Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing.

(c) Filing of Protest.

(1) **When Filed.** Protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Protests filed after the 14 day period shall not be considered.

(2) **Subject of Protest.** Protestors may file a protest on any phase of solicitation or award including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.

(3) **Form.** To expedite handling of protests, the envelope should be labeled "Protest." The written protest shall include as a minimum the following:

- (a) the name and address of the protestor;
- (b) appropriate identification of the procurement, and, if a contract has been awarded, its number;
- (c) a statement of reasons for the protest; and
- (d) supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time in which case the expected availability date shall be indicated.

(4) **Notification of the Attorney General.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall submit a copy of the protest to the Attorney General within three days of the receipt of the written protest.

(d) **Requested Information Time for Filing.** Any additional information requested by any of the parties should be submitted within the time periods established by the requesting source in order to expedite consideration of the protest. Failure of any party to comply expeditiously with a request for information by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may result in resolution of the protest without consideration of any information which is untimely filed pursuant to such request.

(e) **Stay of Procurement During Protest.** When a protest has been filed within 14 days and before an award has been made, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall make no award of the contract prior to final resolution of such protest, and any such further action is void, unless:

1. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency, makes a written determination that the award of the contract without delay is necessary to protect the substantial interests of the government of Guam; and
2. Absent a declaration of emergency by the Governor, the protestor has been given at least two-days notice (exclusive of government of Guam holidays); and

3. If the protest is pending before the Board or Court, the Board or Court has confirmed such determination, or if no such protest is pending, no protest to the Board of such determination if filed prior to the expiration of the two-day period specified in item 2 of this subsection.

SOURCE: Modified to comply with 5 GCA §6425(g). (1/1/1999)

(f) **Making Information on Protests Available.** The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall upon written request make available to any interested party information submitted that bears on the substance of the protest 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 should so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

(g) Decision by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency.

(1) **Time for Decisions.** A decision on a protest shall be made by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency as expeditiously as possible after receiving all relevant, requested information. If a protest is sustained, the available remedies include, but are not limited to, those set forth in Subsection 9101(g)(2) of this Section, and §9104 (Determination that Solicitation or award Violates Law), §9105 (Violation of Law Found Prior to Award), and §9106 (Ratification, Termination, or Cancellation of Contract to Comply with the Law) of these Regulations. A copy of the decision as contained in this section shall be made or otherwise furnished immediately to the protestor and any other party intervening.

SOURCE: Modified to complete protest process. (1/1/1999).

(2) **Bid Preparation Costs.** In addition to any other relief, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall award the protestor the reasonable costs incurred in connection with the solicitation and protest, including bid preparation costs, excluding attorneys fees, when a protest is sustained and the protesting bidder or offeror should have been, but was not awarded the contract under the solicitation.

The Chief Procurement Officer, the Director of Public Works, or the head of the purchasing agency shall have the power to assess reasonable costs other than attorney fees incurred by the government of Guam against a protestor upon a find that the protest was made fraudulently, frivolously or solely to disrupt the procurement process.

SOURCE: Modified upon recommendation of Attorney General. (1/1/1999)

(h) Request for Reconsideration.

(1) **Request.** Reconsideration of a decision of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may be requested by the protestor, within fifteen (15) days after receipt by the protestor of the notice of decision. Reconsideration can also be requested by an appellant or any interested party who submitted comments during consideration of the protest or any agency involved in the protest. The same time frame applies herein. The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered.

SOURCE: Modified to provide fuller procedure.

(2) **Time for Filing.** [Deleted - included elsewhere]

(3) **Time for Acting.** [Deleted - included elsewhere]

(i) **Effect of Judicial or Administrative Proceedings.** If an action concerning the protest has commenced in court, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall not act on the protest, but refer the protest to the Attorney General. This Section shall not apply where a court requests, expects, or otherwise expresses interest in the decision of the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency.

§9101.1 Finality. A decision of the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency is final unless a person adversely affected by the decision commences an action in the Superior Court in accordance with §9103 and §9108.

SOURCE: Added to comply with 5 GCA §5425(f).

§9102. Debarment or Suspension by the Chief Procurement Officer, the Director of Public Works, or the Head of a Purchasing Agency. (a) Authority to Debar or Suspend.

(1) **Application.** This Subsection applies to all debarment or suspensions of persons from consideration for award of contracts imposed by the Chief

Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency.

(b) Suspension.

(1) **Initiation.** After consultation with the affected using agency, the Attorney General, and, where practicable, the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency that probable cause exists for debarment as set forth in 5 GCA §5426 (Authority to Debar or Suspend) of the Guam Procurement Act, a contractor or prospective contractor shall be suspended. A notice of suspension, including a copy of such determination, shall be sent to the suspended contractor or prospective contractor.

Such notice shall state that:

(a) the suspension is for the period it takes to complete an investigation into possible debarment including any appeals of debarment decision, but not for a period in excess of three months;

(b) bids or proposals will not be solicited from the suspended person, and, if they are received, they will not be considered during the period of suspension; and

(c) if a hearing has not been held, the suspended person may request a hearing in accordance with §9102(d) (Request for hearing) of these Regulations.

(2) **Effect of Decisions.** A contractor or prospective contractor is suspended upon issuance of the notice of suspension. The suspension shall remain in effect during any appeals. The suspension may be ended by the officer who issued the notice of suspension or by a court, but otherwise shall only be ended when the suspension has been in effect for three months or a debarment decision takes effect.

(c) **Initiation of Debarment Action.** Written notice of the proposed debarment action shall be sent by certified mail, return receipt requested, to the contractor or prospective contractor. This notice shall:

(1) state that debarment is being considered;

(2) set forth the reasons for the action;

(3) state that if the contractor or prospective contractor so requests, a hearing will be held, provided such request is received by the Chief Procurement Officer, the Director of Public Works, or the head of a

Purchasing Agency within ten days after the contractor or prospective contractor receives notice of the proposed action; and

(4) state that the contractor or prospective contractor may be represented by counsel.

Within ten working days from mail date, such notice shall be personally delivered to [the] vendor's place of business.

Such notice shall also be sent to the Attorney General and the affected using agency. The affected using agency is that agency that has used the supplies, services, or construction supplied by the contractor. 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 representative to be consulted in respect to this action.

(d) **Request for Hearing.** A contractor or prospective contractor that has been notified of a proposed debarment action **must** request in writing that a hearing be held. Such request must be received by the official proposing the action within ten days of receipt of notice of the proposed action under §9102(c) (Initiation of Debarment Action). If no request is received within the 10-day period, a final determination may be made as set forth in §9102(h) (Determination of Hearing Officer; Final Decision) after consulting with the Attorney General and the affected using agency.

SOURCE: First "may" changed to "must" for clarification.

(e) **Notice of Hearing.** If a hearing is requested, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may appoint a hearing officer to conduct the hearing and recommend a final decision. Otherwise, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall act as a hearing officer. The hearing officer shall send a written notice of the time and place of the hearing. Such notice shall be sent by certified mail, return receipt requested, and shall state the nature and purpose of the proceedings. Copies shall be sent to the Attorney General and the using agency.

(f) **Authority of the Hearing Officer.** The hearing officer, in the conduct of the hearing, has the power, among others, to:

(1) hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other

matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

(2) require parties to state their positions with respect to the various issues in the proceeding;

(3) require parties to produce for examination those relevant witnesses and documents under their control;

(4) rule on motions, and other procedural items on matters pending before such officer;

(5) regulate the course of the hearing and conduct of participants therein;

(6) receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;

(7) fix time limits for submission of written documents in matters before such officer;

(8) impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:

(i) refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(ii) excluding all testimony of an unresponsive or evasive witness; and

(iii) expelling any party or person from further participation in the hearing;

(iv) take official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.

(g) Hearings Procedures.

(1) Hearings shall be as informal as may be reasonable and appropriate under the circumstances and in accordance with applicable due process requirements **and the Administrative Adjudication Law**. The weight to be attached to evidence presented in any particular form will be within the discretion of the hearing officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The hearing officer may require evidence in addition to that offered by the parties.

SOURCE: Modified to clarify applicable procedures.

(2) A hearing may be recorded, but need not be transcribed except at the request and expense of the contractor or prospective contractor. A record of those

present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record.

(3) Opening statements may be made unless a party waives this right.

(h) Decision. The Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency shall issue a written decision to debar or suspend. The decision shall:

- 1.. state the reasons for the actions taken; and
- 2 inform the debarred or suspended person involved of its rights to judicial review as provided in these regulations.

(i) Notice of Decision. A copy of the decision made pursuant to this section shall be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.

(j) Determination of Hearing Officer, Final Decision. The hearing officer shall prepare a written determination recommending a course of action. Such determination shall be given to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Copies shall also be sent to the contractor or prospective contractor, the Attorney General, and the affected using agency. The contractor or prospective contractor shall have ten days to file comments upon the hearing officer's determination. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may request oral argument. After consultation with the affected using agency and the Attorney General, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall issue a final decision. Both the hearing officer's determination and the final decision shall recite the evidence relied upon. When debarment is recommended or ordered, the length of the debarment (not to exceed two years), the reasons for such action, and to what extent affiliates are affected shall be set forth. In addition, the final determination shall inform the debarred person of its rights to judicial or administrative review under 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Act.

(i) Effect of Debarment Decision. A debarment decision will take effect upon issuance and receipt by the contractor or prospective contractor. After the debarment decision takes effect, the contractor shall remain debarred until a court, or the head of the agency that issued the decision, orders

otherwise or until the debarment period specified in the decision expires.

(j) **Maintenance of List of Debarred and Suspended Persons.** The Chief Procurement Officer shall maintain and update a list of debarred and suspended persons **including notices from all purchasing agencies of the government of Guam.** All purchasing agencies and political subdivisions of the territory shall be supplied with this list **as needed.** The Chief Procurement Officer shall send updates of this list to all purchasing agencies and political subdivisions of the territory as **needed.** Such list shall be available to the public upon request. **Any and all debarments and suspensions determined by another government or autonomous agency will be honored.**

§9103. Regulations Governing the Settlement and Resolution of contract and Breach of Contract Controversies. (a) Authority to Resolve Contract and Breach of Contract Controversies.

(1) **General.** The Guam Procurement Act establishes procedures and remedies to resolve contract and breach of contract controversies between the territory and a contractor. It is the territory's policy, consistent with this Act, to try to resolve all controversies by mutual agreement without litigation. In appropriate circumstances, informal discussions between the parties can aid in the resolution of differences by mutual agreement and are encouraged. If such informal discussions do not resolve the controversy, individuals who have not participated substantially in the matter in controversy may be brought in to conduct discussions if this is feasible. Independent committees and panels which review controversies expeditiously and informally with a view to fair settlement possibilities also are encouraged at this stage.

(b) **Scope of Regulation.** 5 GCA §5427 (Authority to Resolve Contract and Breach of Contract Controversies) of the Guam Procurement Act is applicable to controversies between the territory and a contractor which arise under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification, reformation, or rescission. The word *controversy* is meant to be broad and all-encompassing. It includes the full spectrum of disagreements from pricing of routine contract changes to claims of breach of contract.

(c) **Delegation of Authority to Procurement Officer.**

(1) **Procurement Officer Authority.** Subject to Subsection 9103(c)(2) of this Section, unless a provision of the contract specifies that the authority to settle and resolve controversies and to issue decisions is reserved to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, such authority is hereby delegated to the Procurement Officer. Within this Regulation, therefore, Procurement Officer denotes the person with such authority whether that is the Procurement Officer, the Chief Procurement Officer, the Director of Public Works, the head of a Purchasing Agency, or a designee of such officer.

(2) **Prior Approval of Settlements.** The settlement or resolution of controversies involving claims is subject to the Government Claims Act.

(d) **Procurement Officer's Decision.**

(1) **Procedures Prior to Issuing Decision.** When a controversy cannot be resolved by mutual agreement, the Procurement Officer shall, after written request by the contractor for a final decision, promptly issue a written decision. Before issuing a final decision, the Procurement Officer shall:

- (a) review the facts pertinent to the controversy;
- and
- (b) secure any necessary assistance from legal, fiscal, and other advisors.

(2) **Final Decision.** The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and include in the decision:

- (a) a description of the controversy;
- (b) a reference to pertinent contract provisions;
- (c) a statement of the factual areas of agreement or disagreement;
- (d) a statement of the Procurement Officer's decision, with supporting rationale;
- (e) a paragraph substantially as follows:
"This is the final decision of the Procurement Officer. You may obtain judicial review of this decision by bringing an action in the Superior Court of Guam."

(3) **Failure to Timely Issue Final Decision.** If the Procurement Officer does not issue a written decision within 60 days after written request by the contractor for a final decision, or within such longer period as may be

agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(e) Controversies Involving Territorial Claims Against the Contractor. All controversies involving claims asserted by the territory against a contractor which cannot be resolved by mutual agreement shall be the subject of a decision by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, as applicable.

(f) Interest.

(1) **Payable on Claims.** Pursuant to 5 GCA §5475 (Interest) of the Guam Procurement Act, interest on amounts ultimately determined to be due to a contractor or the territory shall be payable at the statutory rate applicable to judgments from the date the claim arose through the date of decision or judgment, whichever is later.

(2) **Contract Clause.** Each contract between the territory and a contractor shall contain a paragraph substantially similar to Subsection 9103(f)(1) of this Section.

(g) **Disputes Clause.** Language substantially similar to the following clause shall be inserted in all territorial contracts:

"DISPUTES

(1) All controversies between the territory and the contractor which arise under, or are by virtue of, this contract and which are not resolved by mutual agreement, shall be decided by the Procurement Officer in writing, within 60 days after written request by the contractor for a final decision concerning the controversy; provided, however, that if the Procurement Officer does not issue a written decision, within 60 days after written request for a final decision, or within such longer period as may be agreed upon by the parties, then the contractor may proceed as if an adverse decision had been received.

(2) The Procurement Officer shall immediately furnish a copy of the decision to the contractor, by certified mail, return receipt requested, or by any other method that provides evidence of receipt.

(3) Any such decision shall be final and conclusive, unless fraudulent, or:

(i) the contractor brings an action seeking judicial review of the decision in the Superior Court of Guam.

(4) The contractor shall comply with any decision of the Procurement Officer and proceed diligently with

performance of this contract pending final resolution by the Superior Court of Guam of any controversy arising under, or by virtue of, this contract, except where there has been a material breach of the contract by the territory; provided, however, that in any event the contractor shall proceed diligently with the performance of the contract where the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency has made a written determination that continuation of work under the contract is essential to the public health and safety.”

§9104. Determination that Solicitation or Award Violates Law. (a) **Applicability of this Part.** The provisions of this Part apply where it is determined administratively, or upon administrative or judicial review, that a solicitation or award of a contract is in violation of law (5 GCA §5450 of the Guam Procurement Act).

(1) Determination that Solicitation or Award Violates Law.

(2) **Determination.** A solicitation or award may be in violation of the law due to actions of territorial employees, bidders, offerors, contractors, or other persons. After consultation with the Attorney General, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may determine that a solicitation or contract award is in violation of the provisions of the Guam Procurement Act. After consultation with the Attorney General, the Policy Office may determine that a solicitation or award violates 5 GCA Chapter 5, Article 11 (Ethics in Public Contracting) of the Guam Procurement Act or regulations promulgated thereunder. Any such determination shall be made in writing after an opportunity to be heard is given, and such determination is subject to appropriate appeal. The courts designated in 5 GCA §5480 (Waiver of Sovereign Immunity in Connection with Contracts) of the Guam Procurement Act, may find that a solicitation or award is in violation of the law.

(3) **Finding of Bad Faith or Fraud.** Bad faith or fraud shall not be assumed. Specific findings showing reckless disregard of clearly applicable laws or regulations must support a finding of bad faith. A finding of fraud must be supported by specific findings showing knowing, willful acts in disregard of such laws or regulations.

§9105. Violations of Law Found Prior to Award. (a) Remedies Prior to an Award. If prior to award it is determined that a solicitation or proposed award of a contract is in violation of the law, then the solicitation or proposed award shall be: (Quoted from 5 GCA §5451 of the Guam Procurement Act.)

- (1) cancelled; or
- (2) revised to comply with the law.

(b) Cancelling or Revising Solicitation or Proposed Award to Comply with the Law. A finding by the Procurement Officer, after consultation with the Attorney General, that the solicitation or proposed award is in violation of law will constitute a cogent and compelling reason to cancel or revise a solicitation or proposed award. Such cancellation shall be made in accordance with §3115 (Cancellation of Solicitations) of these Regulations.

§9106. Ratification, Termination, or Cancellation of Contract to Comply with the Law. (1) Remedies After an Award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(a) if the person awarded the contract has not acted fraudulently or in bad faith:

(i) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interests of the territory; or

(ii) the contract may be terminated and the person awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract, plus a reasonable profit, prior to the termination;

(b) if the person awarded the contract has acted fraudulently or in bad faith:

(i) the contract may be declared null and void;
or

(ii) the contract may be ratified and affirmed if such action is in the best interests of the territory, without prejudice to the territory's rights to such damages as may be appropriate.

This Section shall be read as being in addition to and not in conflict with, or repealing 4 GCA, §4137 (Prohibition on Activities of Government Employees). This §9106 is quoted from 5 GCA §5452 of the Guam Procurement Act.

(a) No Fraud or Bad Faith by Contractor.

(b) **General.** Upon finding after award that a territorial employee has made an unauthorized award of a contract or that a solicitation or contract award is

otherwise in violation of law where there is no finding of fraud or bad faith, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may ratify or affirm the contract or terminate it in accordance with this Section after consultation with the Attorney General.

(c) Ratification, and Affirmation.

(1) If the violation can be waived without prejudice to the territory or other bidders or offerors, the preferred action is to ratify and affirm the contract.

(2) If the violation cannot be waived without prejudice to the territory or other bidders or offerors, if performance has not begun, and if there is time for resoliciting bids or offers, the contract shall be terminated. If there is not time for resoliciting bids or offers either formally, or informally under the emergency authority, the contract may be amended appropriately, ratified, and affirmed.

(3) If the violation cannot be waived without prejudice to the territory or other bidders or offerors and if performance has begun, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall determine in writing whether it is in the best interest of the territory to terminate or to amend, ratify, and affirm the contract. Termination is the preferred remedy. The following factors are among those pertinent in determining the territory's best interest:

- (i) the costs to the territory's best interest;
- (ii) the possibility of returning supplies delivered under the contract and thus decreasing the costs of termination;
- (iii) the progress made toward performing the whole contract; and
- (iv) the possibility of obtaining a more advantageous contract by resoliciting.

(d) **Termination.** Contracts based on awards or solicitation that were in violation of law shall be terminated at no cost to the territory, if possible, unless the determination required under Subsection 9106 of this Section is made. If the contract is terminated, the territory shall, where possible and by agreement with the supplier, return the supplies delivered for a refund at no cost to the territory or at a minimal restocking charge. If a termination claim is made, settlement shall

be made in accordance with the contract. If there are no applicable termination provisions in the contract, settlement shall be made on the basis of actual costs directly or indirectly allocable to the contract through the time of termination. Such costs shall be established in accordance with generally accepted accounting principles. Profit shall be proportionate only to the performance completed up to the time of termination and shall be based on projected gain or loss on the contract as though performance were completed. Anticipated profits are not allowed.

(2) **Fraud or Bad Faith by the Contractor.**

(a) **General.** Upon finding after award that a solicitation or award is in violation of law and that the recipient of the contract acted fraudulently or in bad faith, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency may, after consulting with the Attorney General, declare the contract null and void or ratify and affirm it in accordance with this Section.

(b) **Declaration of Contract Null and Void.** The contract shall be declared null and void unless ratification and affirmation is found to be in the territory's best interest under Subsection 9106 of this Section.

(c) **Ratification and Affirmation.** The contract shall not be modified, ratified, and affirmed unless it is determined in writing that there is a continuing need for the supplies, services, or construction under the contract and:

(1) there is no time to reward the contract under emergency procedures or otherwise; or

(2) the contract is being performed for less than it could be otherwise performed.

(d) **Effect of Declaring a Contract Null and Void.** In all cases where a contract is voided, the territory shall endeavor to return those supplies delivered under the contract that have not been used or distributed. No further payments shall be made under the contract and the territory is entitled to recover the greater of:

(1) the difference between payments made under the contract and the contractor's actual costs up until the contract was voided; or

(2) the difference between payments under the contract and the value to the territory of the supplies, services, or construction it obtained under the contract.

The territory may in addition claim damages under any applicable legal theory.

(e) **Effect of Ratification.** The territory shall be entitled to any damages it can prove under any theory including, but not limited to, contract and tort regardless of its ratification and affirmation of the contract.

§9107. Interest. Interest on amounts ultimately determined to be due to a contractor or the territory shall be payable at the statutory rate applicable to judgements from the date the claim arose through the date of decision or judgment, whichever is later (5 GCA §5475 of the Guam Procurement Act).

§9108. Waiver of Sovereign Immunity. (a) Waiver of Sovereign Immunity in Connection with Contracts (5 GCA §5480 of the Guam Procurement Act).

(1) **Solicitation and Award of Contracts.** The Superior Court of Guam shall have jurisdiction over an action between the territory and a bidder, offeror, or contractor, prospective or actual, to determine whether a solicitation or award of a contract is in accordance with the statutes, regulations, and the terms and conditions of the solicitation. The Superior Court shall have such jurisdiction in actions at law or in equity, and whether the action are for monetary damages or for declaratory or other equitable relief.

(2) **Debarment or Suspension.** The Superior Court shall have jurisdiction over an action between the territory and a person who is subject to a suspension or debarment proceeding, to determine whether the debarment or suspension is in accordance with the statutes and regulations. The Superior Court shall have such jurisdiction, in action at law or in equity, and whether the actions are for declaratory or other equitable relief.

(3) **Actions Under Contracts or for Breach of Contract.** The Superior Court shall have jurisdiction over an action between the territory and a contractor, for any cause of action which arises under, or by virtue of, the contract, whether the action is at law or in equity, whether the action is on the contractor or for a breach of the contract, and whether the action is for monetary damages or declaratory or equitable relief, but shall be subject to §526 of the Code of Civil Procedure, and as it may be amended or recodified from time to time.

(4) **Limited Finality for Administrative Determinations.** In any judicial action under this Section, factual or legal determinations by the

employees, agents, or other persons appointed by the territory shall have no finality and shall not be conclusive, notwithstanding any contract provision or regulation, except to the extent provided in 5 GCA §5480 of this Act. See also §3125 of these Regulations.

(5) For the purpose of this Section a *prospective bidder*, contractor or offeror is one who will actually submit a bid, contract or otherwise offer his services if, in the actions permitted by this Section, such person would prevail.

(6) All actions permitted by this Section shall be conducted as provided in the Government Claims Act.

§9109. Time Limitations on Actions (5 GCA §5481 of the Guam Procurement Act.)

(1) **Protested Solicitations and Awards.** Any action under §9108(a) (Waiver of Sovereign Immunity in Connection with Contracts, Solicitation and Award of Contracts) of these Regulations shall be initiated as follows:

(a) within 30 days after the aggrieved person knows or should have known of the facts giving rise to the action; or

(b) within 14 days after receipt of a final administrative decision pursuant to either 5 GCA §5425(c) (Authority to Resolve Protested Solicitations and Awards, Decision) of the Guam Procurement Act.

(2) **Debarment or Suspensions for Cause.** Any action under 5 GCA §5480(b) shall be commenced within six (6) months after receipt of the decision of the Chief Procurement Officer, the Director of Public Works, or head of a Purchasing Agency under 5 GCA §5426(c) or the Decision of the Policy Office under 5 GCA §5651 of this Act whichever is applicable.

(3) **Actions Under Contracts or for Breach of Contract.** Any action commenced under 5 GCA §5481(c) shall be commenced within six (6) months of the date the claim arose or within six months of the date the claimant knew or should have known, that a claim existed against the parties.

CHAPTER 10
COMPLIANCE WITH FEDERAL REQUIREMENTS

§10101. Compliance with Federal Requirements (a).
Federal Funds. Where a procurement involves the expenditure of federal assistance or contract funds, or other federal funds as defined by Section 20 of the Organic Act of Guam, all persons within the Government of Guam shall comply with such federal law and regulations which are applicable and which may be in conflict with or may not be reflected in these Regulations (5 GCA §5501 of the Guam Procurement Act).

CHAPTER 11
ETHICS IN PUBLIC CONTRACTING

- §11101. Definitions of Terms Used in this Chapter.
- §11102. Standards of Conduct
- §11103. General Standards of Ethical Conduct.
- §11104. Criminal Sanctions
- §11105. Conflict of Interest
- §11106. Disclosure of Benefit from Contract
- §11107. Gratuities and Kickbacks
- §11108. Contingent Fees
- §11109. Employment Prohibitions and Restrictions.
- §11110. Use of Confidential Information
- §11111. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards
- §11112. Civil and Administrative Remedies Against Non-Employees who Breach Ethical Standards.
- §11113. Recovery of Value Transferred or Received in Breach of Ethical Standards.
- §11114. Ethics Enforcement.

§11101. Definitions of Terms Used in this Chapter. (a)
Definitions.

(1) *Bona Fide Employee* means employed by a prospective contractor and subject to the prospective contractor's supervision and control as to the time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain territorial contracts. In determining whether a bona fide employment relationship exists, the following factors should be considered:

- (a) whether the employment is continuous;
- (b) whether the person is subject to the supervision and control of the prospective contractor;
- (c) whether the size of any contingent fee is reasonable in relation to the services performed;
- (d) whether the method of payment of the contingent fee is customary in the trade; and
- (e) whether the person is employed solely by the prospective contractor.

(2) *Bona Fide Established Commercial Selling Agency* means a business that neither exerts nor proposes to exert improper influence to solicit or obtain territorial contracts. In determining whether a business is a bona fide established commercial selling business, the following factors should be considered:

(a) whether the business is one which has either been active for a considerable period of time or is presently a going concern and is likely to continue as such;

(b) whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business;

(c) the degree to which the business's activities are directed toward the solicitation of contracts of the territory;

(d) whether the size of any contingent fee is reasonable in relation to the services performed; and

(e) whether the method of payment to the contingent fee is customary in the trade.

(3) *Business Employee* as defined means a person, whether compensated or not, who performs personal services for a business.

(4) *Employee*, as defined in 5 GCA §5030(j), (Definitions, Employee), of the Guam Procurement Act is hereinafter referred to as *government employee*.

As used throughout this Chapter, the term *government employee* shall include:

(a) a person elected to territorial office;

(b) a non-elected person, whether appointed or selected through a personnel selection procedure, receiving a salary, wages, or other compensation from the territory; and

(c) a non-compensated or minimally compensated person who is performing personal services for the territory.

The term *government employee* does not include a person who, as an independent contractor, performs professional, scientific, technical, or advisory service for a territorial agency and who receives a fee, honorarium, or similar consideration for the services performed.

(5) *Financial Interest*. (RESERVED). (See 5 GCA §5601(e) of the Guam Procurement Act.)

(6) *Gratuity*, as defined in 5 GCA §5601(f), (Definitions, Gratuity) of the Guam Procurement Act, means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received. In this Chapter, a gratuity may include any tangible and intangible benefit in the nature of gifts, favors, entertainment, discounts, passes, transportation, accommodation, hospitality, or offers of employment.

Nominal value, as used in 5 GCA §5601(f) of the Guam Procurement Act, means actual worth or actual cost, whichever is greater, which does not exceed \$25 individually or cumulatively.

(7) *Immediate Family*. (RESERVED). (See 5 GCA §5601(g) of the Guam Procurement Act.)

§11102. Standards of Conduct. This Regulation prescribes the standards of conduct for government employees in general, and establishes specific standards of conduct for non-government employees. Regulations governing standards of conduct for government employees are made a part of this Guam Procurement Regulations as Appendix A, as promulgated by the Civil Service Commission.

(a) **Statement of Policy.** Public employment is a public trust. It is the policy of the territory to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the territory. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the territorial procurement organization.

To achieve the purpose of this Chapter, it is essential that those doing business with the territory also observe the ethical standards prescribed herein. (5 GCA §5626 of the Guam Procurement Act.)

§11103. General Standards of Ethical Conduct. General Ethical Standards for Non-Employees. Any effort to influence any public employee to breach the standards of ethical conduct set forth in this Section and 5 GCA §5628 through §5633 of the Guam Procurement Act is also a breach of ethical standards. (5 GCA §5625 of the Guam Procurement Act.)

(a) Required Compliance with Ethical standards as a Condition of Employment: Notice and Acknowledgement Procedures. (Reserved).

(b) Clause Regarding Government Employee and Former Government Employee Ethical Standards. The following clause shall be conspicuously set forth in every contract and solicitation therefor:

“REPRESENTATION REGARDING ETHICAL

STANDARDS FOR GOVERNMENT EMPLOYEES
AND FORMER GOVERNMENT EMPLOYEES

The bidder, offeror, or contractor represents that it has not knowingly influenced and promises that it will not knowingly influence a government employee to breach any of the ethical standards set forth in 5 GCA Chapter 5 Article 11 (Ethics in Public Contracting) of the Guam Procurement Act and in Chapter 11 of the Guam Procurement Regulations."

§11104. Criminal Sanctions. To the extent that violations of the ethical standards of conduct set forth in this Chapter constitute violations of Title 9 GCA (Crimes and Corrections), they shall be punishable as provided therein. Such sanctions shall be in addition to the civil remedies set forth in this Chapter. (5 GCA §5627 of the Guam Procurement Act.)

§11105 Conflict of Interest. (a) Employee Conflict of Interest.

(1) **Conflict of Interest.** It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

(i) the employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;

(ii) a business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or

(iii) any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(2) **Financial Interest in a Blind Trust.** Where an employee or any number of the employee's immediate family holds a financial interest in a blind trust, the employee shall not be deemed to have a conflict of interest with regard to matters pertaining to that financial interest, provided that disclosure of the existence of the blind trust has been made to the Civil Service Commission.

(3) **Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver.** Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same

time, apply to the Civil Service Commission in accordance with 5 GCA §5676(b) for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

(4) **Notice.** Notice of this prohibition shall be provided in accordance with regulations promulgated by the Civil Service Commission. (5 GCA §5628 of the Guam Procurement Act.)

(b) **Definitional Cross-References.** The following terms used in this Subsection are defined in the following Sections of this Guam Procurement Regulations which are quoted in Section 1106 of these Regulations:

(1) *financial interest*, as defined in §1106(40), (Definitions, Financial Interest);

(2) *immediate family*, as defined in §1106(42), (Definitions, Immediate Family).

(c) Disclosure of a Blind Trust. (Reserved).

(d) Civil Service Commission Ruling on a Blind Trust. (Reserved).

(e) Application for a Waiver of Prohibition Against Conflict of Interest.

(1) Application for Waiver. (Reserved).

(2) Grant or Denial of Waiver. Under 5 GCA §5676(c) (Ethics Commission Waiver) of the Guam Procurement Act, the Civil Service Commission may grant an employee or the Policy Officer may grant a contractor the waiver of the conflict of interest prohibition where the interest of the territory so require or when the ethical conflict is insubstantial or remote.

Prior to granting or denying a waiver, the Civil Service Commission with regard to employees and the Policy Office with regard to a contractor, shall make such investigation as it may deem appropriate and which is not in violation of the government employee's or the contractor's rights, privileges, and immunities. Factors to be considered by the Civil Service Commission or the Policy Office when determining whether to grant a waiver shall include:

(A) the degree of involvement of the government employee or a contractor in the particular procurement;

(B) the size and character of the financial interest of the government employee or a member of such employee's immediate family or a contractor which relates to the particular procurement;

(C) the likelihood of the appearance of impropriety;

(D) the availability of suppliers or contractors, if any, with which a contract would not present a conflict; and

(E) the extent to which the territory's interest will be affected by a waiver.

§11106. Disclosure of Benefit from Contract. (a) Employee Disclosure Requirements. (Reserved).

(1) *Definitional Cross-Reference.* The term *Financial Interest* is defined in §1106(40) (Definitions), of the Guam Procurement Regulations.

(2) *Benefit Defined.* (Reserved).

(3) *Disclosure Requirement.* (Reserved).

§11107. Gratuities and Kickbacks. (1) **Gratuities.** It shall be a breach of ethical standards for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other particular matter, pertaining to any program requirement or a contract or subcontract, or to any solicitation or proposal therefor.

(2) **Kickbacks.** It shall be a breach of ethical standards for any payment, gratuity, or offer of employment to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier subcontractor or any person associated therewith, as an inducement of the award of a subcontract or order.

(3) **Contract Clause.** The prohibition against gratuities and kickbacks prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.

(4) **Favors to the Government of Guam.** For purposes of this subsection, a favor is anything, including raffle tickets, or more than *de minimis* value and whether intended for the personal enjoyment of the receiver or for the department or organization in which they are employed or for any person, association, club or organization associated therewith or sponsored thereby. It shall be a breach of ethical standards for any person who is or may become a contractor, a subcontractor under a contract to the prime contractor or higher tier contractor, or any person associated therewith, to

offer, give or agree to give any employee or agent of the government of Guam or for any employee or agent of the government of Guam to solicit or accept from any such person or entity or agent thereof a favor or gratuity on behalf of the government of Guam whether or not such favor or gratuity may be considered a reimbursable expense of the government of Guam, during the pendency of any matter related to procurement, including contract performance warranty periods.

SOURCE: Subsection (4) added to comply with 5 GCA §5630(d). This Section is quoted from 5 GCA §5630 of the Guam Procurement Act.

(a) **Definitional Cross-Reference.** The following terms used in this Section are defined in the following Sections of the Guam Procurement Regulations which are quoted in §1106 of these Regulations:

(1) *gratuity*, as defined in §1106(41) (Definitions, Gratuity); and

(2) *purchase request*, as defined in §1106(44) (Definitions, Purchase Request).

(b) **Gratuities Prohibition.**

(1) **Breach.** It is a breach of §11206(1) (Gratuities and Kickbacks, Gratuities) of these Regulations:

(a) for any person to offer, give, or agree to give any government employee or former government employee a gratuity of offer of employment; or

(b) for any government employee or former employee to solicit, demand, accept, or agree to accept a gratuity or an offer of employment; provided that the gratuity or offer of employment is in relation to a particular matter in accordance with 11206(b)(2) of these regulations, and pertains to any programs requirement, contract, subcontract, or solicitation or proposal therefor.

(b) **Relationship of Gratuity.** In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, to constitute a breach, and in connection with any:

(a) decision;

(b) approval;

(c) disapproval;

(d) recommendation;

(e) preparation of any part of a program requirement or a purchase request;

(f) action to influence the content of any specifications or procurement standard;

- (g) rendering of advice;
- (h) investigation;
- (i) auditing; or
- (j) other advisory capacity.

(3) **Family.** This prohibition extends to the giving of gratuities to anyone on the government employee's or former government employee's behalf such as a member of the employee's immediate family.

(c) **When Prohibition Against Gratuities not Applicable.** Section 11206(1) (Gratuities and Kickbacks, Gratuities) of these regulations does not prohibit:

(1) the solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any procurement or program requirement with the territory and is based upon a personal or family relationship;

(2) the participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social, or fraternal organization, or from a non-profit educational, recreational, public service, or civic organization;

(3) acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of government employees, such as home mortgage loans; or

(4) acceptance of unsolicited advertising products or promotional material, such as pens, pencils, note pads, calendars, and other items under nominal value as described in §11101(a)(6) (Definitions, Gratuity) of this Chapter.

(d) **Payment of a Kickback.** The prohibition against kickbacks set forth in §11206(2) (Gratuities and Kickbacks, Kickbacks) of these Regulations applies whether a kickback is made prior to or after the award of a territorial contract or order.

(e) **Contract Clause.** The following clause shall be conspicuously set forth in every contract and solicitation therefor:

"REPRESENTATION REGARDING
GRATUITIES AND KICKBACKS

The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in §11206 (Gratuities and

Kickbacks) of the Guam Procurement Regulations.”

§11108. Contingent Fees. (a) Prohibition Against Contingent Fees.

(1) **Contingent Fees.** It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a territorial contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

(2) **Representation of Contractor.** Every person, before being awarded a territorial contract, shall represent, in writing, that such person has not retained anyone in violation of Subsection (1) of this Section. Failure to do so constitute a breach of ethical standards.

(3) **Contract Clause.** The representation prescribed in Subsection (2) of this Section shall be conspicuously set forth in every contract and solicitation therefor.

This Section is quoted from 5 GCA §5631 of the Guam Procurement Act.

(b) **Definitional Cross-References.** The following terms used in this Section are defined in §11101 of these Regulations.

(1) *bona fide employee*, as defined in §11101(a)(1) (Definitions, Bona Fide Employee);

(2) *bona fide established commercial selling agency*, as defined in §11101(a)(2) (Definitions, Bona Fide Established Commercial Selling Agency); and

(3) *business employee*, as defined in §11101(a)(3) (Definitions, Business Employee).

(c) **Influence Peddling.** The prohibition in §11207(a) (Prohibition Against Contingent Fees, Contingent Fees) of these Regulations covers influence peddling and particularly that which might occur when a former government official is hired on contingent basis by a business seeking territorial contracts.

(d) **Relationship of Commercial Selling Business to the Prospective Contractor.** The relationship between a bona fide established commercial selling business and the prospective contractor should be characterized by the following:

(1) the fees charged by the business are commensurate with the nature and extent of the business's services actually rendered to the prospective contractor;

(2) the business has adequate knowledge of the supply, service, or construction item of the prospective

contractor which it represents to judge whether the item may be able to meet the territory's requirements; and

(3) the relationship between the business and the prospective contractor is or is contemplated to be continuing.

(e) **Improper Influence.** A business employee or commercial selling business should be conclusively presumed not to be bona fide if the Policy Office determines that improper influence has been or is being used to secure a territorial contract.

(f) **Solicitation Clause.** Every solicitation for a supply, service, or construction item shall conspicuously set forth the following provision to be completed and submitted with every prospective contractor's bid or proposal:

"PROSPECTIVE CONTRACTOR'S REPRESENTATION
REGARDING CONTINGENT FEES

The Prospective Contractor represents as a part of such contractor's bid or proposal that such contractor has/has not (circle applicable word or words) retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract."

(g) **Information on Contingent Fees.** Any prospective contractor who has completed the clause set forth in §11207(f) (Solicitation Clause) in the affirmative and is the apparently successful bidder or offeror shall submit the following information:

(1) the full name and business address of the business or person retained, and the type of business organization;

(2) the relationship of the business or person to the prospective contractor;

(3) the terms of the retention agreement or copy of such agreement;

(4) if such person is a business employee:

(i) the duration of employment;

(ii) whether that employee is on the contractor's payroll for purposes of social security and federal or local income tax withholding;

(iii) whether that employee represents other businesses and, if so, the names and addresses of such businesses;

(5) whether the business or person represents the prospective contractor on:

(i) both government and commercial business;

(ii) only government business; or

(iii) only the present contract;

(6) the extent of the duties of the business or person;
and

(7) the duration the business or person has been engaged in a particular type of work and has performed this type of work for the contractor.

(h) **Contract Clause.** The following clause shall be conspicuously set forth in every contract and solicitation therefor:

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The contractor represents that it has not retained a person to solicit or secure a territorial contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.”

§11109. Employment Prohibitions and Restrictions. (a) Restrictions on Employment of Present and Former Employees.

(1) Restrictions on Former Employees in Matters Connected with Their Former Duties.

(a) **Permanent Disqualification of Former Employee Personally Involved in a Particular Matter.** It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the territory, in connection with any:

(i) judicial or other proceeding, application, request for ruling, or other determination;

(ii) contract;

(iii) claim; or

(iv) charge or controversy; in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the territory is a party or has a direct and substantial interest.

(b) One year representation restriction regarding matters for which a former employee was officially responsible. It shall be a breach of ethical standards for any former employee, within after cessation of the former employee's official responsibility, knowingly to act as principal, or as an agent for anyone other than the territory, in connection with any:

(i) judicial or other proceeding, application, request for a ruling, or other determination;

(ii) contract;

(iii) claim; or

(iv) charge or controversy; in matters which were within the former employee's official responsibility, where the territory is a party or has a direct or substantial interest.

(2) **Disqualification of Business When an Employee has a Financial Interest.** It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the territory, in connection with any:

(a) judicial or other proceeding, application, request for a ruling, or other determination;

(b) contract;

(c) claim; or

(d) charge or controversy;

in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the territory is a party or has a direct and substantial interest.

(3) **Selling to the Territory After Termination of Employment is Prohibited.** It shall be a breach of ethical standards for any former employee, unless the former employee's last annual salary did not exceed \$12,000, to engage in selling or attempting to sell supplies, services other than personal services, or construction to the territory for ninety (90) days following the date employment ceased.

The term *Sell* as used herein means signing a bid, proposal, or contract; negotiating a contract; contracting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract; settling disputes concerning performance of a contract; or any other liaison activity with a view toward the ultimate consummation of a sale although the actual contract, therefore, is subsequently negotiated by another person; provided, however, that this Section is not intended to preclude a former employee from accepting employment with private industry solely because the former employee's employer is a contractor with this territory nor shall a former employee be precluded from serving

as a consultant to this territory.

This Section is quoted from 5 GCA §5632 of the Guam Procurement Act.

(b) Contemporaneous Employment Prohibition.
(Reserved).

(c) Permanent Disqualification of Former Government Employee.

(1) **Personal and Substantial Participation.** For the government employee to have “participated personally and substantially” in a matter, such employee's involvement must have been more than merely ministerial in nature. Factors to be considered in determining personal and substantial participation of a former government employee while a government employee shall include but are not limited to:

(a) the former government employee's degree of involvement in the particular matter;

(b) the degree of involvement of the former employee with a subordinate who had substantial participation in the matter;

(c) the effect or appearance of the involvement of the former government employee; and

(d) the relative time spent on the particular matter by the former government employee.

(2) **Matter must be a Particular Matter Involving Identifiable Parties.** The activities listed in §11208(b)(1) (Restrictions on Employment of Present and Former Employees, Permanent Disqualification of Former Employee Personally Involved in a Particular Matter) of these Regulations generally describe matters in which issues are defined and parties are identified, such as specific proceedings affecting the legal rights of parties, or isolated transactions or related sets of transactions between identifiable parties.

Matters of general application, such as regulation and policy formulation, are not intended to be covered under those activities listed under §11208(b)(1). Therefore, only a particular matter involving an identifiable party or parties is subject to the permanent prohibition set forth under §11208(b)(1).

(3) The Same particular matter must be involved. The prohibition set forth in §11208(b)(1) (Restrictions of Employment of Present and Former Employees, Disqualification of Former Employee Personally Involved in a Particular Matter) of these Regulations applies only with regard to those same particular matters in which the former government employee

participated personally and substantially while a government employee. In determining whether two particular matters are the same, the following factors should be considered:

- (a) the factual basis of the matters;
 - (b) the relationship of the issues involved in each matter;
 - (c) the identity of the parties involved in each matter; and
 - (d) the continued existence of an important territory interest.
- (d) One year restriction for a former government employee.

(1) Official responsibility.

(a) **Definitions.** 5 GCA §5601 (Definitions, Official Responsibility) of the Guam Procurement Act, which defines *official responsibility* is quoted in §1106(43) (Definitions) of these regulations.

(b) **Scope.** The scope of a government employee's official responsibility is determined by the territory's statutes, regulations, executive orders, case law, or job descriptions, or may result from the lawful delegation of another government employee's duties.

(c) **Requirement That Matters Have Been Actually Pending.** In order for a matter to have been within a former government employee's official responsibility, it must have in fact been assigned to or under consideration by persons under the former government employee's official responsibility.

(2) **One year restriction.** The one year restriction set forth in §11208(b)(2) (Restrictions on Employment of Present and Former Employees, Restrictions on Former Employees in Matters Connected with Their Former Duties) of the Guam Procurement Regulations is measured from the time the former government employee's official responsibility ended in a particular matter.

(e) Disqualification of a Business.

(1) **Personal and Substantial Participation.** *Personal and substantial participation* is discussed in §11208(b)(1) (Permanent Disqualification of Former Government Employee, Personal and Substantial Participation) of this Chapter.

(2) **Official responsibility.** 5 GCA §5601(h) (Definitions, Official Responsibility) of the Guam

Procurement Act, which defines *official responsibility*, is quoted in §1106(43) (Definitions) and is discussed in §11208(d)(1) (One Year Restriction for a Former Government Employee, Official Responsibility) of this Chapter.

(3) **Determination of Business Knowledge.** In ascertaining whether a business has knowledge that a government employee has a financial interest in that business for the purpose of applying the prohibition in §11208(b) (Restrictions on Employment of Present and Former Employees, Disqualification of a Business When an Employee Has a Financial Interest) of these Regulations, the factors to be considered should include the following:

- (a) the size of the business;
- (b) the percentage of ownership in the business by the government employee;
- (c) the nature of the dealings of the government employee with the business regarding such employee's financial interest; and
- (d) such other evidence as may be relevant and material.

(f) Prohibition Against Selling to the Territory.

(1) **Prohibition; Applicability.** Section 11208(3) (Restrictions on Employment of Present and Former Employees, Selling to the Territory After Termination of Employment is Prohibited) of these Regulations, prohibits a former government employee whose annual salary exceeded \$12,000 from selling or attempting to sell to any governmental body of the territory within ninety days following the date employment ceases. This prohibition applies with regard to any territorial employee who used to be employed.

(2) **Sell Defined.** Section 11208(3) (Restrictions on Employment of Present and Former Employees, Selling to the Territory After Termination of Employment is Prohibited) of these Regulations, defines *sell* for the purpose of prohibiting selling to the territory to mean:

- (a) signing a bid, proposal, or contract;
- (b) negotiating a contract;
- (c) contracting any employee for the purpose of obtaining, negotiating, or discussing changes in specifications, price, cost allowances, or other terms of a contract;
- (d) settling disputes concerning performance of a contract; and
- (e) any other liaison activity with a view

toward the ultimate consummation of a sale although the actual contract, therefore, is subsequently negotiated by another person.

Requests for information are not included within the term *Sell*.

(g) **Employment with a Territorial Contractor.** The ninety (90) days prohibition against selling contained in §11208(4) of these Regulations shall not prohibit a former government employee from obtaining employment with a contractor, but such employee shall not sell to the territory as defined in §11208(f)(2) (Prohibition Against Selling to the Territory *Sell* Defined.)

§11110. Use of Confidential Information. It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person (quoted from 5 GCA §5633 of the Guam Procurement Act).

§11111. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards. (Reserved).

§11112. Civil and Administrative Remedies Against Non-Employees who Breach Ethical Standards. (1) **Existing Remedies Not Impaired.** Civil and administrative remedies against non-employees which are in existence on the effective date of this Act shall not be impaired.

(2) **Supplemental Remedies.** In addition to existing remedies for breach of the ethical standards of this Chapter or regulations promulgated hereunder, the Procurement Policy Office, in connection with non employees, may impose any one or more of the following:

- (a) written warnings or reprimands;
- (b) termination of transactions; and
- (c) debarment or suspension from being a contractor or subcontractor under territorial contracts.

(3) **Right to Recover From Non-Employee Value Transferred in Breach of Ethical Standards.** The value of anything transferred in breach of the ethical standards of this Chapter or regulations promulgated hereunder by a non-employed shall be recovered by the territory as provided in 5 GCA §5652 (Recover of Value Transferred or Received in Breach of Ethical Standards) of the Guam Procurement Act as quoted on §11303 of these Regulations.

(4) **Right of the Territory to Debar or Suspend.** Debarment or suspension may be imposed by the Procurement Policy Office in accordance with the procedures set forth in 5 GCA §5426 (Authority to Debar or Suspend) for breach of the ethical standards of this Chapter, provided that

such action may not be taken without the concurrence of the Attorney General.

(5) **Due Process.** All procedures under this Section shall be in accordance with the Administrative Adjudication Law.

This §11112 is quoted from 5 GCA §5651(e) the Guam Procurement Act.

§11113. Recovery of Value Transferred or Received in Breach of Ethical Standards. (1) **General Provisions.** The value of anything transferred or received in breach of the ethical standards of this Chapter or regulations promulgated hereunder by an employee or non-employed may be recovered from both the employee and non-employed.

(2) **Recovery of Kickbacks By The Territory.** Upon a showing that a subcontractor made a kickback to a prime contractor or a higher tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be conclusively presumed that the amount thereof was included in the price of the subcontract or order and ultimately borne by the territory and will be recoverable hereunder from the recipient. In addition, said value may also be recovered from the subcontractor making such kickbacks. Recovery from one offending party shall not preclude recovery from other offending parties.

This §11113 is quoted from 5 GCA §5652(b) the Guam Procurement Act.

§11114. Ethics Enforcement. (a) **Ethics: Non employees.** In addition to the authority and duties of the Policy Office under 5 GCA §5101 of the Guam Procurement Act, such office is hereby given the functions required under this Chapter with regard to non employees and the Civil Service Commission is hereby given the functions required with regard to employees.

This §11114 is quoted from 5 GCA §5675 of the Guam Procurement Act.

(1) Ethics Commission.

(a) **Regulations.** The Civil Service Commission shall promulgate regulations to implement this Chapter with regard to employees. The Procurement Policy Office shall promulgate regulations to implement this Chapter with regard to non employees, contractors and subcontractors and the Procurement Policy Office shall do so in accordance with the applicable provisions of the Administrative Adjudication Law of this territory.

(b) **Advisory Opinions.** On written request of employees, the Civil Service Commission may render written advisory opinions regarding the

appropriateness of the course of conduct to be followed in proposed transactions. The Policy Office may render such opinions to contractors regarding the appropriateness of the course of conduct to be followed by the contractors in proposed transactions. Such requests and advisory opinions must be duly published in the manner in which regulations of this territory are published. Compliance with requirements of a duly promulgated advisory opinion of the Civil Service Commission or Policy Office shall be deemed to constitute compliance with the ethical standards of this Chapter.

(c) **Waiver.** On written request of an employee, the Civil Service Commission may grant an employee, or the Policy Office may grant a contractor, a written waiver from the application of 5 GCA §5628 (Guam Procurement Act) and grant permission to proceed with the transaction to such extent and upon such terms and conditions as may be specified. Such waiver and permission may be granted when the interests of the territory so require or when the ethical conflict is insubstantial or remote.

This Section 11114 is quoted from 5 GCA §5675 of the Guam Procurement Act.

(2) Appeal of Decisions.

(a) **General.** Except as provided under Subsections (b) and (c) of this Section, a decision of the Policy Office under 5 GCA §5651 (coded as Section 11112 of these Regulations) of the Guam Procurement Act shall be reviewable in accordance with the Administrative Adjudication Law of this territory. The opinions of the Civil Service Commission shall be reviewable in the same manner, but only in connection with their duty to render opinions.

(b) **Debarment or Suspension.** A decision of the Policy Office regarding debarment or suspension under 5 GCA §5651(b) of this Chapter (coded as §11112 of these Regulations) shall be reviewable as provided in 5 GCA §5481(b) of the Procurement Act (coded as §9109 of these Regulations)

(c) An appeal from the decision of the Civil Service Commission under 5 GCA §5650 of the Procurement Act (coded as §11111 of these

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Regulations) shall be taken before members, either permanent or pro tempore, who had no part in the decision being appealed from in accordance with the rules of the Civil Service Commission governing adverse actions in general. Further, reviewed by the Superior Court, where permitted, shall be pursuant to the provisions of Title 4 GCA.

[This §11114 is quoted from 5 GCA §5675, §5676, and §5677 of the Guam Procurement Act.]

-----End of Regulations-----

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**CHAPTER 12
PROCUREMENT APPEALS TO THE PUBLIC AUDITOR**

SOURCE: Submitted by the Office of the Public Auditor pursuant to Guam's Administrative Adjudication Law (5 GCA Chapter 9, Article 3) these rules were submitted by the Office of the Public Auditor to the Guam Legislature on July 17, 2006 and became effective after 90 calendar days (October 15, 2006).

- § 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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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.

(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.

2019 NOTE: Prior publications of the GAR included information from the OPA indicating 5 GCA § 5703 as the source for subsection (a).

§ 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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Appeal". The written Appeal shall be in substantially the same format as Appendix A to this Chapter, and include at a minimum the following:

- (1) The name, mailing and business address of the Appellant;
- (2) Appropriate identification of the procurement or solicitation, soliciting or procuring agency, and, if a contract has been awarded, its number; a concise, logically arranged, and direct statement of the grounds for Appeal;
- (3) A statement specifying the ruling requested;
- (4) Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for Appeal unless not available within the filing time in which case the expected availability date shall be indicated;
- (5) A copy of prior decisions or determinations of the protests, contract disputes, or debarment action that are being Appealed; or copy of the request for final decision and any agreement to extend the decision deadline;
- (6) An Appeal shall be signed by an Appellant, by an officer of the Appellant corporation or a member of the Appellant firm, or by the Appellant's duly authorized representative or attorney, and the facts therein verified.
- (7) A protest may be dismissed for failure to comply with any of the requirements of this section, except that a protest shall not be dismissed for failure to comply with this section where the contracting officer has actual knowledge of the basis of the protest, or the agency, in the preparation of its report, was not prejudiced by the protester's noncompliance.

(c) Notice of Appeal, Submission of Report and Time for Filing of Comments on Report.

- (1) The Appellant shall file a copy of the Appeal, and all supporting documents with the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency within 24 hours of filing of said Appeal with the Office of the Public Auditor. The Public Auditor shall notify the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency by telephone and in writing within 24 hours of

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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

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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.

(9) Any objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed. The Public Auditor shall have the right to raise the issue of her or his jurisdiction sua sponte at any time and shall do so by an appropriate order.

SOURCE: Promulgated pursuant to the Administrative Adjudication Law and effective October 15, 2006. Amendment to subsection (c)(9) submitted to the Guam Legislature on April 14, 2009 pursuant to the Administrative Adjudication Law, and effective after 90 days (July 13, 2009).

2019 NOTE: Prior publications of the GAR included information from the OPA indicating 5 GCA § 5708 as the source for this provision.

§ 12105. Agency Report.

The Agency Report shall be arranged in chronological order where practicable, numbered sequentially, tabbed, and indexed to identify the

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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):

- (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.

2019 NOTE: Prior publications of the GAR included information from the OPA indicating the ABA 2002 Model Procurement Rules as the source of this provision.

§ 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

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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, and indicating on the front page of each document that it contains such information.

§ 12107. Ex Parte Communications with Hearing Officer.

(a) No person directly or indirectly involved in an Appeal shall communicate with the Hearing Officer or the Office of the Public Auditor staff regarding any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in an Appeal except:

- (1) At a hearing; or
- (2) With the consent of all other parties or their counsel in such matters; or
- (3) In the presence of all other parties or their counsel in such matters; or
- (4) By means of papers provided for or allowed by these rules or by law.

(b) Nothing in this rule shall prevent the OPA staff from entertaining questions or complaints that are not related to the substance of the pending appeals. OPA staff shall report communications regarding pending appeals to all the parties in the pending appeal.

§ 12108. Hearings Procedures.

(a) Request for Hearing. In all Appeals to the Public Auditor of suspension or debarment, a hearing shall be conducted. In all other Appeals, including Appeals of protests or contract disputes, the parties shall either request a hearing in writing or waive their right to a hearing and submit the case on the record without a hearing. Request for a hearing shall be made prior to the expiration of the time period allowed for filing comments on the agency report, and shall be in a form substantially similar to Appendix D to this Chapter. Except in unusual circumstances, requests for a hearing received after such time will not be honored.

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(b) Time and Place for Hearings. Hearings shall be held at the Office of the Public Auditor unless a different place is set by the Hearing Officer. The time for Hearings shall be set by the Hearing Officer. Ordinarily, only one hearing will be held on an Appeal. Such hearing may be held by telephone conference call or other means at the discretion of the Hearing Officer.

(c) Notice of Hearing. The Hearing Officer shall send a written notice of the time and place of the hearing to the Appellant and to the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency at least ten (10) days prior to the hearing unless the parties agree on a shorter period. It shall be the duty of each of these entities to notify the Attorney General or its own counsel, and the affected using agency. Notice shall be sent by the Hearing Officer by certified mail, return receipt requested, or by any other method that provides evidence of receipt, and shall state the nature and purpose of the proceedings, and shall substantially follow the format of Appendix C, attached to this Chapter. The notice shall also state that the Appellant may be represented by counsel. Notices of hearings shall be promptly acknowledged by the parties. The Hearing Officer can require attendance of parties he or she deems appropriate.

(d) Hearing Proceedings. Hearings shall be as informal as may be reasonable and appropriate under the circumstances and shall not be bound by statutory rules of evidence or by technical or formal rules of procedure except as provided by the Guam Procurement Law, Chapter 5 of Title 5, Guam Code Annotated, and with these procurement appeals regulations. The testimony presented shall be written, oral or otherwise. The weight to be attached to evidence presented in any particular form will be within the discretion of the Hearing Officer. Stipulations of fact agreed upon by the parties may be regarded and used as evidence at the hearing. The parties may stipulate the testimony that would be given by a witness if the witness were present. The Hearing Officer may require evidence in addition to that offered by the parties. Where not otherwise provided for by these rules and regulations or statute, and where not inconsistent herewith, hearings shall be conducted in accordance with the Administrative Adjudication Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on subpoenas and contempt.

(e) Record of Hearings. A hearing shall be recorded, but need not be transcribed, except at the request and expense of the person making

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the request. The audio recording, together with the written record of the time, place, and persons present, identification of any written evidence presented, and copies of all written statements and a summary of the hearing shall be sufficient record. An audio copy of the recorded hearing shall be made available to the parties in electronic or digital format at the fee prescribed by 5 GCA § 10304, and shall be available on the website of the Office of the Public Auditor, www.guamopa.org.

(f) Opening Statements. Opening statements may be made unless a party waives this right, subject to time limits that may be set by the Hearing Officer.

(g) Public Hearings. Hearings shall be open and accessible to the public.

(h) Judicial Notice. In reaching a decision, official notice may be taken, either before or after submission of the case for decision, of any fact that may be judicially noticed by the courts of Guam. Parties present at the hearing shall be informed of the matters to be noticed, and these matters shall be noted in the record, referred to therein, or appended thereto. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority, subject to time constraints imposed by the Hearing Officer.

§ 12109. Authority of the Hearing Officer.

The Public Auditor may appoint a Hearing Officer for Procurement Appeals. If no Hearing Officer is appointed or in the event of the Hearing Officer's recusal, the Public Auditor may appoint and contract with another Guam-licensed attorney, who may be an attorney in full time service of the government of Guam, or an attorney in private practice, to act as Hearing Officer for all further proceedings with respect to that matter. The Hearing Officer shall receive written, oral, or otherwise presented testimony, evaluate such testimony and make recommendations to the Public Auditor. No prior determination shall be final or conclusive. The Hearing Officer has the power, among others, to:

(a) Hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion;

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- (b) Require parties to state their positions with respect to the various issues in the proceeding;
- (c) Require parties to produce for examination those relevant witnesses and documents under their control;
- (d) Rule on motions, and other procedural items on matters pending before such officer;
- (e) Regulate the course of the hearing and conduct of participants therein;
- (f) Receive, rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are irrelevant, immaterial, or unduly repetitious;
- (g) Fix time limits for submission of written documents in matters before such officer;
- (h) Impose appropriate sanctions against any party or person failing to obey an order under these procedures, which sanctions may include:
 - (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
 - (2) Excluding all testimony of an unresponsive or evasive witness;
 - (3) Expelling any party or person from further participation in the hearing; and
 - (4) Taking official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice.
- (i) 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;
- (j) Consider testimony and evidence submitted by any competing bidder, offeror or contractor of the protestant or appellant.

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§ 12110. Decisions of the Public Auditor.

(a) Within thirty (30) days of a hearing on an appeal or after the parties have formally waived a hearing, as provided for by 2 GAR, Div. 4, Chap. 12, § 12108(a), the Public Auditor shall issue a final written decision or take other appropriate action. The Public Auditor's final decision, which shall be made part of the record, shall recite the evidence relied upon which the decision is based.

(b) The final decision shall inform the parties of their right to judicial review under 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

(c) A copy of any final decision on Appeal shall be immediately mailed via certified mail, return receipt requested, or furnished by any other method that provides evidence of receipt, to the Appellant; to any other participating party; and, as appropriate, to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. All decisions shall be posted on the website of the Office of the Public Auditor within ten (10) days of issuance.

SOURCE: Promulgated pursuant to the Administrative Adjudication Law and effective October 15, 2006. Amendment to subsection (a) submitted to the Guam Legislature on April 14, 2009 pursuant to the Administrative Adjudication Law, and effective after 90 days (July 13, 2009).

§ 12111. Finality of Decision.

(a) Appeal. Any person receiving an adverse decision, the government or any autonomous agency or public corporation, or both, may Appeal from a decision by the Public Auditor to the Superior Court of Guam.

(b) Authorization of Appeal by the Government. No such Appeal shall be made by the government or an autonomous agency or public corporation unless recommended by the Chief Procurement Officer, the Director of Public Works, or the head of the Purchasing Agency involved.

(c) Standard of Review. Any determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless found by a court to be arbitrary, capricious, fraudulent, clearly erroneous, or contrary to law. Any decision of the Public Auditor, including any determination regarding the application or interpretation of the

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procurement law or regulations, shall be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.

2019 NOTE: Prior publications of the GAR included information from the OPA indicating 5 GCA § 5707 as the source for subsections (a) and (b), and 5 GCA § 5704 as the source for subsection (c).

§ 12112. Appeal to Public Auditor Relative to Method, Solicitation, or Award.

Authority. Pursuant to 5 GCA § 5425(e) a protestor may Appeal a decision under 5 GCA § 5425(c) relative to the protest of a method of selection, a solicitation, an award of a contract, or a decision under 5 GCA § 5425(h) regarding entitlement to costs, within fifteen (15) days of receipt by protestor of the decision. The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.

2019 NOTE: Originally promulgated as § 12201, renumbered by the Compiler pursuant to the authority granted by 1 GCA § 1606.

2016 NOTE: Subsection designation was removed to adhere to the Compiler's general codification scheme pursuant to the authority granted by 1 GCA § 1606.

§ 12113. Appeal to the Public Auditor of Contract and Breach of Contract Controversies.

(a) Pursuant to 5 GCA § 5706, Appeals shall be made in writing to the Public Auditor within 60 days after receipt by an aggrieved contractor of a decision on a contract or breach of contract controversy pursuant to 5 GCA § 5427; within 60 days of the failure to render a timely decision as provided in 5 GCA § 5427; or within 60 days of the time established by the parties for a decision to be rendered. Disputes having to do with money owed to or by the government of Guam shall not be submitted.

(b) A decision on Appeal of a contract controversy shall set forth the reasons for such action and shall inform the persons involved of his or her right to judicial review as provided in these regulations and 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

2019 NOTE: Prior publications of the GAR included information from the OPA indicating 5 GCA § 5703 as the source for subsections (a).

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Originally promulgated as § 12301, renumbered by the Compiler pursuant to the authority granted by 1 GCA § 1606.

§ 12114. Appeal to Public Auditor of Debarment or Suspension.

This section applies to Appeals of debarment or suspensions of persons from consideration for award of contracts imposed by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Pursuant to 5 GCA § 5705 an aggrieved person may Appeal a suspension or debarment action within 60 days of receipt of a decision under subsection (c) of 5 GCA § 5426. The Public Auditor shall review actions between the territory and a person who is subject to a suspension or debarment proceeding, to determine whether, or the extent to which the debarment or suspension was imposed on a Contractor in accordance with applicable statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair.

A decision on Appeal of a suspension or debarment shall set for the reasons for such action and shall inform the debarred or suspended person involved of his right to judicial review as provided in these regulations and 5 GCA Chapter 5, Article 9 (Legal and Contractual Remedies) of the Guam Procurement Law.

2019 NOTE: Prior publications of the GAR included information from the OPA indicating 5 GCA § 5705 as the source for this provision.

Originally promulgated as § 12401, renumbered by the Compiler pursuant to the authority granted by 1 GCA § 1606.

§ 12115. Review of Award Pending Protest or Appeal.

(a) Any protestor may protest a determination by the Chief Procurement Officer or the Director of Public Works pursuant to 5 GCA § 5425(g) that award of a contract without delay pending Appeal is necessary to protect the substantial interests of the government of Guam. Said protest must be filed in writing at the Office of the Public Auditor within two (2) days of receipt by protestor of the notice of determination. The Public Auditor shall either confirm or reject the determination.

(b) After an Appeal is filed with the Public Auditor relative to method of selection, solicitation, or award pursuant to 5 GCA § 5425(e) and § 9301 of this Chapter, the Public Auditor shall review and confirm or reject any determination by the Chief Procurement Officer or the Director of Public Works pursuant to 5 GCA § 5425(g) that award of a

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contract without delay pending Appeal is necessary to protect the interests of the government.

(c) The Chief Procurement Officer and the Director of Public Works shall file with the Office of the Public Auditor a copy of all determinations made pursuant to 5 GCA § 5425(g) on the date of issuance, together with any information used or considered by the agency in making that determination.

(d) Any additional information requested by the Public Auditor or Hearings Officer for Procurement Appeals shall be submitted within the time periods established by the requesting source in order to expedite consideration of the Appeal. Failure of any party to comply expeditiously with a request for information by the Public Auditor or Hearings Officer for Procurement Appeals may result in resolution of the Appeal or review of award pending Appeal without consideration of any information, which is untimely filed pursuant to such request.

2019 NOTE: Originally promulgated as § 12501, renumbered by the Compiler pursuant to the authority granted by 1 GCA § 1606.

§ 12116. Disqualification of Public Auditor.

The Public Auditor may recuse herself or himself at any time and notify all parties, or any party may raise the issue of disqualification and state the relevant facts prior to the hearing. The Public Auditor shall make a determination and notify all parties. In the event of disqualification or recusal of the Public Auditor, the Public Auditor shall designate a member of his or her staff or the appointed Hearing Officer for procurement appeals to preside over the matter. If no member of the Public Auditor's staff or the appointed Hearing Officer is able to preside over the matter due to disqualification, then such matter may be taken to the Superior Court of Guam in accordance with 5 G.C.A. §5480.

SOURCE: Promulgated pursuant to the Administrative Adjudication Law and effective October 15, 2006. Amendment submitted to the Guam Legislature on April 14, 2009 pursuant to the Administrative Adjudication Law, and effective after 90 days (July 13, 2009).

2019 NOTE: Originally promulgated as § 12601, renumbered by the Compiler pursuant to the authority granted by 1 GCA § 1606.

Appendix A: Notice of Appeal Form

PROCUREMENT APPEAL

PART I- To be completed by OPA

In the Appeal of _____)
) **NOTICE OF APPEAL**
)
)

(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

PART II- Appellant Information

Name: _____
Mailing Address: _____
Business Address: _____
Daytime Contact No: _____

I. PART III- Appeal Information

- A) Purchasing Agency: _____
- B) Identification/Number of Procurement, Solicitation, or Contract: _____
- C) Decision being appealed was made on _____ (date) by:
 - ___ Chief Procurement Officer
 - ___ Director of Public Works
 - ___ Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

- D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
 - ___ Decision on Protest of Method, Solicitation or Award
 - ___ Decision on Debarment or Suspension
 - ___ Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
 - ___ Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

II. PART V- Declaration Re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this __ day of _____, 20__.

By: _____
APPELLANT

or

By: _____
Appellant's Duly Authorized Representative

Address: _____

Phone No.: _____

Appendix B: Declaration Form
PROCUREMENT APPEAL

In the Appeal of _____)
)
)
)
(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

DECLARATION RE COURT ACTION

(To be signed by the Government Purchasing Agency.)

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this __ day of _____, 20__.

By: _____
DECLARANT

Print Declarant's Name

Appendix C: Notice of Hearing Form
PROCUREMENT APPEAL

In the Appeal of _____)
)
)
)
(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

NOTICE OF HEARING

You are hereby notified that a hearing will be held before the Public Auditor or the Hearings Officer for Procurement Appeals at the Office of the Public Auditor on the _____ day of _____, 20__, at the hour of _____, relative to the above referenced Procurement Appeal. You may be present at the hearing; may be, but need not be, represented by counsel; may present any relevant evidence; and will be given full opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Hearings Officer for Procurement Appeals, Office of the Public Auditor.

Please acknowledge receipt of this Notice and return to the Office of the Public Auditor immediately.

Acknowledged receipt:

Receiver's Signature

Print Name

Date

Appendix D: Hearing Request/Waiver Form

PROCUREMENT APPEAL

In the Appeal of _____)
)
) **HEARING REQUEST/WAIVER**
)
(Name of Company), APPELLANT)
Docket No. OPA-PA _____)
_____)

Please select one:

- Pursuant to 2 GAR § 12108(a), the undersigned party does hereby request a hearing on the appeal stated above.
- Pursuant to 2 GAR § 12108(a), the undersigned party does hereby waive his/her right to a hearing and is submitting the appeal stated above on record without a hearing.

Submitted this ___ day of _____, 20__.

By: (Please select one)

- ___ APPELLANT
___ Chief Procurement Officer
___ Director of Public Works
___ Head of Purchasing Agency

Print Name

Sign Name

CHAPTER 13
GOVERNMENT OF GUAM HEALTH INSURANCE NEGOTIATING
TEAM

SOURCE: Adopted by P.L. 32-083:2 (Nov. 27, 2013).

2019 NOTE: The rules were renumbered and subsection designations were added/altered pursuant to the authority of 1 GCA § 1606.

- § 13101. Authority.
- § 13102. Membership.
- § 13103. Voting.
- § 13104. Confidentiality.
- § 13105. No Conflict-of-interest.
- § 13106. Meetings.
- § 13107. Quorum.
- § 13108. Decisions.
- § 13109. Opening of Proposals.
- § 13110. Communication by Offerors and Sub-contractors.
- § 13111. Authority to Clarify Proposals.
- § 13112. Proceeding to the Next Phase.
- § 13113. Weighting and Ranking.
- § 13114. Review and Audit.
- § 13115. Roles of Team Members.
- § 13116. Amendment.
- § 13117. Compliance With Law.
- § 13118. Vice Chairperson.

§ 13101. Authority.

The Negotiating Team for the government of Guam, responsible for the solicitation of group health insurance benefits for employees and retirees of the government, is established by statute. Pursuant to law, the Negotiating Team shall develop its rules of procedure in accordance with the Administrative Adjudication Law. 4 GCA § 4302(c). The responsibilities and roles of the Negotiating Team are those set out by law at Title 4, Chapter 4, Article 3, of the Guam Code Annotated (“Group Benefits Laws”). At any time that these Rules of Procedure

come into conflict with the Group Benefits Laws, the Group Benefits Laws shall preempt these rules.

§ 13102. Membership.

(a) The Negotiating Team is comprised of individuals identified by statute at 4 GCA § 4302(c).

(b) The Negotiating Team may obtain technical support from other financial, legal and health-related agencies.

(1) The Director of Administration, upon the approval of the Negotiating Team, may invite representatives of government departments, agencies, bureaus and other government entities to Negotiating Team meetings as seen fit to serve as consultants in aid of the Negotiating Team in its duties.

(2) No unilateral consultations shall be conducted by the Chairperson or any member of the Negotiating Team nor shall they hold independent meetings or consultations with persons outside of the Negotiating Team and its consultants prior to the conclusion of the Negotiating Team proceedings.

(c) The Attorney General or his designee shall act as legal advisor during all phases of the solicitation or procurement process for group health insurance benefits for employees and retirees of the government.

(d) Non-delegation of representation. The following members of the Negotiating Team are not permitted, by law, to delegate to another individual the authority to serve in their stead as a substitute or proxy for purposes of participation in Negotiating Team activities:

(1) Director of Administration

(2) The employee representative of the Judiciary of Guam to be appointed by the Chief Justice of the Supreme Court of Guam.

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(3) The employee representative of the Legislative Branch to be appointed by the Speaker of *I Liheslaturan Guåhan*.

(4) The retiree who is a member of the Government of Guam Retirement Fund appointed by the Board of Trustees of the Government of Guam Retirement Fund.

(5) The member of the general public appointed by *I Maga'låhen Guåhan*.

(e) Delegation of representation. The following members of the Negotiating Team are permitted, by law, to delegate to another individual the authority to serve in their stead as a substitute or proxy for purposes of participation in Negotiating Team activities:

(1) The Administrator of the Department of Integrated Services for Individuals with Disabilities.

(2) The Director of the Bureau of Budget and Management Research.

(3) The Superintendent of the Department of Education.

(4) The Director of the Government of Guam Retirement Fund.

(5) The Chairperson of the Committee on Health or the successor committee of *I Liheslaturan Guåhan*.

(6) The Chairperson of the Committee on Appropriations, or the successor committee of *I Liheslaturan Guåhan*.

(f) Delegation in writing. A member of the Negotiating Team who is permitted, by law, to delegate to another individual the authority to serve in their stead as a substitute or proxy shall designate such delegation in writing and have such written delegation delivered to the Chairperson of the Negotiating Team prior to the delegation being effective. Any member of the Negotiating Team with the authority to delegate shall delegate

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only one representative for the entire process to ensure for continuity of communications and to safeguard the dissemination of information. A written delegation may be repealed in writing.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13103. Voting.

(a) Voting Members. The following members of the Negotiating Team are voting members:

(1) The Director of Administration, who shall be Chairperson of the Negotiating Team.

(2) The employee representative from the Judicial Branch appointed by the Chief Justice of the Supreme Court of Guam.

(3) The employee representative of the Legislative Branch to be appointed by the Speaker of *I Liheslaturan Guåhan*.

(4) The retiree who is a member of the Government of Guam Retirement Fund to be appointed by the Board of Trustees of the Government of Guam Retirement Fund.

(5) The member of the general public, appointed *by I Maga'låhen Guåhan*.

(6) The Administrator of the Department of Integrated Services for Individuals with Disabilities, or his or her designee.

(7) The Director of the Bureau of Budget and Management Research, or his or her designee.

(8) The Superintendent of the Department of Education, or his or her designee.

(9) The Director of the Government of Guam Retirement Fund, or his or her designee.

(b) Non-Voting Members. The following members of the Negotiating Team are non-voting members:

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(1) The Chairperson of the Committee on Health or the successor committee of *I Liheslaturan Guåhan*, or his or her designee.

(2) The Chairperson of the Committee on Appropriations or the successor committee of *I Liheslaturan Guåhan*, or his or her designee.

§ 13104. Confidentiality.

(a) Members, delegates of members, consultants of the Negotiating Team, and applicable Department of Administration staff as determined by the Director of Administration must adhere to the strictest of confidentiality and acknowledge that the proposals received are confidential in nature.

(1) Team members, delegates of members, consultants, and applicable Department of Administration staff acknowledge that no information contained in the proposals, meetings or negotiations can be divulged to any person outside of the Negotiating Team.

(2) Team members, delegates of members, consultants and applicable Department of Administration staff must sign a confidentiality agreement attesting to such. Confidentiality agreements shall be signed prior to the predetermined meeting date and time for opening proposals referenced in § 13109.

(3) A delegate may brief the member of the Negotiating Team who made the delegation about the business of the Negotiating Team but both parties are subject to strict confidentiality throughout the entire process.

(b) Copies of all correspondence between the negotiating team and the Judiciary or Governor, shall also be transmitted to the Legislature.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13105. No Conflict-of-interest.

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(a) A member, consultant or advisor of the Negotiating Team that has a conflict of interest (as understood and regulated by 5 GCA §§ 5625-5633) because of a financial interest with an offeror or due to employment of a family member shall recuse him or herself from being a member, consultant or advisor of the Negotiating Team during the pendency of the solicitation.

(b) Members, consultants and advisors of the Negotiating Team must sign an affidavit that no conflict of interest exists with any offerors once knowledge of the names of the carriers who submitted proposals is known and prior to receiving any information contained in the proposals.

(c) Any member, consultant or advisor who later realizes that a conflict of interest exists must recuse himself or herself from being a member of the Negotiation Team.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13106. Meetings.

Meetings of the Negotiating Team shall be called by the Chairperson, or by a majority of the voting members of the Negotiating Team.

(a) The Chairperson shall set the time, day and place of meetings with the intent to permit the largest number of voting members of the Negotiating team to attend the meeting. The Chairperson shall establish an agenda for each meeting. The agenda shall be adopted or amended by the Negotiating Team at the start of a meeting.

(b) Notice of meetings of the Negotiating Team shall be provided to each member of the Negotiating Team in writing, by business email, and by other acceptable written or telephonic format as may be determined by the Negotiating Team from time to time, at least one business day in advance of the meeting.

(c) Notwithstanding the foregoing, the Negotiating Team, at a properly noticed meeting with a quorum present,

may adjourn its business and schedule a subsequent meeting for a time, day and place certain even though notice as prescribed here cannot be given one business day before the meeting. Nonetheless, written notice, by business email of such subsequent meeting shall be provided to each member. Nothing here prohibits additional forms of providing notice to ensure that all members receive actual notice of a scheduled meeting.

(d) The Chairperson is responsible for providing timely notice to all members of the Negotiating Team of each meeting, as provided for in this rule.

§ 13107. Quorum.

The Negotiating Team may conduct official business if a quorum of its voting members is present at any properly noticed meeting. A quorum of the Negotiating Team is seven (7) voting members.

§ 13108. Decisions.

(a) At any properly noticed meeting of the Negotiating Team where a quorum is present, the Negotiating Team shall make decisions based upon an affirming vote of at least five (5) of the voting members present, after a motion is made by any member, and seconded by any other member.

(b) In any circumstance, a failure to get an affirming vote of at least five (5) of the voting members present shall mean that the motion being voted on fails for lack of a majority.

(c) Upon the casting of votes, team members shall sign off on a voting sheet to document the decision made.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13109. Opening of Proposals.

(a) Provisions shall be made in each Request For Proposals that establish the process for receiving proposals, documenting the reception of proposals, the initial opening of proposals to

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ensure a proper count, documenting the count, and for adequately securing proposals received so that they shall only be viewed by persons having legitimate access to proposals.

(b) Provisions made for the initial opening of proposals may include the involvement of the Negotiating Team and/or representatives of offerors, as determined by the Negotiating Team and set out in the Request For Proposals.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13110. Communication by Offerors and Sub-contractors.

(a) Unsolicited communication by offerors and sub-contractors by phone, mobile phone, email, or any other mode of delivery about any facet of the RFP prior to negotiations is prohibited and may result in disqualification of proposals of any offending offeror.

(b) Prior to disqualification, the Negotiating Team shall request the Attorney General's office to conduct an investigation to verify the veracity of such communication and shall provide its recommendation to the negotiating team for action.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13111. Authority to Clarify Proposals.

The Negotiation Team shall request any documents or information for any proposals received and deemed to be non-responsive or not qualified that will cause said proposals to be responsive and qualified. A proposal shall only be disqualified or rejected if any offeror fails to submit the requested information to the Negotiating Team within three business days after request.

§ 13112. Proceeding to the Next Phase.

After the conclusion of each phase identified in the RFP, Team Members must acknowledge, via signature, such approval or disapproval to proceed to the next phase.

§ 13113. Weighting and Ranking.

During the planning stage of each solicitation for group health and dental insurance, the Negotiating Team shall establish the processes and mechanisms for evaluating proposals submitted in response to a solicitation for the purpose of the ultimate ranking of proposals, to include the factors to be evaluated, the weighting of the various factors, the process of scoring the evaluation factors, the development of a scoring sheet or sheets, and all other processes that lead to the ultimate ranking of proposals. The Negotiating Team, and each Team member, shall follow the evaluation process developed for a given solicitation and as set out in the Request For Proposals for that solicitation.

§ 13114. Review and Audit.

The Negotiating Team reserves the right and obligation to review and audit its evaluation determination during the solicitation process, consistent with the instructions and procedures provided for in a Request For Proposals, Guam law, and regulations.

§ 13115. Roles of Team Members.

The following are the responsibilities of the Department of Administration personnel, consultant and negotiating team members. Any additional duties identified in the consultant contract, 4 GCA § 4301, and other pertinent sections that may arise hereafter are also included under these Rules of Procedure.

(a) Recording of Meetings. All meetings between the Negotiating Team's consultants and any offerors shall be recorded and be made available to members of the Negotiating Team upon request.

(b) Consultant: Consultant is responsible for duties as defined in consultant contract and any amendments thereof.

(c) DOA: The Department of Administration is responsible for the following:

(1) Preparation of RFP to include:

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(A) comments and recommendations submitted by team members,

(B) finalization and issuance of RFP,

(C) advertisements,

(D) recordings of meetings with team,

(E) scheduling and notifications of meetings,

(F) compilation of voting sheets of motions made,

(G) responding to inquiries posed during the issuance of the RFP as guided by consultant,

(H) collection of incoming proposals,

(I) review of proposals to ensure for initial compliance as defined in the RFP,

(J) preparation of negotiations materials,

(K) securing site for negotiations,

(L) logistics,

(M) communications to carriers as directed by Negotiation Team members and

(N) communications to the consultant except during designated official team meetings.

(2) The publication date of the RFP is determined by the Chairperson of the Negotiation Team.

(d) Negotiation Team Members: Negotiation Team members are responsible for the development of the minimum qualifications for;

(1) proposals,

(2) development of the ranking system used to rank proposals,

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- (3) reviewing proposals upon conclusion of initial review by consultant,
- (4) examination of the financial information,
- (5) rating of proposals,
- (6) determination of qualified carriers after review,
- (7) approval and recommendation from the consultant and Department of Administration,
- (8) ranking of carriers,
- (9) negotiations,
- (10) development of contractual language requirements, and
- (11) the final recommendation, after obtaining guidance from the Consultant, Insurance Commissioner and Attorney General, to the Governor for approval.

2019 NOTE: Subsection designations added pursuant to authority granted by 1 GCA § 1606.

§ 13116. Amendment.

These Rules of Procedure may be amended by the Negotiating Team pursuant to the Administrative Adjudication Law, 5 GCA § 9301.

§ 13117. Compliance With Law.

The Negotiating Team shall retain consultants cognizant of federal and Guam laws as applicable to the provision of health and dental insurance and health and dental services, and as applicable to the solicitation and acquisition of group health and dental insurance programs for government employees, retirees, families and survivors.

§ 13118. Vice Chairperson.

There shall be a Vice Chairperson of the Negotiating Team chosen from among the members of the Negotiating Team by a majority vote of the Negotiating Team. The Vice Chairperson

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shall serve as Chairperson at any meeting of the Negotiating Team at which the Director of Administration is unable to attend.

CHAPTER 14

**GOVERNMENT OF GUAM HEALTHY
VENDING MACHINE POLICY**

SOURCE: Added by P.L. 32-085:2 (Nov. 27, 2013) as Chapter 13. Renumbered by the Compiler as authorized by the rules and regulations.

2019 NOTE: Subsection designations have been added/altered throughout pursuant to authority granted by 1 GCA § 1606.

- § 14101. Background.
- § 14102. Rules and Regulations.
- § 14103. Policy: Placement of Vending Machines.
- § 14104. Policy: Food and Beverage Operations.
- § 14105. Policy: Nutrition Facts.
- § 14106. Policy: Food and Beverage Nutrition Guidelines.
- § 14107. Policy: Consultation.
- § 14108. Policy: Amendment of Nutrition Standards.
- § 14109. Policy: Implementation.
- § 14110. Policy: Evaluation

Attachment : List of Approved Snacks and Beverages

§ 14101. Background.

(a) The Department of Public Health and Social Services recognizes the impact that the increasing rates of obesity and overweight are having on chronic diseases, quality of life, and health care costs.

(1) Consumption of just 100 extra calories a day from foods such as soda and snacks can cause a ten pound weight gain each year.

(2) Individual weight loss of as little as five to ten pounds can delay or prevent the onset of type 2 diabetes, metabolic syndrome, hypertension, etc. and can reduce chronic disease-related health care costs.

(b) According to the Department of Public Health & Social Services (DPHSS), in 2009 a combined total of 61.2 % of the island's adult population was either overweight or obese and according to the 2007 Youth Risk Behavior Surveillance System

(YRBS) a combined total of 40.9% middle and high school students described themselves as overweight.

(c) The vision of the Government of Guam's Healthy Vending Machine Policy is to promote the prevention of chronic diseases by providing access to healthier beverages and foods from vending machines within the workplace.

(1) With most employees spending nearly half their waking hours on the job, worksites can play an essential role in helping people make healthy lifestyle choices. According to the Comprehensive Wellness Program Employee Interest Survey conducted in September 2010, respondents reported that they would buy healthy snacks at the worksite if they were available. Through this policy, the Department of Public Health and Social Services is actively promoting access to healthier items at the workplace, within offices, and public facilities that serve island residents.

(2) Mandating healthier food options at the workplace and within offices and public facilities that serve island residents may be one of the most cost effective changes to immediately improve employee eating habits and to provide access to healthier beverage and food options to the public. By implementing this Healthy Vending Machine Policy, the Government is taking a reasonable first step to combat the obesity epidemic.

(d) The Government of Guam Healthy Vending Machine Policy requires that 50% of all foods and beverages offered in Government-contracted food and beverage vending machines within Government facilities and offices shall adhere to specific guidelines.

(1) These guidelines promote good nutrition and healthy environments to prevent obesity and the diseases associated with it.

(2) The guidelines further provide restrictions on the calorie, fat, saturated fat and sugar content of foods and beverages. A list of examples of foods and beverages that comply with these guidelines is included in Attachment 1.

§ 14102. Rules and Regulations.

(a) This policy covers all machines designed to dispense food and/or beverages located within all government owned, leased and/or operated spaces or facilities.

(1) Should a Healthy Vending Machine Policy or public law exist at any government of Guam agency, and that agency's policy requires a percentage greater than 50% of the items sold in vending machines follow specific nutritious guidelines, that agency's policy will remain in effect and supersede this Healthy Vending Machine Rules and Regulations requirement of 50%.

(2) If, however, that agency's policy does not require that 50% of the items sold in the vending machines follow specific nutritious guidelines, this Healthy Vending Machine Rules and Regulations will supersede that agency's policy.

(b) Each agency-designated HEALTH Coach or other designee shall have primary responsibility for the management and administration of the vending machines that are located within their respective department and facility. The Government of Guam HEALTH Steering Committee shall have the primary responsibility for consulting with HEALTH Coaches or designees regarding established nutrition standards and selections as outlined and approved by this policy and assisting with the implementation of the policy.

(c) Agency Heads, or their appointed designee, shall be responsible for the dissemination, implementation, and compliance with the approved policy for all vending machines either owned or leased that are located within their departments and facilities. Failure to comply with, or violation of any approved provisions of these rules and regulations shall result in the immediate removal or disablement of the vending machine. The Department, in the regular conduct of inspections of vending machines pursuant to this Chapter, shall additionally inspect vending machines on government of Guam premises for compliance.

§ 14103. Policy: Placement of Vending Machines.

(a) No independently owned vending machines shall be allowed on government property without the prior written

approval of the Agency Head or his/her designee. Snack and beverage vending machines shall be permitted to operate on government property for the sale of food and beverage items to government employees and members of the public who use the facilities subject to the provisions of this policy.

(b) The Agency Head or his/her designee shall have the authority to authorize the placement of vending machines in strategic locations throughout government facilities where traffic patterns or other circumstances warrant their placement.

(1) Prior to the installation, the location of a new or replacement vending machine shall be reviewed and approved by the Agency Head or his/her designee. Machines shall not be located in corridors unless adequate space has been approved and/or provided as determined by both by the Facilities Manager and, if applicable, the local Fire Marshall.

(2) No vending machine shall in any way obstruct or otherwise interfere with emergency exits or access areas.

(3) All vending machines must be securely fastened to a wall, floor, or other structure or otherwise secured in such a way as to prevent it from being rocked, bounced, or tipped.

(4) Failure to comply with or violation of any approved provisions of this policy shall result in the immediate removal or disablement of the vending machine.

§ 14104. Policy: Food and Beverage Operations.

(a) All food and beverage products must be delivered and placed in machines in their original wrappers or in a sanitized bulk dispenser that fits on the machine as a unit and meets the nutritional standards outlined in Section D Food and Beverage Nutrition Guidelines.

(b) The areas surrounding all vending machines are to be kept clean, and proper waste and/or recycling receptacles shall be provided in the immediate area of the machines.

§ 14105. Policy: Nutrition Facts.

The vending machine operator shall provide a sign in close proximity to each and every article of food/beverage or the

selection button that includes a clear and conspicuous statement disclosing the number of calories, fat, sugar, and sodium contained in the article.

§ 14106. Policy: Food and Beverage Nutrition Guidelines.

(a) Beverages. In reference to PL 31-141, as amended, effective January 2014, at least 50% of beverages offered in a vending machine must contain one or a combination of the following:

(1) Water;

(2) Coffee or Tea;

(3) Nonfat or reduced fat milk (including soy or cow's milk, chocolate or other flavored milk not containing more than fifteen (15) grams of added sugar per 250 gram serving or three (3) teaspoons of sugar per one (1) cup of milk;

(4) One hundred (100%) percent fruit/vegetable juice;

(5) Fruit based drinks containing one hundred (100%) percent fruit juice and no added caloric sweeteners;

(6) All other non-caloric beverages, including diet sodas; or

(7) Sport drinks less than or equal to 100 calories.

(b) Snacks/Food. At least 50% of all snacks/foods offered in vending machine shall meet the following criteria:

(1) Not more than 250 calories.

(2) Not more than thirty-five (35%) percent of the calories shall be from fat with the exception of nuts and seeds; snack mixes and other foods of which nuts are a part must meet the thirty five (35%) requirement.

(3) Not more than ten (10%) percent of the calories shall be from saturated fat.

(4) Shall not contain trans fats that are added during processing (hydrogenated oils and partially hydrogenated oils).

(5) Not more than thirty-five (35%) percent of the total weight shall be from sugar and caloric sweeteners with

the exception of fruits and vegetables that have not been processed with added sweeteners or fats.

(6) At least one (1) item meeting the snack criteria in each vending machine shall also meet the FDA definition of “Low Sodium” (< 140mg per serving) Further, the policy recommends that options within the vending machine contain items that include at least two (2) grams of dietary fiber.

(7) Not more than 360 mg of sodium per serving.

(c) Considerations:

(1) Avoid fat content above 3 gm/serving when possible;

(2) Avoid products with chocolate as prominent ingredient;

(3) Avoid products with first or second ingredient as salt or sugar;

(4) Avoid sugar or salt coated products;

(5) Avoid sodium content above 50 mg/serving when possible;

(6) Avoid foods that have the following ingredients:

(A) Aspartame, MSG, Ajinomoto, Accent, Glutamate, Textured protein, Monosodium glutamate, Hydrolyzed protein (any protein that is hydrolyzed), Monopotassium glutamate, Glutamic acid, Yeast extract, Calcium caseinate, Yeast food, Sodium caseinate, Autolyzed yeast, Gelatin, Yeast nutrient (these are all possible forms of MSG);

(B) Splenda;

(C) Acesulfame-K;

(D) Nitrite;

(E) caffeine;

(F) Sulfite;

(G) Saccharin;

(H) BHA or BHT.

(d) In reference to P.L. 31-141, effective January 2012, at least 50% of the snacks/foods sold in vending machines must abide by the criteria outlined above.

§ 14107. Policy: Consultation.

Government of Guam agency designated HEALTH Coaches or designees will be available to consult with vending machine vendors on item placement in machines, healthy item identification strategies, and consumer outreach and education.

§ 14108. Policy: Amendment of Nutrition Standards.

This policy may be amended from time to time as new reference material that may have a direct impact on additional healthy options that are within vending machines becomes available.

§ 14109. Policy: Implementation.

(a) Time Line. The policy proposes that by January 2012, at least 50% of all foods and beverages offered in government-contracted food and beverage vending machines within government facilities and offices shall adhere to the specific guidelines established in this Healthy Vending Machine Policy.

(b) Contract Process:

(1) Existing Vending Machine Contracts: Government agencies which have existing vending machine contracts would be expected to obtain compliance from current vendors.

(2) Future Vending Machine Contracts: The Healthy Vending Machine Policy shall be part of all future vending machine contracts. Therefore, all future Request For Proposals (RFPs) will stipulate that vendors will comply with the criteria set forth in said Policy.

§ 14110. Policy: Evaluation.

(a) To evaluate the degree of compliance to the Healthy Vending Machine Policy, it is important to involve and get the support of the vendors, who are in the position to compile and monitor the data on consumption of the food items in the vending machines.

(b) At the same time, any change in the attitudes and perceptions of the consumers of vending machine products in Government of Guam (GovGuam) agencies should also be measured over time. The items included in the Comprehensive Wellness Program Employee Interest Survey which was conducted in September 2010 should provide the baseline attitudes toward healthy vending machines. Consequently, the evaluation of compliance should focus on the response of two populations: (1) the consumers, and (2) the vendors.

(1) Consumers

(A) Self-report surveys of vending machine product consumption of a random sample of GovGuam employees will be conducted every twelve (12) months in order to measure changes in individual attitudes

(B) Changes in attitudes toward vending machine product consumption will be monitored over time.

(2) Vendors

(A) A pretest of vendors' attitudes toward healthy vending machine products and their response to the policy will be conducted before it is implemented.

(B) Vendor training will be conducted to acquaint them with the policy and the guidelines established for healthy vending machines.

(C) Voluntary compliance among current vendors will be sought; new vendors will be required to comply with the policy.

(D) Vendors will be required to provide information on sales of vending machine products every six (6) months. These reports should provide a detailed inventory of items sold in machines, as indicated in a checklist of nutritional standards which have been established.

(E) A posttest to measure vendors' attitudes will be conducted six (6) months after the policy is introduced.

(F) After the initial pretest-posttest period, an analysis of changes, if any, will be conducted.

(c) Every six (6) months thereafter, random self-report surveys on vending machine utilization will be conducted. At the same time, vendors will also be asked to report vending machine consumption. DPHSS coordinates the surveys and ensure that vendors will submit the reports in a timely manner.

ATTACHMENT

List of Approved Snacks and Beverages.

BEVERAGES:

- Water
- Coffee or Tea
- Nonfat or reduced fat milk (chocolate or other flavored milk), shelf stable portion size
- Soy milk (chocolate or other flavored milk)
- Fruit/vegetable juice – 100% juice, shelf stable portion size
- Non-caloric beverages, including diet sodas

SNACKS:

- Popcorn (light or no butter)
- Pop Tarts (like those allowable in Public School machines)
- Trail mix (dry nuts & dry fruits, coconut meat, etc.)
- Granola bars
- Fig bars
- Nuts – 1 serving per container (peanuts, cashews, pine nuts, almonds, pistachio nuts, etc.)
- Mixed nuts
- Seeds – 1 serving size container (unsalted sunflower, pumpkin)
- Raisins

- Dried fruits – 1 serving size container (apples, prunes, peaches, apricots, etc.)
- Pretzels (lightly salted or non-salted)
- Dry roasted or baked taro, breadfruit, or carrot chips
- Canned (1 serving size) Fruit Cocktail (and any other available serving size canned fruits)
- Cheese & cracker snacks
- Peanut butter & cracker snacks
- Dry roasted soy beans
- Dry roasted peas
- Dry Seaweed
- Rice snack crackers
- Oatmeal cookies (with raisins & nuts if possible)
- Beef Jerky
- Fruit
- Low fat yogurt
- Similar food groups approved by USDA, FNS, USFDA and Food & Nutrition Services Management Division-GDOE (former GPSS).
