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July 28, 2010

VIA HAND DELIVERY

The Honorable Judith T. Won Pat, Ed.D.
Speaker
Mina' Trenta Na Liheslaturan Guåhan
155 Hessler Street
Hagåtña, Guam 96910

36-10-0645
Office of the Speaker
Judith T. Won Pat, Ed.D.
Date: 7/28/10
Time: 3:18 PM
Received by: [Signature]
JUL 28 PM 3:18

Re: AN ACT TO REPEAL AND REENACT §58A105 OF TITLE 5 G.C.A.

Dear Speaker Won Pat:

On behalf of our client, Guam Community Improvement Foundation, Inc. ("GCIF"), I relay our client's strong objections to the proposed legislation, "AN ACT TO REPEAL AND REENACT §58A105 OF TITLE 5 G.C.A."

Several important public purposes of Guam's procurement law are stated at 5 G.C.A. § 5001, including the following:

- To provide for increased public confidence in the procedures followed in public procurement;
- To ensure the fair and equitable treatment of all persons who deal with the procurement system of this territory;
- To provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory;
- To foster effective broad-based competition within the free enterprise system;
- To provide safeguards for the maintenance of a procurement system of quality and integrity; and
- To require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.



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The proposed legislation undermines each and every one of these important public policies.

We assume this legislation is sought by the Governor because a decision has already been made to award the contract to International Bridge Corporation ("IBC"). However, because IBC's proposal is sealed, there is no way for the public to understand at this time the basis for this decision. We cannot judge whether DPW has complied with the Public Auditor's requirement that it " . . . must ensure that IBC's proposal was submitted in good faith by conducting an analysis as to why there is such a dramatic increase between IBC's proposal and the cost of their Certificate of Participation and such analysis must be made a part of the procurement record. . ." See Appeal of Guam Community Improvement Foundation, OPA-PA-09-005 at p. 21. Nor can we determine whether DPW has complied with the additional requirements imposed by the Public Auditor that:

- (a) DPW must determine the sources and uses of the entire \$69,030,000 par amount of IBC's Certificates of Participation prior to the sale of said certificates in order to confirm that such uses are necessary and truly maximize the purchasing value of Guam's scant public funds for the JFK reconstruction project and said analysis shall be made part of the procurement record;
- (b) Conduct an analysis and cost comparison as to the reasonableness of IBC's proposed annual maintenance cost and include said analysis as a part of the procurement record;
- and (c) Conduct an analysis and cost comparison as to why the government has to pay the Certificates of Participation over a 30 year period versus a 20 year period and include said analysis as a part of the procurement record.

See Appeal of Guam Education Financing Foundation, Inc., OPA-PA-09-007 at p. 20.

The Public Auditor's requirements are important for the protection of Guam's taxpayers. If the Governor were confident that DPW has adequately complied with these requirements, and that the IBC proposal is fair and cost-effective, why does he seek legislation that will preclude any challenge to the award of the contract to IBC? The Legislature itself is being requested to preclude challenge to a contract with no way of judging whether the contract actually complies with the law.

I am attaching an article that appeared in the Marianas Variety on July 14, 2010, by John Thos. Brown. Mr. Brown is an attorney and author of Procurement Lore or Procurement Law? A Guam Procurement Process Primer, which is a basic reference source of Guam Procurement law. Mr. Brown eloquently explains the evil of creating an exemption to the procurement law for the JFK project. As Mr. Brown states, "Exemption

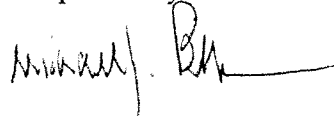
is absolutely the worst way to maintain the integrity of the procurement system. . .”, and that “The protest procedure is there to scrutinize the procurement process, to make sure it functions according to law, not to hide it from view. Exemptions allow, indeed encourage, dirt to be swept under the rug.”

GCIF has no intention to file a protest merely for the sake of delay, and it may be that the contract award to IBC is in accordance with the law and the Public Auditor’s requirements. It is concerning, however, that the Legislature is being asked to, in effect, approve the contract in advance without knowing whether the contract does in fact comply with the law.

Though it is apparent that the aim of this bill is to curtail legal challenge to the contract award in the JFK procurement, we note that it may instead lead to even more complicated and protracted legal proceedings. The effect of this special legislation is to decide a controversy between two parties and to, in effect, deny the access to court by one of the parties. Determining the outcome of controversies is the domain of the Judiciary, and not the Legislature. See Evans v. State, 872 A.2d 539 (2005). Guam’s Organic Act echoes the United States Constitution in providing for Separation of Powers amongst the branches of government. The judicial power of Guam is vested in the Judiciary under § 1424 of the Organic Act. Acts violating this important doctrine could lead to litigation under the Organic Act. While this is the most obvious constitutional issue raised by the proposed bill, there are also Constitutional due process concerns. Even if the aim of the Legislature is to avoid continued litigation in this matter, the proposed bill will not efficiently achieve that goal.

In conclusion, I request on behalf of GCIF that I Liheslaturan Guåhan respectfully decline the Governor’s invitation to undermine the procurement law of Guam.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael J. Berman", with a horizontal line extending to the right.

Michael J. Berman



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The virtues of protest actions

WEDNESDAY, 14 JULY 2010 03:58 BY JOHN THOS. BROWN



I AM concerned to read the speculation that legislation is being considered which would exempt the finance portion of a finance/design/build/operate RFP or bid from any protest.

0 Comments and 0 Reactions

The article titled "Bond snag stalls JFK project," published in the July 13 issue of Marianas Variety quotes an unidentified source as saying once an award is made, the winner's "books are open," and other bidders "can go in and inspect all the documents." Evidently the aim is to prevent any such scrutiny by exempting any protest over the financing aspects of the award process.

Exemption is absolutely the worst way to maintain the integrity of the procurement system. And, for some reason, it seems to always be the knee-jerk first choice. But there would seem to be a better method to deal with the current perceived problem that does not undermine the integrity of the procurement process.

The protest procedure is there to scrutinize the procurement process, to make sure it functions according to law, not to hide it from view. Exemptions allow, indeed encourage, dirt to be swept under the rug.

Official commentary in ABA Model Procurement Code § 9-101 notes, "It is essential that bidders, offerors and contractors have confidence in the procedures for soliciting and awarding contracts."

This can best be assured by allowing an aggrieved person to protest the solicitation, award, or related decision.

Exemptions that deny protests fail at this essential requirement.

The textbook, "Service Contracting, A Local Government Guide," published by the International City/County Management Association, says, "Protests are the safety valve of public procurement.... Failure to address seriously every protest received can damage the integrity of the local government's bidding process."

The Asian Development Bank, in its 2006 Guide, Curbing Corruption in Public Procurement in Asia and the Pacific, also emphasizes the critical role of an adequate review process: "Sound procedures and honest staff, while essential, are not sufficient to contain corruption in public procurement. Effective and swift review of major procurement decisions in response to complaints from aggrieved bidders is just as important in a procurement system that is well protected against corruption."

The ADB report continues, "Complaint and review mechanisms fulfill two functions in curbing corruption. They allow involved bidders and the public to verify the conformity of individual decisions with the established rules and bolster trust in the fairness of the procedures. Sound verification procedures also have an important preventive role: the possibility that decisions can be overturned renders corrupt practices more difficult and therefore constitutes, together with credible sanctions, a strong incentive to respect the procedures.

All of these authorities are uniform in their insistence on availability of procedures to scrutinize the bid process. You do not improve the procurement system by creating exemptions to protest mechanisms.

The idea behind the apparent new legislative proposal seems to be that the only way to get an unqualified bond opinion is to make sure that there is no protest overhang when the award winner goes to market for the financing.

This can be assured, however, without throwing a cloak of secrecy over the bid process. Indeed, it would require the opposite. It would shine a light on the process before the award is made to smoke out any protestable issues before the award is finalized.

Under the RFP procurement process which was used for the JFK project, the information in a proposal cannot be disclosed until after the award is made. But everyone knows that the award is intended to be made to a particular offeror. This is where the problem lies, and this is where the solution should be sought.

I would propose that, in the RFP process, once the government has determined which offeror it intends to award, it must give notice of intent to award, but not actually award the contract until it has disclosed the full procurement record, including the terms of the intended proposal. The time for bringing a protest action based on the known procurement record would then begin to run.

If no protest or appeal is brought within the filing period, the award can then be made and the awarded contractor can then go to market for bonding without fear of protest based on the procurement record.

If, however, there is a protest, it can – and should – be dealt with. There should be no immunity for engaging in improper procurement actions.

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islander94 1 week ago

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What if the protest was deliberate and intended to stall the construction of a new JFK? What protects the awardee from frivolous protests? GCIF's appeal had been denied form DPW, the AG's office, the OPA, and the Superior Court of Guam. Why doesn't GCIF go public on how much they offered to construct the new JFK and how much the amoritization cost for 30 years under their proposal would cost the government? That's the question? If the other 2 bidders were to go public with their cost to construct JFK and it is lower than GCIF..then I would suspect some type of impropriety. Why don't we go that route shall we?

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