

**I MINA' TRENTAI UNU NA LIHESLATURAN GUÅHAN
2011 (FIRST) REGULAR SESSION**

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Bill No. 140-31(car)

Introduced by:

B.J.F. CRUZ 
T.R. MUNA BARNES 

**AN ACT TO AMEND §§ 5004, 5008, 5030, 5121, 5122, 5215, 5216,
5233, 5425, 5480, 5481, 5601, AND 5707 OF TITLE 5, GUAM
CODE ANNOTATED AND TO ADD NEW §§ 5126, 5425.2, AND
5634 TO TITLE 5, GUAM CODE ANNOTATED; RELATIVE
TO GOVERNMENT OF GUAM PROCUREMENT.**

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1. Legislative Findings.** *I Liheslaturan Guåhan* finds that the
3 existing regulations and statutes governing the procurement of goods, services,
4 supplies, and construction by the agencies, autonomous and semi-autonomous
5 agencies, public corporations and other instrumentalities of the government of
6 Guam are largely based on the American Bar Associations (ABA) Model
7 Procurement Code (MPC) of 1979, and that substantial problems and issues have
8 arisen through the years with the application of or non-compliance with these rules,
9 regulations and statutes. A number of such concerns, *inter alia*, include the
10 following claims: (1) that the procurement statutes and regulations do permit local
11 government agencies to obtain or transfer goods, supplies, construction or services
12 between each other unless they do so competitively under the procurement code,
13 (2) that there are situations where professional services are procured without or in
14 the absence of formal written contracts which would ordinarily require the
15 additional safeguard of having an attorney review the same, (3) that price cannot
16 be considered a factor in Request For Proposals (RFPs) for evaluating proposals

1 because it is not expressly provided for in the statutes or regulations, and (4) there
2 are even more serious claims that the current procurement protests statutes and
3 regulations unnecessarily allow frivolous, costly, and time-consuming litigation
4 where delay of the procurement becomes a more important aim than having a
5 procurement system that provides for the fair, equitable and expeditious treatment
6 of all parties in the procurement system.

7 **Section 2.** Section 5004 of Title 5, Guam Code Annotated, is hereby
8 *amended* to read:

9 **“§ 5004. Application of this Chapter.** (a) General Application. This
10 Chapter applies only to contracts solicited or entered into after the effective
11 date of this Chapter unless the parties agree to its application to a contract
12 solicited or entered into prior to the effective date.

13 (b) Application to Territorial Procurement. This Chapter shall apply to
14 every expenditure of public funds irrespective of their source, including
15 federal assistance funds except as otherwise specified in §5501 of this
16 Chapter, by this Territory, acting through a governmental body as defined
17 herein, under any contract, except that this Chapter shall not apply to either
18 grants or contracts between the Territory and another government, or
19 between one government of Guam agency, autonomous agency, semi-
20 autonomous agency, public corporation, or instrumentality, and another
21 government of Guam agency, autonomous agency, semi-autonomous
22 agency, public corporation, or instrumentality. Nothing in this Chapter or in
23 regulations promulgated hereunder shall prevent any governmental body or
24 political subdivision from complying with the terms and conditions of any
25 grant, gift, bequest, or cooperative agreement.”

1 **Section 3.** Section 5008 of Title 5, Guam Code Annotated, is hereby
2 *amended* to read:

3 “**§ 5008. Policy In Favor of Local Procurement.** All procurement
4 of supplies and service shall be made from among businesses licensed to do
5 business on Guam and that maintain an office or other facility on Guam,
6 whenever a business that is willing to be a contractor is:

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

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

15 (c) a business that has a bonafide retail or wholesale business location
16 that regularly carries an inventory on Guam of a value of at least one half of
17 the value of the bid or One Hundred Fifty Thousand dollars (\$150,000)
18 which ever is less, of supplies and items of a similar nature to those being
19 sought; or

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

1 Procurement of supplies and services from off Guam may be made if
2 no business for such supplies or services may be found on Guam or if the
3 total cost F.O.B. job site, unloaded, of procurement from off island is no
4 greater than eighty-five percent (85%) of the total cost F.O.B. job site,
5 unloaded, of the same supplies or services when procured from a business
6 licensed to do business on Guam that maintains an office or other facility on
7 Guam and that is one of the above-designated businesses entitled to
8 preference. This section shall not apply to professional services which are
9 awarded on the basis of best qualifications without pricing pursuant to §
10 5216 of this Chapter.”

11 **Section 4.** Section 5030 of Title 5, Guam Code Annotated, is hereby
12 *amended* to read:

13 “**§ 5030. Definitions.** As used in this Chapter, unless the context in
14 which they are used requires a different meaning, or unless a different
15 definition is prescribed for a particular Chapter, Article or provision:

16 (a) Award means granting a contract; an award is the execution of a
17 contract between the government and the bidder or offeror as the result of
18 the procurement process; an award takes place at that moment when an
19 enforceable contract exists between the government and the offeror or
20 bidder.

21 (b) *Business* means any corporation, partnership, individual, sole
22 proprietorship, joint stock company, joint venture, or any other private legal
23 entity.

24 (c) *Change Order* means a written order signed by the Procurement
25 Officer, directing the contractor to make changes which the changes clause

1 of the contract authorizes the Procurement Officer to order without the
2 consent of the contractor.

3 (d) *Chief Procurement Officer* means the person holding the position
4 created in §5110 of this Chapter, as the head of the central procurement
5 office of Guam.

6 (e) *Contract* means all types of territorial agreements, regardless of
7 what they may be called, for the procurement or disposal of supplies,
8 services or construction.

9 (f) *Contract Modification* means any written alteration in
10 specifications, delivery point, rate of delivery, period of performance, price,
11 quantity or other provisions of any contract accomplished by mutual action
12 of the parties to the contract.

13 (g) *Contractor* means any person having a contract with a
14 governmental body.

15 (h) *Construction* means the process of building, altering, repairing,
16 improving, or demolishing any public structure or building, or other public
17 improvements of any kind to any public real property. It does not include the
18 routine operation, routine repair, or routine maintenance of existing
19 structures, buildings, or real property.

20 (i) *Data* means recorded information, regardless of form or
21 characteristic.

22 (j) *Designee* means a duly authorized representative of a person
23 holding a superior position.

24 (k) *Employee* means an individual drawing a salary from a
25 governmental body, whether elected or not, and any noncompensated
26 individual performing personal services for any governmental body.

1 (l) *Governmental Body* means any department, commission, council,
2 board, bureau, committee, institution, agency, government or public
3 corporation, authority *or* other establishment *or* establishment *or* official of
4 the executive branch of the government of Guam, *except* for the Government
5 of Guam Retirement Fund, Guam Community College, the University of
6 Guam, the Department of Education, and the Guam Memorial Hospital
7 Authority.

8 (m) *Grant* means the furnishing by the Territory of assistance,
9 whether financial or otherwise, to any person to support a program
10 authorized by law. It does not include an award whose primary purpose is to
11 procure an end product, whether in the form of supplies, services or
12 construction; a contract resulting from such an award is not a grant but a
13 procurement contract.

14 (n) *May* denotes the permissive.

15 (o) *Person* means any business, individual, union, committee, club,
16 other organization or group of individuals.

17 (p) *Procurement* means buying, purchasing, renting, leasing *or*
18 otherwise acquiring any supplies, services or construction. It also includes
19 all functions that pertain to the obtaining of any supply, service or
20 construction, including description of requirements, selection and
21 solicitation of sources, preparation and award of contract, and all phases of
22 contract administration.

23 (q) *Procurement Officer* means any person duly authorized to enter
24 into and administer contracts and make written determinations with respect
25 thereto. The term also includes an authorized representative acting within the
26 limits of authority.

1 (r) Purchasing agency means any governmental body of the Territory
2 including but not limited to any government of Guam agency, autonomous
3 agency, semi-autonomous agency, public corporation, or instrumentality
4 other than the Chief Procurement Officer or the Director of Public Works
5 which is authorized by this Chapter or its implementing regulations, or by
6 way of delegation from the Chief Procurement Officer, to enter into
7 contracts.

8 (s) Regulation shall have the meaning given in the Administrative
9 Adjudication Law.

10 (t) Services means the furnishing of labor, time or effort by a
11 contractor, not involving the delivery of a specific end product other than
12 reports which are merely incidental to the required performance. This term
13 shall not include any form of employment relationship with the government
14 or collective bargaining agreements. Services also includes printing and
15 processing for printing finished products, such as books, reports, and other
16 items which are, when delivered in finished form and are not to be further
17 processed by the using agency.

18 (u) Shall denotes the imperative.

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

23 (w) Using agency means any governmental body of the Territory
24 including but not limited to any government of Guam agency, autonomous
25 agency, semi-autonomous agency, public corporation, or instrumentality

1 which utilizes any supplies, services or construction procured under this
2 Chapter.

3 (x) *Entity* means any department, agency whether line, autonomous or
4 semi-autonomous, board, commission, instrumentality, public corporation or
5 branch of the government of Guam and any corporation or person expending
6 funds appropriated from the Government of Guam.

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

11 **Section 5.** Section 5121 of Title 5, Guam Code Annotated, is hereby
12 *amended* to read:

13 **“§ 5121. Authority to Contract for Certain Services and Approval**
14 **of Contracts.** (a) General Authority. Notwithstanding any other provisions
15 of law, for the purpose of procuring the services of accountants, physicians,
16 lawyers, dentists, licensed nurses, other licensed health professionals, and
17 other professionals, any governmental body of Guam may act as a
18 purchasing agency and contract on its own behalf for such services, *subject*
19 *to* this Chapter and regulations promulgated by the Policy Office and that
20 procurement of professional services under this Section also requires a
21 written contract in a form approved by the agency’s attorney or the Office of
22 the Attorney General, but this Subsection shall *not* authorize the procuring
23 of such services where any given governmental body is otherwise prohibited
24 from procuring such services.

25 (b) Approval of Contracts for Legal Services. No contract for the
26 services of legal counsel in the Executive Branch shall be executed without

1 the approval of the Attorney General. Nothing in this Section or Chapter
2 shall preclude the Attorney General or his designee from participating in
3 negotiations for any contract upon the request of the government officer or
4 agency primarily responsible for such negotiations.

5 (c) Approval of Contracts Generally. The Chief Procurement Officer,
6 or his designee, or a procurement officer of an agency authorized to procure
7 the services or supplies in question, as stated in the Rules promulgated by
8 the Policy Office, shall execute all contracts for the government of Guam.
9 The Chief Procurement Officer may approve standard form contracts or
10 purchase orders which shall include a demonstration of compliance with §§
11 5801 & 5802 of this Chapter, where applicable, and once such approval of
12 the standard form is given, contracts or purchase orders made on such form
13 may be executed without the further approval of the Chief Procurement
14 Officer unless he has reserved such power of approval pursuant to the
15 applicable rules promulgated by the Policy Office.

16 (d) Approval of Contracts by Department of Revenue and Taxation.
17 Notwithstanding any other provision of law, the Director of the Department
18 of Revenue and Taxation or his designee shall have exclusive authority to
19 approve and execute all contracts for the procurement of supplies, license
20 plates, safety decals, tax forms, tax booklets, and printing services for the
21 department.

22 (e) Approval of Contracts by Government of Guam Retirement Fund.
23 Notwithstanding any other provision of law, the Board of Trustees of the
24 Government of Guam Retirement Fund shall have exclusive authority to
25 approve and execute all contracts for the procurement of professional
26 services associated with the operation of the Fund.”

1 **Section 6.** Section 5122 of Title 5, Guam Code Annotated, is hereby
2 *amended* to read:

3 **“§ 5122. U.S. Government.** The General Services Agency shall
4 procure supplies from the United States when the cost to the General
5 Services Agency, F.O.B. job site, unloaded, and if required by
6 specifications, to include maintenance is less by ten percent (10%) than from
7 other contractors.”

8 **Section 7.** A New Section 5126 of Title 5, Guam Code Annotated, is
9 hereby *added* and enacted to read:

10 **“§ 5126. Joinder or Mutual Use of Contracts by Governmental**
11 **Entities.** The Chief Procurement Officer, the Director of Public Works and
12 any purchasing agency are authorized to join or use the contracts of other
13 states or other government units within or outside of Guam, with the
14 authorization of the contracting vendor. The other states or other
15 government units wherever located are not liable for the obligations of the
16 Guam governmental entity which joins or uses the contract. Before any
17 joinder or mutual use may take place, the contracting officer must determine
18 in writing that the other jurisdiction’s contract has gone through a
19 competitive procurement process.”

20 **Section 8.** Section 5215 of Title 5, Guam Code Annotated, is hereby
21 *amended* to read:

22 **“§ 5215. Emergency Procurement.** Notwithstanding any other
23 provision of this Chapter, the Chief Procurement Officer, the Director of
24 Public Works, the head of a purchasing agency, or a designee of either
25 officer may make or authorize others to make emergency procurements
26 when there exists a threat to public health, welfare, or safety under

1 emergency conditions as defined in regulations promulgated by the Policy
2 Officer; provided that such emergency procurements shall be made with
3 such competition as is practicable under the circumstances, and further
4 provided that the procurement agency must solicit at least three (3) informal
5 price quotations, if time allows must give notice to all contractors from the
6 qualified bid list who have provided the needed supplies and services to the
7 government within the preceding twelve (12) months, and must award the
8 procurement to the firm with the best offer, as determined by evaluating cost
9 and delivery time. If the emergency procurement is of a service specified in
10 § 5121(a) of this Chapter, then the procuring agency must solicit at least
11 three (3) contractors for their qualifications and interest in providing the
12 emergency services, and their ability to perform the emergency services
13 within the time frames specified by the procuring agency, and the procuring
14 agency shall award the procurement to the contractor who the procuring
15 agency determines best meets the agency's requirements. No emergency
16 procurement or combination of emergency procurements may be made for
17 an amount of goods or supplies greater than the amount of such goods and
18 supplies which is necessary to meet an emergency for the thirty (30) day
19 period immediately following the procurement, except that emergency
20 procurement of services specified in § 5121(a) may be for the time period
21 necessary to complete the project contemplated by the procuring agency. If
22 the procuring agency determines in writing that it is impractical to obtain
23 goods or supplies for thirty (30) days because of the nature of the
24 emergency, then the procuring agency may obtain an amount of goods and
25 supplies sufficient for up to ninety (90) days. A written determination of the
26 basis for the emergency and for the selection of the particular contractor

1 shall be included in the contract file. The requirements for a written
2 determination for the emergency shall be met if the procurements are being
3 made on the basis of the Governor's declaration of an emergency situation
4 by Executive Order if such Order states that emergency procurement may be
5 resorted to for the purposes of the Order. Unless authorized by an Executive
6 Order declaring an emergency, no emergency procurement may be made
7 except on a certificate made under penalty of perjury by the Chief
8 Procurement Officer, Director of Public Works or the head of a purchasing
9 agency, as the case may be. Certified copies of the certificate shall be sent,
10 prior to award and as a condition thereof, to the Governor and Speaker of the
11 Legislature. The certificate shall contain the following:

12 (1) a statement of the facts giving rise to the emergency;

13 (2) the factual basis of the determination that an emergency
14 procurement is necessary; *and*

15 (3) a statement that emergency procurement is not being used
16 solely for the purpose of avoidance of the provisions of this Chapter.

17 In addition to any other requirement, the Governor must approve in
18 writing all authorizations for emergency procurement.”

19 **Section 9.** Section 5216 of Title 5, Guam Code Annotated, is hereby
20 *amended* to read:

21 **“§ 5216. Competitive Selection Procedures for Services Specified**
22 **in §5121 of this Chapter.** (a) Conditions for Use. The services specified in
23 § 5121(a) of this Chapter shall be procured in accordance with this Section,
24 except as authorized under §§ 5214 or 5215 of this Chapter. Services for
25 ~~architecture, engineering, construction, land surveying, environmental~~
26 ~~assessment and other such services~~ shall be procured by competitive sealed

1 bidding and shall also follow the requirements in accordance with Article 5
2 of this Chapter.

3 (b) Statement of Qualifications. Persons engaged in providing the
4 types of services specified in § 5121(a) of this Chapter may submit
5 statements of qualifications and expressions of interest in providing such
6 types of services. The Procurement Officer may specify a uniform format for
7 statements of qualifications. Persons may amend these statements at any
8 time by filing a new statement.

9 (c) Public Announcement and Form of Request for Proposals.
10 Adequate notice of the need for such services shall be given by the
11 purchasing agency through a Request for Proposals. The Request for
12 Proposals shall describe the services required, list the type of information
13 and data required of each offeror, and state the relative importance of
14 particular qualifications.

15 (d) Discussions. The head of the purchasing agency or a designee of
16 such officer may conduct discussions with any offeror who has submitted a
17 proposal to determine such offeror's qualifications for further consideration.
18 Discussions shall not disclose any information derived from proposals
19 submitted by other offerors.

20 (e) Award. Award shall be made to the offeror determined in writing
21 by the head of the purchasing agency or a designee of such officer to be best
22 qualified based on the evaluation factors set forth in the Request for
23 Proposals, and negotiation of compensation determined to be fair and
24 reasonable. If compensation cannot be agreed upon with the best qualified
25 offeror, the negotiations will be formally terminated with the selected
26 offeror. If proposals were submitted by one or more other offerors

1 determined to be qualified, negotiations may be conducted with such other
2 offeror or offerors, in the order of their respective qualification ranking, and
3 the contract may be awarded to the offeror then ranked as best qualified if
4 the amount of compensation is determined to be fair and reasonable.

5 (f) Evaluation Factors. The Request for Proposals shall state the
6 relative importance of factors and subfactors, if any. Price may be included
7 as a factor or sub-factor if relevant.”

8 **Section 10.** Section 5233 of Title 5, Guam Code Annotated, is hereby
9 repealed and re- enacted to read:

10 **“§ 5233. Disclosure of Major Shareholders.** (a) As a condition of
11 submitting a bid or offer ~~bidding~~, any partnership, sole proprietorship or
12 corporation doing business with the government of Guam shall submit an
13 affidavit executed under oath that lists the name and address of any person
14 who has held more than ten percent (10%) of the outstanding interest or
15 shares in said partnership, sole proprietorship or corporation at any time
16 during the twelve (12) month period immediately preceding submission of a
17 bid, or, that it is a not for profit organization that qualifies for tax exemption
18 under the Internal Revenue Code of the United States or the Business
19 Privilege Tax law of Guam, Title 12, Guam Code Annotated, Section
20 26203(c). With the exception of not for profit organizations, the affidavit
21 shall contain the number of shares or the percentage of all assets of such
22 partnership, sole proprietorship or corporation which have held by each such
23 person during the twelve (12) month period. In addition, the affidavit shall
24 contain the name and address of any person who has received or is entitled
25 to receive a commission, gratuity or other compensation for procuring or
26 assisting in obtaining business related to the bid or offer and shall also

1 contain the amounts of any such commission, gratuity or other
2 compensation. The affidavit shall be open and available to the public for
3 inspection and copying.

4 (b) As a condition of submitting a bid or offer, during the pendency
5 of the bid or offer, and as a condition of accepting an award of a contract
6 with the government for supplies or services, during the pendency of the
7 contract, any partnership, sole proprietorship or corporation that has a
8 material change in the form of its business, or a material change in the
9 interest or shares of ownership in the sole proprietorship, partnership or
10 corporation such that there is a change in the identity of any person who
11 holds more than ten percent (10%) of the outstanding interest or shares in
12 said partnership, sole proprietorship or corporation, shall submit an affidavit
13 executed under oath setting out that information identified here that has
14 changed since submission of an affidavit previously submitted pursuant to
15 this section.

16 (c) Any partnership, sole proprietorship or corporation that is a sub-
17 contractor under a contract with the government of Guam, and whose sub-
18 contract has a value more than fifty-one percent (51%) of the prime contract,
19 shall be required to comply with subsection (a) and (b) of this section.”

20 **Section 11.** Section 5425 of Title 5, Guam Code Annotated, is hereby
21 *amended* to read:

22 **“§ 5425. Authority to Resolve Protested Solicitations and Awards.**

23 **(a) Right to Protest.** Any actual or prospective bidder, offeror, or contractor
24 who ~~may be~~ is aggrieved in connection with the method of source selection,
25 solicitation or award of a contract, may protest to the Chief Procurement
26 Officer, the Director of Public Works or the head of a purchasing agency.

1 An aggrieved person or party means an actual or prospective bidder or
2 offeror, or contractor whose economic interest might be affected
3 substantially and directly by the issuance of a solicitation, the award of a
4 contract, or by the failure to award a contract, and whether an actual or
5 prospective bidder or offeror has economic interests will depend upon the
6 circumstances of each case. The protest shall be submitted in writing within
7 ~~fourteen (14)~~ seven (7) calendar days after such aggrieved person knows or
8 should know of the facts giving rise thereto, and the written protest shall be
9 accompanied by a protest bond in accordance with §5425.2. Any issues
10 raised by the protesting party after the seven (7) days shall not be considered
11 as part of the protest.

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

19 **(c) Decision.** If the protest is not resolved by mutual agreement, the
20 Chief Procurement Officer, the Director of Public Works, the head of a
21 purchasing agency, or a designee of one of these officers shall promptly
22 issue a decision in writing within seven (7) calendar days of receiving the
23 written protest. The decision shall:

24 (1) state the reasons for the action taken; and

25 (2) inform the protestant of its right to administrative and
26 judicial review.

1 **(d) Notice of Decision.** A copy of the decision under Subsection (c)
2 of this Section shall be mailed or otherwise furnished immediately to the
3 protestant and any other party intervening.

4 **(e) Appeal.** A decision under Subsection (c) of this Section including
5 a decision there under regarding entitlement to costs as provided by
6 Subsection (h) of this Section, may be appealed by the protestant, to the
7 Public Auditor within ~~fifteen (15)~~ seven calendar (7) days after receipt by
8 the protestant of the notice of decision. The Public Auditor or his or her
9 hearing officer shall hold a hearing within forty (40) calendar days of receipt
10 of protestant's notice of appeal unless good cause requires an extension of
11 time, in which case the hearing in the protestant's appeal shall be held within
12 sixty (60) calendar days of receipt of protestant's appeal. The Public
13 Auditor shall render a written decision of the protestant's appeal within
14 thirty (30) calendar days of the completion of the hearing on the issue or
15 issues on appealed from.

16 **(f) Finality.** A decision of the Public Auditor shall be is final and
17 conclusive unless fraudulent, or unless an aggrieved person adversely
18 affected by the decision commences an action in the Superior Court in
19 accordance with Subsection (a) of §5480 of this Chapter.

20 **(g) Stay.** In the event of a timely protest under Subsection (a) of this
21 Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall
22 not proceed further with the solicitation or with the award of the contract
23 prior to final resolution of such protest, and any such further action is void,
24 unless:

25 (1) The Chief Procurement Officer or the Director of Public
26 Works after consultation with and written concurrence of the head of

1 the using or purchasing agency and the Attorney General or
2 designated Deputy Attorney General, makes a written determination
3 that the solicitation or award of the contract without delay is necessary
4 to protect substantial interests of the Territory agency, autonomous
5 agency, semi-autonomous agency, public corporation, or
6 instrumentality; and

7 (2) Absent a declaration of emergency by the Governor, the
8 protestant has been given at least two (2) days notice (exclusive of
9 territorial holidays); *and*

10 (3) If the protest is pending before the Public Auditor or the
11 Court, the Public Auditor or Court has confirmed such determination
12 of substantial interest was an abuse of discretion by the Chief
13 Procurement Officer or the Director of Public Works or head of the
14 purchasing or using agency and the Attorney General or designated
15 Attorney General, or if no such protest is pending, no protest to the
16 Public Auditor of such determination is filed prior to expiration of the
17 two (2) day period specified in Item (2) of Subsection (g) of this
18 Section.

19 (h) **Entitlement to Costs.** In addition to any other relief or remedy
20 granted under Subsection (c) or (e) of this Section or under Subsection (a) of
21 § 5480 of this Chapter, including the remedies provided by Part B of Article
22 9 of this Chapter, when a protest is sustained, the protestant shall be entitled
23 to the reasonable costs incurred in connection with the solicitation and
24 protest, including bid preparation costs, excluding attorney's fees, if:

25 (1) the protestant should have been awarded the contract under
26 the solicitation but was not; *or*

1 (2) there is a reasonable likelihood that the protestant may have
2 been awarded the contract but for the breach of any ethical obligation
3 imposed by Part B of Article 11 of this Chapter or the willful or
4 reckless violation of any applicable procurement law or regulation.
5 The Public Auditor shall have the power to assess reasonable costs
6 including reasonable attorney fees incurred by the government,
7 including its autonomous or semi-autonomous agencies,
8 instrumentalities and public corporations, against a protestant upon its
9 finding that the protest was made fraudulently, frivolously or solely to
10 disrupt the procurement process.”

11 **Section 12.** A new Section 5425.2 of Title 5, Guam Code Annotated, is
12 hereby *added* to read:

13 **“§ 5425.2 Protest Bond.** (a) Any aggrieved person who files a protest
14 under §5425(a) shall post a bond payable to the government agency or using
15 agency or purchasing agency, autonomous agency, semi-autonomous
16 agency, public corporation, or instrumentality in an amount equal to [five
17 percent (5%) of the lowest bid submitted or lowest cost proposal evaluated
18 or five percent (5%) of the highest revenue proposal evaluated], which bond
19 shall be conditioned upon payment of all costs which may be adjudged
20 against the protester in the administrative or appeal hearing before the Public
21 Auditor in which the action is brought and in any subsequent court or
22 appellate court proceedings.

23 (b) Such protest bond shall be in a form and substance acceptable to
24 the Chief Procurement Officer or Director of the Department of Public
25 Works or the using or purchasing agency and shall be immediately payable
26 to the government agency or using agency or purchasing agency,

1 autonomous agency, semi-autonomous agency, public corporation, or
2 instrumentality. In lieu of a bond, a cashier's check, certified bank check,
3 bank certified company check, irrevocable letter of credit, money order or
4 U.S. currency would be acceptable form of security.

5 (c) If, after completion of the administrative hearing process before
6 the Public Auditor and any court or appellate court proceedings, the
7 government or purchasing agency, autonomous agency, semi-autonomous
8 agency, public corporation, or instrumentality prevails, it shall recover all
9 costs and charges, which shall be included in the final order or judgment,
10 including charges made by the Public Auditor Hearings, but excluding
11 attorney's fees. Upon payment of such costs and charges by the protester, if
12 any, the protest bond or security shall be returned; provided, however, that
13 the Public Auditor or his or her hearing officer or the court has not
14 determined that the protest was filed for a frivolous or improper purpose,
15 including but not limited to the purpose of harassing, causing unnecessary
16 delay, or causing needless cost to the the government or purchasing agency,
17 autonomous agency, semi-autonomous agency, public corporation, or
18 instrumentality, in which case the entire amount of the bond shall be
19 forfeited . If the protester prevails, he or she shall recover from the
20 government or purchasing agency, autonomous agency, semi-autonomous
21 agency, public corporation, or instrumentality all costs and charges which
22 shall be included in the final order of judgment, excluding attorney's fees."

23 **Section 13.** Section 5480 of Title 5, Guam Code Annotated, is hereby
24 *amended* to read:

25 **"§ 5480. Waiver of Sovereign Immunity in Connection with**
26 **Contracts.** (a) Solicitation and Award of Contracts. The Superior Court of

1 Guam shall have jurisdiction over an appeal from the administrative
2 decision of the Chief Procurement Officer, Director of the Department of
3 Public Works, head of the using or purchasing agency, or the Public Auditor
4 or his or her hearing officer or action between the Territory and a bidder,
5 offeror, or contractor, either actual or prospective, to determine whether a
6 solicitation or award of a contract is in accordance with the statutes,
7 regulations, and the terms and conditions of the solicitation. The Superior
8 Court shall have such jurisdiction in actions at law or in equity, and whether
9 the actions are for monetary damages or for declaratory, or other equitable
10 relief.

11 (b) Debarment or Suspension. The Superior Court shall have
12 jurisdiction over an action between the Territory and a person who is subject
13 to a suspension or debarment proceeding, to determine whether the
14 debarment or suspension is in accordance with the statutes and regulations.
15 The Superior Court shall have such jurisdiction, in actions at law or in
16 equity, and whether the actions are for declaratory, or other equitable relief.

17 (c) In addition to other relief and remedies, the Superior Court shall
18 have jurisdiction to grant injunctive relief in any action brought under
19 Subsections (a), (b) or (c) of this Section.

20 (d) Limited Finality for Administrative Determinations. In any
21 judicial action under this Section, factual or legal determinations by
22 employees, agents or other persons appointed by the Territory shall have no
23 finality and shall not be conclusive, notwithstanding any contract provision,
24 or regulation, except to the extent provided in §§ 5245, 5705 and 5706 of
25 this Chapter.

1 (e) For purposes of this Section a "prospective" bidder, contractor or
2 offeror is one who will actually submit a bid, contract or otherwise offer his
3 services if, in the actions permitted by this Section, such person would
4 prevail.

5 (f) All actions permitted by this Article shall be conducted as provided
6 in the Government Claims Act."

7 **Section 14.** Section 5481 of Title 5, Guam Code Annotated, is hereby
8 *amended* to read:

9 **"§ 5481. Time Limitations on Actions.**

10 (a) Protested Solicitations and Awards. Notwithstanding any other
11 law, Any appeal from the administrative decision of the protested
12 procurement solicitation or award or action between the Territory and a
13 bidder, offeror, or contractor, either actual or prospective, to determine
14 whether a solicitation or award of a contract is in accordance with the
15 statutes, regulations, and the terms and conditions of the solicitation action
16 under § 5480(a) of this Chapter shall be initiated within ~~fourteen (14)~~ seven
17 (7) days after receipt of a final administrative decision.

18 (b) Debarments and Suspensions for Cause. Any action under
19 §5480(b) of this Chapter shall be commenced within six (6) months after
20 receipt of the decision of the Policy Office under § 5651 of this Chapter, or
21 the decision of the Procurement Appeals Board under § 5707 of this
22 Chapter, whichever is applicable.

23 (c) Actions Under Contracts or for Breach of Contract. Any action
24 commenced under 5480(c) of this Chapter shall be commenced within
25 twelve (12) months after the date of the Procurement Appeals Board
26 decision.

1 (d) The limitations on actions provided by this Section are tolled
2 during the pendency of any proceeding brought pursuant to § 5485 of this
3 Chapter.”

4 **Section 15.** Section 5601 of Title 5, Guam Code Annotated, is hereby
5 *amended* to read:

6 **“§ 5601. Definitions.**

7 As used in this Chapter:

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

12 (b) *Confidential Information* means any information which is
13 available to an employee only because of the employee’s status as an
14 employee of this Territory and is not a matter of public knowledge or
15 available to the public on request.

16 (c) *Conspicuously* means written in such special or distinctive format,
17 print or manner that a reasonable person against whom it is to operate ought
18 to have noticed it.

19 (d) *Direct or Indirect Participation* means involvement through
20 decision, approval, disapproval, recommendation, preparation of any part of
21 a purchase request, influencing the content of any specification or
22 procurement standard, rendering of advice, investigation, auditing or in any
23 other advisory capacity.

24 (e) *Financial Interest* means:

25 (1) ownership of any interest or involvement in any relationship
26 from which, or as a result of which, a person within the past year has

1 received, or is presently or in the future entitled to receive, more than
2 Two Thousand Five Hundred Dollars (\$2,500) per year, or its
3 equivalent;

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

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

9 (f) *Gratuity* means a payment, loan, subscription, advance, deposit of
10 money, services, or anything of more than nominal value, present or
11 promised, unless consideration of substantially equal or greater value is
12 received.

13 (g) *Immediate Family* means a spouse, children, a child's spouse,
14 parents, brothers and sisters, a spouse of a brother or sister, fathers- and
15 mothers-in-law, brothers- and sisters-in-law, or parents-in-laws.

16 (h) *Official Responsibility* means direct administrative or operating
17 authority whether intermediate or final, either exercisable alone or with
18 others, either personally or through subordinates, to approve, disapprove, or
19 otherwise direct territorial action.

20 (i) *Purchase Request* means that document whereby a using agency
21 requests that a contract be entered into for a specified need, and may include,
22 but is not limited to, the technical description of the requested item, delivery
23 schedule, transportation, criteria for evaluation, suggested sources of supply,
24 and information supplied for the making of any written determination
25 required by this Chapter.”

1 **Section 16.** A new Section 5634 of Title 5, Guam Code Annotated, is
2 hereby *added* and enacted to read:

3 **“§ 5634. Organizational Conflict of Interest.**

4 (a) An organizational conflict of interest is a conflict of interest of a
5 government contractor that arises or might arise because the nature of the
6 work to be performed may, absent some restriction on future activities, result
7 in an unfair competitive advantage to the contractor, impair the contractor’s
8 objectivity in performing the contract work, or make the contractor unable or
9 potentially unable to render impartial assistance or advice to the government.

10 (b) The contracting officer is responsible for resolving any significant
11 potential conflicts before the award is made. Resolution may be by
12 avoiding, neutralizing, or mitigating the significant potential conflict, and
13 shall be documented in writing in the procurement record. Contracting
14 officers should obtain the advice of counsel in evaluating potential conflicts
15 and in developing any necessary solicitation provisions or contract clauses,
16 and avoid unnecessary delays, burdensome information requirements, and
17 excessive documentation.

18 (c) The contracting officer shall award the contract to the apparent
19 successful offeror unless a conflict of interest is determined to exist that
20 cannot be avoided or mitigated. Before determining to withhold award
21 based on a conflict of interest consideration, the contracting officer shall
22 notify the contractor, provide the reasons therefore, and allow the contractor
23 a reasonable opportunity to respond. If the contracting officer finds that it is
24 in the best interest of the government of Guam to award the contract
25 notwithstanding a conflict of interest, the contracting officer may waive the
26 requirements of this section and proceed with the award. The determination

1 to proceed shall be in writing and shall be included in the procurement
2 record.

3 (d) If a contractor drafts, prepares or furnishes specifications to be
4 used in an acquisition, that contractor shall not be allowed to participate as a
5 bidder or offeror in the acquisition of the supplies or services specified.

6 (e) Contracts for the evaluation of bids or offers shall not be awarded
7 to a contractor that will evaluate its own bids or offers, or those of a
8 competitor.”

9 **Section 17.** Section 5707 of Title 5, Guam Code Annotated, is hereby
10 *repealed and reenacted* to read:

11 **“§ 5707. Appeals and Review of Public Auditor Decisions.**

12 (a) Appeal. Any person receiving an adverse decision, the government
13 or any autonomous agency or public corporation, or both, may appeal from a
14 decision by the Public Auditor to the Superior Court of Guam as provided in
15 ~~Article D of Chapter 9 of this Chapter~~ Part D of Article 9 of this Chapter.

16 (b) Authorization of Appeal by the Government. No such appeal shall
17 be made by the government or an autonomous agency or public corporation
18 unless recommended by the Chief Procurement Officer, the Director of
19 Public Works, or the head of the Purchasing Agency involved.”