

EMERGENCY PROCUREMENT UNDER GUAM LAWS
(To Procure or to Abjure)
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THE THREE LAWS

Guam law offers up special procurement law in three different Acts of Legislation, each, to one extent or other, contemplates, within the scope of the respective laws, some hint, form or possibility of emergency procurement (as that term is colloquially used). They are:

The Procurement Act: Procurement Law is the only law specifically designed to be an omnibus, comprehensive, remedial law dedicated principally (bad pun intended) to GovGuam purchases of supplies and services. The Procurement Act, originally passed as P.L. 16-124, effective October 1, 1983, is now codified in Title 5 GCA Chapter 5 (§§ 5001 et seq.) The Procurement Act heavily borrows from the American Bar Association Model Procurement Code (1979).

The Guam Civil Defense Act of 1951: Long prior to adoption of the Procurement Act, the Guam Civil Defense Act of 1951 was passed, as part of P.L. 1-88, 1952. It's substance is presently little changed, and currently codified as 10 GCA Chapter 65, §§ 65100 et seq. The purposes of the Civil Defense Act were predicated on and informed by "existing possibility of the occurrence of disasters or emergencies resulting from enemy attack, sabotage, or other hostile action, *as well as from the vicissitudes of nature.*" (10 GCA § 65101.) The stated purposes were principally to provide for rendering mutual federal-state-territorial cooperation "with respect to carrying out the civil defense functions" of Guam "to the end that ... manpower, resources, and facilities ... for dealing with any disaster that may occur. Civil defense functions are broadly described: "all emergency functions ... related to civilian protection, together with all other activities necessary or incidental to the preparation for the carrying out of the foregoing functions." (10 GCA § 65102.)

The Emergency Health Powers Act: The Department of Public Health and Social Services ("DPHSS") was also created by enactment in 1952 (now at 10 GCA Division 1, Chapter 1¹). Unlike the Civil Defense Act, it has gone through substantial changes over the years. Like the Civil Defense Act, it was instigated and informed by notorious events happening at the time of passage, as revealed in its legislative history:

"A state of a public health emergency was declared in May of 2002 by *I Maga 'lahen Guåhan* relating to a measles outbreak. This outbreak has catastrophic implications to the health and well being of the people.... In 1994, a similar outbreak manifested where 280 people were suspected, probable, or confirmed to have contracted measles.... As a result of the 911 incident, Guam, an instrumentality of the United States of America, is prone (sic) to terroristic (sic) attacks on mankind. In the wake of the tragic events of September 11, 2001, our nation realizes that the government's foremost responsibility is to protect the health, safety, and well being of its citizens."

Expanded *emergency powers* were bestowed under the H&S law by the Emergency Health Powers Act ("EHPA" or "EHP law"), in January 2003 (P.L. 26-173, 10 GCA Chapter 19, §§ 19101 et seq). One element of the emergency health powers DPHSS was given, was expressed as a power to "procure, *by condemnation or otherwise* ... materials and facilities". (§ 19502(a)) Apart from that

¹ Title 10 GCA houses many different divisions, chapters and articles dealing with a wide variety of health and safety matters. The Compiler has captioned Title 10 as "Health and Safety". Since the DPHSS laws mentioned here are all within Title 10, they may be referred to as Health and Safety law ("H&S law").

dubious procurement power, there is a *suggestion* in § 19403 of the EHPA that the Governor could suspend other procurement laws and regulations that would “prevent, hinder or delay necessary action (including emergency purchases)” of the Public Health Authority (“PHA”) from responding to a declared Public Health Emergency. (§ 19403(a)(1).) The scope of these procurement provisions in the EHP law is at the core of a controversy in the current pandemic, as will be discussed below.

EXAMINATION OF WHO CAN EXERCISE PROCUREMENT POWERS – AUTHORITIES

The current COVID-19 pandemic has revealed some confusion about who has authority to procure in the face of the health crisis. Authorities matter.² I like to think of these authorities as badges³. The public do not have to obey those government agents without badges, and those not entitled to wear a badge have no authority at all. More importantly, *it is up to the government to specifically identify* the source (“warrant”) of any such badge of authority – to show us their badges.

“As creatures of legislation, the powers of administrative agencies and their executive officers are dependent upon statutes, so that *they must find* within the statute warrant for the exercise of *any authority which they claim*. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication.” *Carlson v. GTA*, 2002 Guam 15, ¶ 9; italics added

AUTHORITY UNDER THE PROCUREMENT LAW: Since the Legislature enacted P.L. 4-68 in 1958 (establishing the “Central Procurement and Warehousing Law”, Guam Code §6600 et seq., which divested the Governor of authority to regulate procurement under general Organic Act powers), the specific power to procure has derived from a specific legislative grant of authority. 5 GCA § 5215 of the Procurement Law specifically authorizes the following identities to procure supplies and services by means of an emergency *procurement* process: the Chief Procurement Officer (“CPO”), the Director of Public Works, the head of a *purchasing agency*, or a designee⁴ of such an officer may make or authorize others to make emergency procurements. Not every agency that is a beneficiary *user* of a procured supply or service is a “purchasing agency”⁵.

If an agency is not endowed with that express and particular procurement authority by the procurement law *or* its enabling statute *or* delegated authority, it must *requisition* supplies and

² See, 5 GCA § 7103 of the Enforcement of Proper Government Spending Act, which allows residents of Guam to sue “the government of Guam and any officer, agent, contractor, or employee of the Executive Branch”, including the Governor and Lt. Governor, to make them personally liable for “the return to the Government of Guam of any money which has been expended without proper appropriation, *without proper authority*, illegally, or contrary to law.”

³ But in the more popular sense made notorious by Humphrey Bogart in the *Treasure of the Sierra Madre* – see [Wikipedia](https://en.wikipedia.org/wiki/Bogart_badge).

⁴ A designee “means a duly authorized *representative of a person holding a superior position*.” 5 GCA § 5030(I), italics added.

⁵ “Purchasing agency means any governmental body other than the Chief Procurement Officer or the Director of Public Works which is *authorized by this Chapter or its implementing regulations, or by way of delegation from the Chief Procurement Officer, to enter into contracts*.” 5 GCA § 5030(q). By contrast, a “using agency means any governmental body of the Territory *which utilizes* any supplies, services of construction *procured under this Chapter*”. 5 GCA § 3030(v); italics added in both instances.

services procurement through the CPO, thus GSA. “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. ... [Generally,] the Chief Procurement Officer... shall: [] *procure* or *supervise* the procurement of ***all supplies and services needed by the Territory.***” (5 GCA § 5113(a).) Thus, the offices or persons authorized and responsible to carry out emergency procurement, thereby bearing the focus of accountability, under the Procurement Act, are fairly well limited and easily identified.

AUTHORITY UNDER THE CIVIL DEFENSE ACT: Under the Civil Defense Act, the **Office** of Civil Defense is headed by an “Administrator”. The [current Administrator](#) is Charles V. Esteves. The quick litmus test of procurement authority under any agency enabling law, is to do a search of that law (provided by pdf format on the Compiler’s website) for key words “acquire” or “procure”. That test comes back negative on the Civil Defense Act, 10 GCA Chapter 65, indicating it has no such authority (except as the CPO may delegate it). There is seemingly no controversy regarding use of the emergency procurement process by the Office of Civil Defense. The Administrator has stated clearly that he follows the advice and action of the CPO in such matters.

AUTHORITY UNDER THE EMERGENCY HEALTH POWERS ACT: The EMHA is codified within the H&S law, in its own Title 10 GCA, Chapter 19. DPHSS is the primary authority of that law. “There is, within the Executive Branch of the government of Guam, a Department of Public Health and Social Services, the head of which is the *Director.*” (5 GCA § 3111.) Linda Unpingco-DeNorcey is the current Director of DPHSS. The Director is responsible for the promulgation of regulations for the Department. (10 GCA § 3106.)

The EHP law contemplates the exercise of many health responsibilities and authorities by the Public Health Authority (PHA). Under 10 GCA § 19104(l), the “*Public Health Authority*” is *variously identified* as DPHSS (i.e., the Department *as a whole*); **or** any local government agency **that acts principally** to protect or preserve the public’s health; **or**, any person *directly authorized* to act on behalf of the DPHSS, **or** local public health agency. **Moreover**, “the *determination of the Public Health Authority shall be determined by the Governor*, based upon the circumstances of the public health emergency”; and finally, “the Public Health Authority shall be appointed by the Governor by an Executive Order *declaring a public health emergency*”. (id) This makes it a bit of a thimble game to determine the precise holder of that authority at any given time.

This shotgun approach to the identity of the PHA can create confusion as to “who’s in charge?”. An example of the confusion in action is EO 2020-04, in which *the Governor* ordered the closure of all government schools and cessation of large gatherings, “pursuant to Section 3317, Article 3, Chapter 3, of Title 10, Guam Code Annotated”. That statute specifically that authority to the Director of DPHSS; and to muddy the waters some more, the Governor’s own EO 2020-03, which declared the Public Health Emergency in the first place, specifically recited that “the Department of Public Health and Social Services, *through its Director* and with the approval of *I Maga’hågan Guåhan*, shall be authorized to exercise all powers enumerated in Chapter 19 of Title I 0, Guam Code Annotated. So, schools were closed and gatherings prohibited under the wrong authority. Meh. Who cares? We should all care when an unauthorized person usurps the legal authority of another.

EXAMINATION OF EMERGENCY PROCUREMENT POWERS – SCOPE AND LIMITATIONS

SCOPE AND LIMITATION OF PROCUREMENT POWERS UNDER THE PROCUREMENT ACT: Under the Emergency Procurement statute (5 GCA § 5215; and see, 2 GAR § 3113), emergency procurement is only available for purchase of supplies and services. “No emergency procurement

or combination of emergency procurements may be made *for an amount of goods or supplies⁶ greater than the amount of such goods and supplies which is necessary to meet an emergency for thirty (30) day period* immediately following the procurement.” (Id.)

The emergency triggering an emergency procurement “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*.” (5 GCA § 5030(x); see “other methods of source selection” at § 5210.) “A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.” (§ 5215.)

The basic process for conducting an emergency procurement requires three simple things: (1) that it “shall be made with such competition as is practicable under the circumstances”, and (2) that “the procurement agent must solicit at least three informal price quotations”, and (3) that the “award [must go] to the firm with the best offer, as determined by evaluating cost and delivery time.” (Id.)

Similar to the Public Health Emergency Act, an emergency procurement under § 5215 requires a certification of necessity occasioned in connection with an emergency, made by high authority. In the procurement law context, that is satisfied by either a Declaration of Emergency by the Governor, or a Certificate of Emergency as described below. A Declaration of Emergency made pursuant an Executive Order satisfies the requirement of the certification if it specifically states that emergency procurement may be resorted to for the purposes of the EO.

A *Certificate of Emergency* must be “made *under penalty of perjury* by the Chief Procurement Officer, Director of Public Works or the head of a purchasing agency, as the case may be”, and contain statement of the facts giving rise to the emergency, the factual basis of the determination that an emergency procurement is necessary, and a statement that emergency procurement is not being used solely for the purpose of avoidance of the procurement law. Certified copies of the certificate shall be sent, *prior to award and as a condition thereof*, to the Governor and Speaker of the Legislature. And, “the Governor must approve in writing all authorizations for emergency procurement.” In either case, the file must include a written determination of the basis for the selection of any particular contractor.(Id.) It’s all just routine paper needed to validate an audit trail, especially important when expending federal funds.

SCOPE AND LIMITATION OF PROCUREMENT POWERS UNDER THE CIVIL DEFENCE ACT

The purpose of the Office of Civil Defense is to “protect the health and safety and to preserve the lives and property of the people of Guam”. (10 GCA § 65101) But that does not justify procurement, even in an emergency. The Administrator of the Office of Civil Defense has mere *expenditure* power under the Civil Defense Act. The Administrator, with the Governor’s approval, “may *make such expenditures* within the appropriation therefore ... for purposes of civil defense”. (10 GCA § 65103(a).) But, *authority to make an expenditure is not procurement; using agencies must acquire* supplies and services by requisition and *expend* their own agency funds to do so. The term procurement involve more than the expenditure. “Procurement ... 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.” (5 GCA § 5030(o).) “This Chapter [the Procurement Law] shall

⁶ Although the term “procurement” can include procurement of construction as well as supplies and service, there is no specifically expressed construction, as there is with supplies and services, under § 5215.

apply to every *expenditure* of public funds irrespective of their source, *including federal assistance funds* except as otherwise specified in § 5501 of this Chapter⁷,... by this Territory, *acting through a governmental body* as defined herein, **under any contract....**" (5 GCA § 5004.) Thus, the Administrator does not have *procurement* authority, corroborated by the litmus test of authority under the Civil Defense Act mentioned above.

The Administrator is also given the emergency power to "**seize, take or condemn** property for the protection of the public" and "to make compensation for the property so seized, taken, condemned on [certain terms and conditions]". (10 GCA § 65107.) But, again, *condemnation* is not procurement. It is a separate legal process deriving from the Constitutional concept of *unilateral and mandatory* governmental "Taking". Private as well as government contracting involves a *willing* buyer and a *willing* seller.

The Civil Defense Act, *similar* to the Public Health Emergency Act, allows the Governor to issue executive orders [] making, amend[ing], and [rescinding] ... orders, rules and regulations as may be necessary for civil defense purposes ... not inconsistent with any orders, rules or regulations, *promulgated by ... any territorial agency exercising a power delegated to it by [the Governor].*" (10 GCA § 65114) And, any such orders, rules and regulations promulgated by the Governor "... shall have the full force and effect of law..."; further, "[a]ll existing laws, ordinances, rules and regulations inconsistent... [therewith] *shall be suspended* during the period of time and *to the extent* that **such conflict** exists." (Id.) Given that the Civil Defense Act is predicated on "enemy attack, sabotage, or other hostile action", *as well as* from "vicissitudes of nature", the "conflict" condition can only reasonably rule out the authority to make or suspend orders, rules and regulation "[b]ecause of ... the vicissitudes of nature". (10 GCA § 65101.)

Finally, *assuming any* power to procure supplies and services did ever exist in the Office of Civil Defense since the enactment of the Civil Defense Act 1952, it was expressly negated when the Procurement Law became effective on October 1, 1983. As mandated by 5 GCA § 5120,

"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 Chief Procurement Officer"

However, it is easily *conceivable* that the CPO might *delegate* procurement authority for provision of supplies and services to the Office or Administrator (see, 5 GCA § 5114, paying due regard to the financial disclosure law condition in § 5114(b) and the scope of that disclosure law as defined in 4 GCA § 13102(a)). Delegation must be in writing and subscribe to other conditions; see, 2 GAR §§ 2105-2108. That said, from public comments of the current Administrator, he appears to prefer and be accustomed to requisitioning Civil Defense needs through the CPO (and, perhaps, he wants to stay well within the disclosure requirement *exception* in § 5114(b)(4)).

SCOPE AND LIMITATION OF PROCUREMENT POWERS UNDER THE EHP Law

To begin with, as with the Office of the Civil Defense, and further discussed above, the *CPO* is charged with the duty to procure and supervise the procurement of all supplies and services for the

⁷ 5 GCA § 5501. 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 this Chapter.

whole of the Territory, and DPHSS may avail of that facility. From public comments of the current Director of DPHSS, she has so far appeared to be relying on the CPO and GSA to obtain the use of isolation and quarantine facilities for needs of the pandemic crisis. (Leases of improved real property, which would embrace such facilities, are defined within the term “supplies” under the Procurement Act. 5 GCA § 5030(u).) While it may not be necessary to find explicit procurement authority in the EHP law at this time, it may be prudent to do so, looking over the horizon to a potential time when the *procurement law* might be “suspended”.

The declared *purposes* of the EHPA, as expressed in Title 10, Chapter 19, help us understand its *scope*. The specific purpose coming closest to creating any *power to procure* is in § 19103(d): “(d) to **grant** the government of Guam and local officials the **authority to use and appropriate property** as necessary *for the care, treatment, vaccination and housing of patients*, and to destroy contaminated facilities or materials”. An authority to “appropriate property” is akin to the power to “seize, take or condemn property for the protection of the public” as discussed above in relation to the Civil Defense Act. (Black’s Law Dictionary, 6th Ed, defines *appropriate* as “to make a thing one’s own; to exercise dominion over an object to the extent, and for the purpose, of making it subserve one’s own proper use or pleasure”.) “Appropriate” does not connote or implicate two party commercial *contracting* between willing sellers and buyers, as is an integral feature of the procurement law.⁸

It may be useful to note that the PHA may exercise similar *appropriation* power over *facilities*, such as those in controversy in the pandemic, under authority of § 19502(a), “to *procure, by condemnation or otherwise*” such facilities. As discussed above, one cannot technically *procure by condemnation* as those terms are understood under the procurement law. So, is “*or otherwise*” meant to be an alternative **a blank check** available to the PHA, *with no safeguards or procedures*, or perhaps something else altogether? If something else, what? Is “*or otherwise*” left to the Director to describe on a blank slate by regulation? Might it involve sending out the Governor’s Legal Counsel to drum up, vet and negotiate terms with possible bidders by means of private, personal introductions?

In the same vein, *during* a State of Public Health Emergency, the Governor, by EO “may through an executive order **suspend, the provisions of any regulatory statute prescribing procedures for conducting local business**, or the orders, rules and regulations of any government of Guam agency, **to the extent that strict compliance** with the same would prevent, hinder or delay necessary action (*including emergency purchases*) by the public health authority to respond to the public health emergency...” (§ 19403(a)(1).) It is critical to be clear about the precise language of this statute. Read it again, slowly and in context, giving effect to every word and phrase, as is required by the legal rules statutory construction.

Disregarding the plain language of this provision, the Governor cited this statute for authority to suspend law and regulations in EO 2020-03, but in “paraphrasing” the statute (to be charitable), it was obscured and misrepresented, to imply there were no qualifications to or other limits on her power to implement such suspensions. She “ordered the following”:

4. **“Suspension of Statutes, Orders, Rules and Regulations That Prevent, Hinder or Delay Necessary Action to Respond to the Emergency.**

“Pursuant to Section 19403(a)(1), of Chapter 19, Title 10 Guam Code Annotated, **statutes,**

⁸ See, Procurement Law, § 5004(b): This Chapter shall apply to every expenditure of public funds ... under any contract....”; and, Article 3: “Source Selection and Contract Formation”; and, § 5002: “Unless displaced ... the principles of law and equity, including the Uniform Commercial Code of Guam, the law merchant, and law relative to capacity to contract ... shall supplement the provisions of this Chapter.”

orders, rules, and regulations that prevent, hinder or delay necessary action to prepare for or respond to this public health emergency, including but not limited to[.] purchases and hiring, are hereby suspended.”

See anything different or missing in this *rendition* of the statute and the actual statute itself? Look again. EO 2020-03 purports to suspend, *without limitation, all* “statutes” plain and simple, *not* the “regulatory statutes” as clearly specified in the cited § 19403(a)(1). She purported to suspend, without limitation, *all* “statutes” plain and simple, not *just* those statutes “*prescribing procedures for conducting local business*” as clearly specified in the cited § 19403(a)(1). She purported to suspend, without limitation, all “statutes” plain and simple that, *to any degree*, prevent, hinder, or delay necessary action to prepare or respond; whereas, § 19403(a)(1) applies only to such regulatory statutes prescribing procedures for conducting local business **to the extent that strict compliance** with those particular statutes *would* prevent, hinder or delay. She expanded the parenthetical phrase “including emergency purchases” to include “hiring”, which, as AAG Taitano pointed out on April 15 to the Governor’s Legal Counsel in her email, responding to his request for assistance to contract for services, that contracting for services, as distinguished from “*purchases [of supplies]*” comes in two forms, each with its own unique procurement process: one for services generally, the other for “professional” services.

The (mis)characterization of § 19403(a)(1) in EO 2020-03 is a gross misstatement of the law. It is not an accident. It is an obvious intention to distort the meaning of law, by selectively filtering out any reference to any qualification in the statute, thereby authorizing the creation of a *fast track* and the *foregoing* of procurement law and its competitive, accountable principles and processes. This deceit remains a continuing misrepresentation because, rather than make a new declaration of emergency and correct the problem, EO 2020-03 has twice been extended by subsequent EOs, on the same terms and under the same alleged authority in EO 2020-3.

Despite the effort of EO 2020-03 to create an undefined “fast tract” and forego emergency procurement under procurement law, DPHSS regularly uses the procurement law facility of the CPO and GSA. Only last September, under EO 2019-21, *the Governor* issued a Declaration of State of Emergency “in order to assist the Department of Public Health and Social *Services in preventing an outbreak of Dengue Fever on Guam.*” That public health emergency EO called on the authority of the Procurement Law: “5 G.C.A § 5215, authorizing emergency procurement of supplies and services ... [and] emergency procurement to contain and further prevent any outbreak of mosquito borne diseases.”

Unlike EO 2020-03, precaution was taken in that EO to expressly instruct DPHSS “to keep appropriate documentation on all emergency expenses for inspection by the Executive and Legislative Branches and by the Public Auditor of Guam, [and] the Department of Public Health and Social Services via the Bureau of Budget and Management Research shall provide a written report of the emergency expenditures and its source to the Legislature and the Public Auditor within five (5) days of such transactions.”

Even in the context of the present pandemic, and despite the butchered citation to § 19403(a)(1) in EO 2020-03, emails to and from the Governor’s Legal Counsel recently revealed that he was in repeated communication with the Attorney General, two Assistant Attorneys General, and the CPO, well into April at least, to obtain their assistance with the process and documentation needed to acquire isolation and quarantine facilities, by way of either a sole source or emergency procurement *under the procurement law*. And, because he was already having his own troubles stitching up the facilities, in his email to then Chief of Staff on March 26th, he expressed the view that, “I do believe the governor’s executive order *allows for the fast tracking* of these. In fact, *it may allow us to forego some things* as well (I am not advising that).” (Parenthetical phrase in original; italics added.) I point this out because this reveals no fundamental objection to use of the

procurement act methods, and, weeks later, he was still pushing to get the deals done because he seemed not to know how to go about it.

Perhaps, notwithstanding the slight of the phrases in § 19401(a)(1), no statutes were actually suspended, despite the clear implication that they would be or had been. Perhaps statutes related to other limitations imposed were suspended. If the Governor did in fact suspend any such statute in whole or to some extent, there has been no specific notice or statement given to that effect, or what other specific statute, let alone what ad hoc process was authorized to procure the facilities. The public should not be left in the dark on that critical matter. It is the duty of the Governor to point to her specific authority to do what was done, by legitimate, specific law. Telling us what she *can* do does not tell us what she *did* do, *nor her authority* to do what she actually did.

OBSERVATIONS AND SUGGESTIONS – Though no one has asked

It is not my intent here to cast blame or ridicule, even though missteps should be acknowledged. It was and remains an overwhelming crisis. There appear to have been misjudgments, and feathers were ruffled. But, after the fact, it should be seen that Guam's health has fared pretty well, considering our major industry and proximity to the early hotspots of the not well understood novel coronavirus. The Governor, her executives, front line and other civil servants have exhibited good intentions, and selflessly served (in most cases) the community in the face of serious, even deadly, harm to themselves and their families. Of course, certain roads are paved with good intentions. Still, out of this experience, we have lessons to learn.

Let's start with a review of what the Emergency Heal Powers Act was *meant to do* in the first place, rather than focus on what some believe it allows us to *avoid doing*. "The *purposes* of this Chapter are: (a) to require the development of a *comprehensive plan* to provide for a coordinated, appropriate response in the event of a public health emergency." (10 GCA § 19103(a).) "The public health authority shall have primary jurisdiction, responsibility and authority for: (1) *planning and executing public* health emergency assessment, mitigation, preparedness response and recovery for Guam...." (19403(b).) Such planning may have contemplated in advance *after* public input, for instance, *reasonable* use and implementation of fines, jail time and the euphemistic "road closures".

The EMH law as first enacted called for a Governor's Public Health Emergency Planning *Commission* to actually come up with "a plan for responding to a public health emergency", as detailed in § 19202(a), and to "distribute this plan to those who will be responsible for its implementation, health care providers, other interested persons, *and the public*, and *seek their review and comments*", (§ 19202(b)). Critically, the Commission is meant to "annually review its plan for responding to a public health emergency." (§ 19202(c).) Does such a plan exist?⁹ Is the annual review on time? Has it been helpful? If not what has been done to improve the plan. Are changes due for lessons learned and being learned from this pandemic? There have been a lot of pent up aggravated comments of late, and this would be a good opportunity to air and hear them and smooth ruffled feathers.

Given that the Governor is a nurse (once a nurse, always a nurse), and, as a Guam Senator she supported and voted for the Public Health Powers Act when it was originally adopted, one might reasonably think having a Guam Health Emergency Plan would have been a subject of some

⁹ Sorry to say, I conducted an admittedly quick search online, for "Guam Public Health Emergency Planning Commission" and "Guam Public Health Emergency Plan". It was quick because I turned up nothing for either topic. I did find that the CDC seems to provide a coattail for Guam to come along on, but it has no Guam specific substance. (Click [link here](#))

consideration during the post-election transition, if not before. The Governor adopted an ad hoc *Recovery Plan* in EO 2020-11 for the pandemic, but, apparently, there is no guiding long term comprehensive master Guam Public Health Emergency Plan to prepare us for the *next* health emergency, that's coming just as sure as God made the little green apples.

So, **Lesson One**: Let's start work on a Guam Public Health Emergency Plan, and involve the community in it, while we have a nurse at the helm and recent lessons to learn from. We don't need generals who plan for the last war. If it is thought that procurement is an impediment, let me say that Senator Tom Ada presented several bills, of a comprehensive whole work that I have worked on for years, that addressed exactly that, some of which were received and passed by prior legislature without objection, but got vetoed without successful override. Perhaps now is a good time to try again.

But one thing that has been shown in the last month or so, is that the procurement law was not the problem in the pandemic response. The problems of the facility procurement was there was no one in the wheel house who knew how to make the acquisition work. That is obvious from the now public emails. And, it was obvious from the ham-fisted attempts to build a smoke screen around § 19401(a)(1) that something was not quite right.

Next. There has been *no common ground* to conduct emergency procurement in public health, Civil Defense, and the regular emergency procurement law. The Public Health Powers Act has been used in an attempt to create an opaque cone of fast tracked, no accountability, no transparency, and no competition, where the administration proceeded to acquire facilities from selected, introduced bidders, and "succeeded" in acquiring the facilities without a finalized contract that would pass federal (not to mention Guam Public Auditor) scrutiny, leaving the providers with a bare claim for the "agreed" price. Good luck to that prize holder under the Claims Act. Could a worse disaster have been created by sticking to the emergency procurement process?¹⁰

Put another way, and with allusion to my bad pun at the beginning ("principly"), there are no guiding *principles* controlling whatever procurement authorities there may be in the Defense or Public Health emergency laws. The procurement law, on the other hand, begins (with interpretation) and ends (with application) with explicit principles and policies. It is worth the effort to learn from that. The first section of the Procurement Act, § 5001, frames the whole law: *Interpretation. This Chapter shall be construed and applied to promote its underlying purposes and policies.* Some specific underlying purposes and policies in the law are:

- **to provide** for increased **public confidence** in public procurement;
- **to ensure** the **fair and equitable treatment** of all persons who deal with the procurement system;
- **to provide** increased **economy** and to **maximize the purchasing value** of public funds
- **to foster effective competition**;
- **to provide safeguards for** a procurement **system of quality and integrity**;
- **to require public access** and **the integrity** of procurement.

IF, and it's a big if for me, the law and regulation of emergency procurement under the

¹⁰ See, GSA Circular 2019-11, issued in **August 2019**, and sent to all Department and Agency Heads. In summary, it was a reminder "that commitments shall not be made between the government and a vendor prior to the issuance of an approved purchase order or a valid contract signed by the Governor. ... Departments/ Agencies who commits this government without a valid purchase order or contract will be liable to resolve the matter between the department and the vendor, which of course is to advise the vendor to file under the Claims Act for payment. This office will no longer tolerate procurement violations due to the negligence of the departments/agencies to submit request in a timely manner for goods or services."

Procurement Law is deemed to be beyond capacity of Civil Defense and DPHSS to learn, accommodate, and incorporate in its operations, then the Civil Defense Act and the Public Health Emergency law need an overhaul, because as is, there is no structure, no guidance, and no accountability in those laws for the expenditure of emergency government funds.

An emergency procurement requires only (1st) competition as is practicable under the circumstances; (2nd) solicitation of at least three informal price quotations; and, (3rd) award to the best offer considering time and price. Indeed, emails released to the public reveal that the Governor's legal counsel himself originally sought help from the AG's office and the CPO to prepare an emergency procurement solicitation, after first considering and preparing for a sole source procurement. And, his subsequent efforts to round up vendors and contracts sound exactly like the three steps in emergency procurement, but he did it through a dodge into the Emergency Health Powers and ended up with a [schmozzle](#). In the end, it is not apparent at all which legal process he attempted.

If the plan is to reinvent that procurement wheel within the context of the EHP law or Civil Defense Act, it should end up a better wheel, not a flat tire. Get specific procurement authority and/or teach someone within the health and defense systems to understand and facilitate if not conduct procurement, or requisition through the CPO. It's not that difficult, and there are already all kinds of back office, non-medical support services within those offices; some have taken my classes.

But, alternatively, and this is my choice, just leave health care and defense to the people who care for our health and defense; they have their hands full already. Emergency procurement already comes complete with a comprehensive system that demands particular authority, integrity, transparency, accountability and competition, all critical principles, practices of good governance which the Health and Defense acts lack.

So, **Lesson Two:** If, after a fair, close analysis, the Emergency Procurement process really is found to be more of a hindrance than benefit to emergency health procurement, we need to find a way to fully integrate principles of integrity, transparency, accountability and competition, and statutory safeguards giving effect to those principles, together with particularized and consistent authorities, to any independent procurement activity that is authorized under the Health and Safety law generally, and the Emergency Health Powers Act in particular. Given that we get far more money and in kind aid from the Federal Government than locally, and that we, as a community must trust the health care of the community to GovGuam in an emergency, we need tighter controls over funds expended to make sure we get to keep the funds we're given, and to manifest our trustworthiness to the sources of aid, including Guam taxpayers..

For your consideration,
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