

McDONALD LAW OFFICE
173 ASPINALL AVENUE, SUITE 207A
HAGATNA, GUAM 96910
(671) 588-8866/(671) 472-9616 FAX
EMAIL: correspondence@mcdonald.law

Hon. Benjamin J. F. Cruz
Public Auditor
Office of Public Accountability
Suite 401 DNA Building
238 Archbishop Flores Street
Hagåtña, Guam 96910

November 1, 2022

SUBJ: Procurement Law Ethical Standards concerning contributions to governor-elect inauguration committees

Dear Hon. Public Auditor:

Introduction

The Procurement Law applies to every contractual expenditure of the public funds by the territorial government acting through a governmental body, irrespective of its source.¹ In OPA Report 19-06, the Public Auditor (“Pub. Aud.”), examined expenditures made with contributions donated to the government during the transition between incoming and outgoing administrations. The Report noted the potential applicability of the Procurement Law to the Governor’s Transition Committee, organized and acting under 5 GCA § 1502. Because there is no express exception for the expenditure of public funds for the purposes stated in § 1502, expenditures by the Transition Committee are plainly subject to the Procurement Law.

With the conclusion of the 2022 general election, the applicability of the Procurement Law to the Governor’s Transition Committee again comes into focus. This opinion letter analyzes the other side of the equation, that is, whether contributions themselves are subject to the Procurement Law. Specifically, this opinion letter analyzes inauguration committee contributions in the context of the Standards of Conduct found at Chapter 5 of the Procurement Law, 5 GCA § 5625 *et seq.* (the “Ethical Standards”).

The Ethical Standards cover a range of conduct including prohibited Conflicts of Interest (§ 5628); the duty to disclose Financial Interests in government contracts (§ 5629); prohibitions against Gratuities (§ 5630 (a)), Kickbacks (§ 5630 (b)), and Favors (§ 5630 (d)); the prohibition against Contingent Fees (§ 5631); Restrictions on Employment of Present and

¹ Procurement Law, 5 GCA § 5004 (b).

Former Employees (§§ 5632 (a), (b)); Disqualification of Business when an Employee has a Financial Interest (§ 5632 (c)); selling to the government after employee's separation from service (§ 5632 (d)); and the Use of Confidential Information for the employee's personal gain or the gain of another person (§ 5633). Depending on the facts and circumstances, inauguration contributions may be subject to Ethical Standards.²

Pay to play schemes

At its core, political supporters' donations/contributions are often perceived as "pay to play" schemes, especially when the supporter is a current government contractor or later receives a government contract. In pay to play schemes, a government official will receive an illegal contribution or will use a lawful contribution for non-political purposes. Then, at a later date, the supporter gets awarded a lucrative government contract.³ One pay to play scheme has recently resulted in a conviction in Massachusetts.⁴ New York's governor is currently embroiled in pay to play allegations.⁵

There are state and federal laws which attempt to regulate these schemes. For example, California's anti-pay to play law requires a party applying for a license, contract, use entitlement, or franchise to disclose contributions of \$250 or more to any agency or government officer within the last 12 months and prohibits such solicitations and contributions within 3 months before or after a decision.⁶ The federal government prohibits any person who has a contract with the United States from directly or indirectly making any contribution to any political party, committee, or candidate for public office or to any person for any political purpose, from the time of commencement of negotiations, to the completion of performance of the contract.⁷

Ethical Standards:

Procurement Law's emphasis on integrity, responsibility, and good faith

Guam's legislature has declared that it is the government's express policy "to promote and balance the objective of protecting government *integrity* and the objective of facilitating the recruitment and retention of personnel needed by [the government]. Such policy is

² This opinion letter focuses on contributions to inauguration committees, which are distinguishable from campaign contributions since, at the time of an inauguration, the campaign is over. While inauguration contributions may still be considered political in nature because of the prestige afforded the winning political candidates, such analysis is beyond the scope of this opinion letter. For a thorough discussion of the constitutional limits on campaign contributions in the procurement context, see *Wagner v. Federal Election Comm'n*, 793 F.3d 1 (D.C. Ct. App. 2015). *Wagner* continues the longtime test for whether a particular statute is unconstitutional in the context of political contribution laws by analyzing whether the government "demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." At bottom, the "closely drawn" test is likely to be employed in a procurement case involving inauguration contributions.

³ See, e.g. <https://www.sec.gov/news/press-release/2016-8>.

⁴ See <https://gvwire.com/2021/09/21/pay-to-play-corruption-scheme-sends-young-ex-mayor-behind-bars/>.

⁵ See <https://nypost.com/2022/09/23/ny-gov-kathy-hochul-on-637m-alleged-pay-to-play-scheme/>.

⁶ See Cal. Gov. Code § 84308.

⁷ See 52 USC § 30119(a)(1); see also 11 CFR §§ 115.2, 115.1(b).

implemented by prescribing essential standards of ethical conduct ... 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 government] also observe the ethical standards”⁸ “[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” is “*responsible*” under the Procurement Law.⁹ The Pub. Aud. is mandated to utilize his jurisdiction “to promote the *integrity* of the procurement process” and the purposes of Guam’s Procurement Law.¹⁰

The Procurement Law thus stresses a system of integrity, fairness, and competition, with impartial employees and responsible vendors acting in good faith. Government employees are to act impartially and to assure fairness and competition. Vendors are to observe employees’ ethical standards, fully perform contract requirements, foster public confidence in the integrity of the government’s procurement organization, and have the integrity and reliability to assure good faith performance. And the Public Auditor is to use his authority to promote the integrity of the procurement process.

Requirement of good faith in the Procurement Law

The Procurement Law requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith.¹¹ Good faith in contract law is defined as follows:

Meanings of “good faith.” Good faith is defined in Uniform Commercial Code § 1–201(19) as “honesty in fact in the conduct or transaction concerned.” “In case of a merchant” Uniform Commercial Code § 2–103(1)(b) provides that good faith means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” The phrase “good faith” is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; **it excludes a variety of types of conduct characterized as involving “bad faith” because they violate community standards of decency, fairness or reasonableness.** The appropriate remedy for a breach of the duty of good faith also varies with the circumstances.¹²

The Procurement Law thus requires that vendors not violate community standards of decency, fairness or reasonableness.

⁸ Procurement Law § 5625 (emphasis supplied).

⁹ *Id.* § 5201 (f) (emphases supplied).

¹⁰ *Id.* § 5703 (f) (emphasis supplied).

¹¹ *See* Procurement Law § 5003.

¹² Rest. (Second) of Contracts, § 205 (1981); *see also* 13 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 38:15 (4th Ed. 2000).

Contributor's duty to give fair and full disclosure

“Good faith,” when dealing with the government, also means fair and full disclosure of facts relevant to the provision of a status, benefit, or service.¹³ Under the Transition in the Office of the Governor statute, 5 GCA § 1502, the governor-elect is authorized to appoint a Transition Committee which is a governmental body that shall assist during the transition period between the election and up to 30 days after the assumption of office by the governor-elect. The Transition Committee ensures orderly transition between administrations including preparation of the governor-elect’s inaugural ceremony and celebration.¹⁴

The statute also requires the chairman of the Transition Committee to report contributions to it to the governor and the legislature:

Notwithstanding any other provisions of law, in addition to utilizing government funds and in order to keep the use of public funds to a minimum, the Committee may accept monetary and in-kind donations for the purposes set out in this Section, and may deposit donations in a private bank account to be administered by the Committee. A report of the donations received and expenses paid shall be included in the report made [to the legislature and the governor]. All such donations, being made to an interim government agency, shall be tax deductible pursuant to § 170 of the Internal Revenue Code. Donations in excess of the amount needed to pay expenses of the Committee shall be the property of the Government of Guam and shall be deposited with the Treasury of Guam no later than thirty days after the assumption of office of the Governor-elect.¹⁵

Thus, in a procurement appeal, a protesting bidder or offeror may allege that the winning bidder or offeror was not a responsible bidder because of large donations/contributions to the governor-elect’s inauguration committee. In addition to providing information regarding the winner’s donations/contributions to the inauguration festivities, the winning bidder may be required to give fair and full disclosure of communications with the governor-elect or other high-ranking officials.

Government employees’ duty to keep the public trust

The General Standard of Ethical Conduct provides that it is a “breach of a public trust” for a government employee to “attempt to realize personal gain through public employment by [engaging in] conduct inconsistent with the proper discharge of the employee’s duties”.¹⁶ Such personal gain would certainly include money and other things of value. Public perception may focus on career advancement, or other benefit or advantage, that would otherwise be unavailable to the employee but for their position in government. Accordingly, to keep the public trust, employees should not be perceived to act inconsistently

¹³ See *Petition of Cardines*, 366 F.Supp 700, 709 (D. Guam 1973) (reopening of naturalization proceedings after immigration officers found falsity).

¹⁴ See 5 GCA § 1502 (b).

¹⁵ See *id.* § 1502 (d).

¹⁶ *Id.* § 5626 (a).

with his or her official duty by using their status in the government for benefit or advantage that would not otherwise be available to them.

Employees' duty to keep the public trust conceivably includes employees who are involved in inauguration festivities. Consider, for example, an employee who participates in the procurement process, such as evaluation and award of government contracts. That employee's solicitation of a \$25,000 contribution from a vendor or potential vendor may be perceived as use of a government position for personal gain in the nature of political patronage or opportunistic career advancement.

The General Standard, therefore, should cause employees who, among other things, determine specifications, generate solicitations, review, rank, or select offers, approve expenditures, or evaluate vendor performance, as well as persons in government who through their status or position may influence these employees' decisions or discretion (i.e. high-ranking officials), to refrain from participating in inauguration committees or risk being scrutinized for lack of integrity and breach of public trust.¹⁷

Vendors' duty to keep the public trust

The Procurement Law also imposes Ethical Standards on vendors and prospective offerors. These persons also must keep the public trust and not influence any public employee to breach the Ethical Standards.¹⁸ Vendors, therefore, are prohibited from influencing the employee to do any of the following: (i) have a conflict of interest—meaning, while participating as an employee in a procurement, to have a financial interest or a family member with financial interest in the vendor seeking government business; (ii) fail to disclose a benefit received from a procurement; (iii) accept a gratuity, kickback or favor; (iv) be employed with a vendor while in government service; (v) act as principal or agent of a vendor, in a judicial or administrative proceeding or ruling, administrative application or other determination of rights, contract, claim, charge or controversy in which the employee had substantial participation; (vi) take employment from the vendor within a year of leaving government service; (vii) act as agent or principal of a vendor, in a judicial or administrative proceeding or ruling, administrative application or other determination of rights, contract, claim, charge or controversy within a year of leaving government service; (viii) act as a principal or agent of a vendor in which the employee has a financial interest, in connection with a judicial or administrative proceeding or ruling, administrative application or other determination of rights, contract, claim, charge or controversy; (ix) within 90 days of leaving government service, sign a bid, proposal, or contract, negotiate a contract, contract any employee for the purpose of obtaining, negotiating or discussing changes in specifications, price, cost allowances or other terms of a contract; settle 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 therefor is subsequently negotiated by another person.¹⁹ It is

¹⁷ A scheme involving a high-ranking official exerting influence on a procurement employee to skew the procurement towards a inauguration committee contributor could be a civil conspiracy against the government. *See Walters v. Blankenship*, 931 So.2d 137 (Fl. Ct. App. 2006) (civil conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act by unlawful means where the agreement results in damage to the plaintiff).

¹⁸ *See* Procurement Law § 5626 (b).

¹⁹ *See* Procurement Law §§ 5628-30, 5632-33.

also a breach of the public trust for a vendor to pay a fee that is contingent on securing business from the government to anyone other than an employee or agency who specializes in securing government business.²⁰

Specific issue concerning inauguration contributions—Favors

Under recent trends in public corruption cases, a *quid pro quo* is required for a corrupt act. Because no express promise of a lucrative contract may be made in return for a contribution to an inauguration, a *quid pro quo* may be difficult to find.

Nevertheless, the Procurement Law makes it a breach of the public trust for existing and potential vendors to offer, give or agree to give a “Favor”:

[I]t 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 Guam or for any employee or agent of Guam to solicit or accept from any such person or entity or agent thereof, a favor or gratuity on behalf of Guam whether or not such favor or gratuity may be considered a reimbursable expense of Guam, during the pendency of any matter related to procurement, including contract performance warranty periods.

“A favor is anything, including raffle tickets, of 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.”²¹

In other words, while supporters of the incoming administration may make donations/contributions to the Transition Committee for use in inauguration festivities, if it comes from a vendor or person or company who is, or may be, associated with a government vendor, that contribution is potentially subject to the Ethical Standards. The chairman, high-ranking official, or employee who accepts or agrees to accept donations or contributions to a governor-elect’s inauguration festivities may, therefore, be considered to have breached the public trust and violated the Ethical Standards. Furthermore, the supporter may also be considered to have breached the public trust and violated the Ethical Standards. As a result, the supporter may ultimately be found not to be a responsible bidder or offeror.

I trust this opinion letter is helpful. Thank you for the opportunity to provide it.

Sincerely,



Joseph B. McDonald

²⁰ *See id.* § 5631

²¹ *Id.* § 5630 (d).