IN THE SUPREME COURT OF GUAM

FLEET SERVICES, INC.,
Plaintiff-Appellant,

vs.

DEPARTMENT OF ADMINISTRATION,
GOVERNMENT OF GUAM,
Defendant-Appellee,

and
KLOPPENBURG ENTERPRISES, INC., a Member and on Behalf of Kloppenburg Enterprises, Inc., GUAM SANKO TRANSPORTATION, INC., and MICRONESIAN HOSPITALITY, INC., a Joint Venture Partnership,
Intervenor-Appellee.

Supreme Court Case No. CVA05-005 (consolidated with CVA05-006)
Superior Court Case Nos. CV1993-03 and CV0337-04

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on November 3, 2005
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; MIGUEL S. DEMAPAN, Justice *Pro Tempore*.

CARBULLIDO, C.J.:

[1] This appeal arises from the procurement for the operation, management and maintenance of the Guam Public Transit System. Defendant-Appellee Department of Administration ("DOA") issued a Request for Proposal, and responses were submitted by Plaintiff-Appellant Fleet Services, Inc. and a joint venture comprised of Intervenor-Appellee Kloppenburg Enterprises, Inc. ("KEI"), Guam Sanko Transportation and Micronesian Hospitality, Inc.. When DOA announced its intent to award the contract to KEI, Fleet filed two separate protests with DOA. Both protests were rejected and Fleet then filed two separate lawsuits in the Superior Court, based on the two separate protests. Both cases were dismissed for different reasons, and appealed to this court.

[2] We hold that the procurement for the operation, management and maintenance of the Guam Public Transit System was not for professional services, and thus, does not fall within any of the statutory exceptions to the requirement competitive sealed bidding in Executive Branch contracts. We further hold that the procurement procedure in this case is contrary to law, and therefore, the procedure used is invalidated, and the proposed award is canceled. Accordingly, we hold the trial court erred in dismissing the cases below, and we reverse.

I.

[3] In September 2003, DOA issued DOARFP 03-001, an RFP for the operation, management and maintenance of the Guam Public Transit System. Proposals were timely submitted by KEI, and by Fleet, who had been operating the transit system pursuant to an award of a contract.

[4] In September 2003, KEI received notice that it was tentatively selected as the primary offeror for the RFP. DOA then requested official written price offers from both Fleet and KEI. According to John A. Limtiaco, Fleet Services' President and General Manager, DOA requested that he submit a "best and final offer" in a sealed envelope and deliver it to DOA. Transcript ("Tr.") at 29 (Hr'g on Mot. for Prelim. Inj., Mar. 11, 2004).

[5] In September 2003, Fleet was notified that it was awarded the contract, subject to negotiations and protests. KEI filed a protest on September 30, 2003. In October 2003, DOA notified Fleet that because of errors in the RFP, it intended to cancel the RFP and issue a new one. DOA later changed its position and notified Fleet that it intended to begin negotiations with KEI. DOA and KEI finalized contract negotiations in November 2003, and DOA later issued a notice of intent to award the contract to KEI.

A. Fleet's First Protest Letter

[6] After DOA issued its notice of intent to award the contract to KEI, Fleet filed a protest, arguing that KEI's submission was noncompliant because KEI did not have accessible vehicles that complied with the federal Americans with Disabilities Act. DOA denied this protest. In December 2003, Fleet filed a Complaint in CV1993-03, and made a Motion for Preliminary Injunction. The trial court denied Fleet's Motion for Preliminary Injunction in January 2004.

[7] Fleet then filed a second motion for preliminary injunction, alleging that the decision to award the RFP to KEI was arbitrary, capricious and in violation of the law. On March 11, 2004, the trial court conducted an evidentiary hearing on this motion, and later denied the Second Motion for Preliminary Injunction, finding that Fleet had failed to prove that DOA's decision to award the contract to KEI was arbitrary, capricious, or in violation of the law. In March 2005, the court entered a judgment dismissing the case, pursuant to Rule 65(a)(2) of the Guam Rules of Civil Procedure and its March 30, 2004 Decision and Order. The Judgment of Dismissal was entered on the Superior Court docket. Fleet timely filed its Notice of Appeal in CVA05-006.

B. Fleet's Second Protest Letter

[8] Fleet filed a second protest letter in January 2004, arguing that KEI had failed to include, pursuant to 5 GCA § 5233, an affidavit stating the names and addresses of major shareholders who hold more than 10% of the interest in the partnership, and an affidavit stating the names and addresses of persons who have received or are entitled to receive compensation (including a commission or a gratuity) for the business related to the procurement. Fleet's protest was also based

on KEI's failure to include its business license in its submission. When DOA denied the protest, Fleet then filed a new complaint, in CV337-04, in March 2004.[1] In April 2004, KEI filed a Motion to Dismiss for Lack of Jurisdiction and for Failure to State a Claim Upon Which Relief Could be Granted. DOA joined in both motions. Fleet filed oppositions to the motions and filed its own Motion for Summary Judgment in August 2004. The trial court conducted a hearing on both motions. In its Decision and Order of October 22, 2004, the trial court granted the Motion to Dismiss for Lack of Personal Jurisdiction, finding that the protest and petition had not been timely filed. The trial court entered a judgment in February 2005, dismissing the case pursuant to its Decision and Order of October 22, 2004. The Judgment of Dismissal was entered on the Superior Court docket, and Fleet timely filed its Notice of Appeal in CVA05-005.

[9] On appeal, the cases were consolidated in the interest of judicial economy. At oral argument, further briefing was requested regarding whether the procurement in this case was within the scope of procurement of "other professionals" as set forth in 5 GCA § 5121 (2005). Supplemental briefs were timely submitted by the parties.

II.

[10] This court has jurisdiction over appeals from a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 109-169 (2006)); 7 GCA §§ 3107, 3108(a) (2005).

III.

[11] Ultimately, this case requires that we examine the trial court's interpretation of Guam's procurement statutes and regulations; thus, our review in this case is *de novo*. *E.C. Dev. v. Gen. Conference of Seventh-Day Adventist*, 2005 Guam 9 ¶ 12 (citing *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 16).

IV.

[12] The parties here raise several arguments. Fleet challenges KEI's proposal in response to the RFP. Fleet argues that the trial court erred in concluding that it was reasonable for the DOA

[1] Fleet filed the new complaint even before the trial court had entered judgment of dismissal in CVA1993-03.

Selection Committee ("Committee") to determine KEI was a qualified offeror, and in ultimately holding that the Committee's determination was not arbitrary, capricious, or contrary to law. Fleet next argues that the trial court erred in holding that its second protest letter was not timely and in dismissing the case. KEI and DOA maintain that the trial court's analysis was correct under Guam law, and that the cases were properly dismissed. The RFP itself did not cite any statutes or regulations, but it is undisputed that the parties believed they were using the competitive sealed proposal process.

[13] Before addressing the specific arguments raised by the parties, we first examine the RFP and the procurement process used in this case.

A. Executive Branch Procurement Under Guam Law

[14] The Guam Procurement Law, Chapter 5 of Title 5 of the Guam Code Annotated, applies to procurement within the Executive Branch:

> **§ 5125. Application of this Chapter to Executive Branch.**
>
> Every governmental body which is in the purview of the Executive Branch . . . shall be governed by Articles 1, 3, 6, 7, 10, 11 and 12 of this Chapter . . . .
>
> It is the intent of *I Liheslaturan Guåhan* [the Legislature] to require all Executive Branch governmental bodies . . . to be governed to the maximum extent practicable by Chapter 5 of Title 5 of the Guam Code Annotated. This provision requires any governmental body, and each above-named body, to conduct their procurement activities pursuant to Chapter 5 of Title 5 of the Guam Code Annotated . . . .

5 GCA § 5125 (2005). The Guam Procurement Law provides for several methods of procuring government contracts applicable to the Executive Branch, and expressly mandates the use of the competitive sealed bid process.[2] "Unless other wise [sic] authorized by law, all territorial contracts

[2] Mass transit services for Guam was once under the autonomous agency, the Guam Mass Transit Authority ("GMTA"), but the GMTA was abolished by section 23(b) of Guam Public Law 26-76 (Mar. 12, 2002). This public law further provided that "[a]ll the powers, duties, responsibilities and jurisdiction of the former GMTA are hereby transferred to the Department of Administration." Guam Pub. L. 26-76:23(b) (Mar. 12, 2002).

There is no dispute that DOA is "[under] the purview of the Executive Branch" as contemplated by 5 GCA § 5125. First, DOA "is within the Executive Branch of the government of Guam." 5 GCA § 3101 (2005). Second, Guam Public Law 26-76 gave to DOA "the *exclusive* franchise for the furnishing of public transportation within Guam and on its roads and highways." Guam Pub. L. 26-76:24 (Mar. 12, 2002) (passed by legislative override). Therefore, the

shall be awarded by competitive sealed bidding, pursuant to § 5211 of this Article, except for the procurement of professional services . . . . " 5 GCA § 5210(a) (2005). The exceptions to the sealed bid process are delineated by statute: small purchases pursuant to 5 GCA § 5213; sole source procurement pursuant to 5 GCA § 5214; emergency procurement pursuant to 5 GCA § 5215; procurement of certain services specified in 5 GCA § 5121 pursuant to 5 GCA § 5216; and procurement from nonprofit corporations pursuant to 5 GCA § 5217.

[15] The competitive sealed bid process is set out in statute at 5 GCA § 5211, and in regulation at 2 GAR Div. 4 § 3109 (1997). Although 5 GCA § 5210(a) states a preference for sealed bidding, in many cases, sealed bidding is the only procedure permitted by law. The exceptions, as indicated above, are limited, and Guam law no longer provides for an alternative to sealed bidding except as provided above. Prior to 1985, government contracts could be awarded using the competitive sealed proposal process previously set forth in 5 GCA § 5212. The Guam Legislature, however, repealed section 5212 when it passed section 8 of Guam Public Law 18-8, which was effective retroactive to April 1, 1985. Guam Pub. L. 18-8:8 (July 8, 1985); Compiler's Note, 5 GCA § 5210.[3] The repeal of the statute repealed the corresponding regulation, 2 GAR Div. 4 § 3110, relating to competitive sealed proposals.[4] *Georgia v. Heckler*, 768 F.2d 1293, 1299 (11th Cir. 1985) (citing *United States v. Larienoff*, 431 U.S. 864 (1977) (stating that an agency regulation which conflicts with a statute is without any legal effect)); *see also* 2 GAR Div. 4 § 3108, note (1997) (stating that the "[o]riginal

procurement for mass transit services is undoubtedly a procurement under the Executive Branch, and as such, must comply with the Guam Procurement Law. *See* 5 GCA § 5125.

[3] Specifically, section 8 of Guam Public Law 18-8 repealed Government Code § 6959.2, which is the source of 5 GCA § 5212, governing competitive sealed proposals. The public law stated: "Section 6959.2 of the Government Code is repealed. This Section 8 shall take effect retroactively as of April 1, 1985."

[4] For some unknown reason, 2 GAR Div. 4 § 3110, governing competitive sealed proposals, was still included in the 1997 publication of the GAR. However, according to the GAR now available on the Compiler of Laws website, 2 GAR Div.4 § 3110 now relates to procurement from nonprofit organizations. *See* http://www.guamcourts.org/CompilerofLaws.

subsection (a) repealed "to reflect repeal of competitive sealed proposals and to add reference to exemptions for non-profit organizations.1/1/1999"). Therefore, competitive bidding must be used unless the procurement falls within certain statutory exceptions.[5]

1. Incorporation by reference

[16] Notwithstanding the repeal of the competitive sealed proposal statute, DOA argues that this procedure continues to be a viable method of procurement. DOA maintains that by referring to 5 GCA § 5212, 5 GCA § 5210 incorporated section 5212 by reference, rendering its repeal ineffective. DOA further argues that because the repeal of section 8 of Guam Public Law 18-8 was ineffective, then section 5210(a) continues to allow for competitive sealed proposals as a method of procuring government contracts.

[17] We are not persuaded by DOA's argument. We do not dispute that 5 GCA § 5210(a)(1) contains a reference to 5 GCA § 5212, which for reasons unknown, remained even after the repeal effectuated by Guam Public Law 18-8. It is unclear whether the reference to section 5212 was due to mere oversight. It is clear, however, that the Legislature in 2004 enacted a new section 5212, entitled "Bid Security and Performance Bond Requirement for Contractors." By section 2 of Guam Public Law 270127 enacting a new section 5212, the Legislature confirmed its earlier action of repealing former section 5212 and its intent not to retain the former section 5212 in any form. It is equally clear that when the Legislature passed section 8 of Guam Public Law 18-8, it repealed 5 GCA § 5212, which provided for competitive sealed proposals. If it was the intent of the Legislature to later change its mind, it could have clearly stated so. As such, we are not persuaded by DOA's argument that the incorporation by reference of section 5212 into section 5210 permits the use of competitive sealed proposals as it existed prior to its repeal by Guam Public Law 18-8.

[18] In the instant case, it is undisputed that despite the repeal, the parties purported to have engaged in the competitive sealed proposal process. DOA issued a "Request for Proposal" and the

[5] The relevant inquiry in this case, however, relates to the statutory exception for professional services, found at 5 GCA § 5121 and 2 GAR Div. 4 § 3110. Notably, the exception for professional services is specifically stated again in 5 GCA § 5210(a).

parties submitted proposals in response. Throughout the proceedings below, the trial court also acknowledged that the proposal process was used. Therefore, to be upheld, the procurement must fall within one of the statutory exceptions to the sealed bidding process. If none of the exceptions apply, the procurement violates Guam law and must be set aside. We next examine the exceptions to competitive sealed bidding.

2. Statutory exceptions to competitive sealed bidding

[19] Guam law sets out the limited exceptions to the statutory requirement of competitive sealed bidding: small purchases[6]; sole source procurement[7]; emergency procurement[8]; and procurement from nonprofit corporations pursuant to 5 GCA 5217.[9] These exceptions do not apply to this case.

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[6] Title 5 GCA § 5213 (2005) states: "**§ 5213. Small Purchases.** Any procurement not exceeding the amount established by regulation may be made in accordance with small purchase procedures promulgated by the Policy Office, provided, however, that procurement requirements shall not be artificially divided so as to constitute a small purchase under this Section." Furthermore, 2 GAR Div. 4 § 3111 (1997) provides that a small purchase under 5 GCA § 5213 is defined as "a procurement of less than $15,000 for supplies or services and less than $50,000 for construction."

[7] Title 5 § 5214 (2005) states:

> **§ 5214. Sole Source Procurement.** A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the Policy Office, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of either officer above the level of the Procurement Officer determines in writing that there is only one source for the required supply, service or construction item.

[8] Title 5 GCA § 5215 (2005) states:

> **§ 5215. Emergency Procurements.** Notwithstanding any other provision of this Chapter, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Policy Office . . . . .

[9] Title 5 GCA § 5217 (2005) states:

> **§ 5217. Procurement from Nonprofit Corporations.** A contract may be awarded for a supply or service without competition when the contractor is a nonprofit corporation employing sheltered or handicapped workers. As a condition of the award of the contract the contractor must certify that labor on the project will be performed by handicapped persons except that supervisory personnel do not have to be handicapped. A contractor awarded a contract pursuant to this Section shall not be required to post any of the bonds required under Article 5 of this Chapter.

The operation, management and maintenance of the Guam Public Transit system cannot be considered a small purchase pursuant to 5 GCA § 5213 because it is not a service for less than $15,000; a sole source procurement pursuant to 5 GCA § 5214 because there is more than one source; an emergency procurement pursuant to 5 GCA § 5215 because there was no stated emergency; or procurement from nonprofit corporations pursuant to 5 GCA § 5217 because nonprofit services were not sought.

[20] The remaining exception in 5 GCA § 5216 governs the procurement of certain services specified in 5 GCA § 5121. This "professional services" exception is the relevant inquiry in this case.

[21] Title 5 GCA § 5121 states:

> **§ 5121. Authority to Contract for Certain Services and Approval of Contracts.**
> **(a) General Authority.** *For the purpose of procuring the services of accountants, physicians, lawyers, dentists, licensed nurses, other licensed health professionals and other professionals*, any governmental body of Guam may act as a purchasing agency and contract on its own behalf for such services, *subject* to this Chapter and regulations promulgated by the Policy Office . . . .

(Emphasis added.) The exception is also set out in regulation. Title 2 GAR Div. 4 § 2112 states:

> **§2112. Authority to Contract for Certain Services and Approval of Contracts (Guam Procurement Act §5121 of Title 5**). (a) **General Authority.** *For the purpose of procuring the services of accountants, physicians, lawyers, dentists and other professionals*, any governmental body of this territory may act as a purchasing agency and contract on its own behalf for such services, subject to the provisions of the Guam Procurement Act, and these Regulations . . . .

(Emphasis added.). Title 2 GAR Div. 4 § 3114 further states:

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

(Emphasis added.).

[22] The issue is whether the procurement in this case is for professional services.

B. Professional Services Exception to Competitive Sealed Bidding

[23] We have long held that in cases of statutory construction, we start with the plain language of the statute. *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23, *aff'd*, 276 F.3d 539 (9th Cir. 2002). Furthermore, our "task is to determine whether or not the statutory language is 'plain and unambiguous'" and our inquiry in this regard "'is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 341 (1997)).

1. Definition of "professional services"

[24] The term "professional services" is not defined in the Guam Procurement Law, Chapter 5 of Title 5 GCA, or in corresponding procurement regulations.[10] We may start with a literal reading of the term, *see Aguon*, 2002 Guam 14 ¶ 7, as we did in *Yasuda Fire & Marine Insurance Co. v. Heights Enterprises*, 1998 Guam 5. In *Yasuda*, we examined the concept of "professional services" in the context of the insurance industry. The suit in *Yasuda* was initiated by a claim against a general contractor, who then sued Heights for defective workmanship arising from pest extermination services. Yasuda had issued a general liability insurance policy to Heights which excluded "bodily injury or property damage due to . . . (D) the rendering or failure to render professional services." *Id.* ¶ 3. The trial court had ruled that the professional services exclusion in the policy excluded Heights from coverage, and in so doing, implicitly held that pest extermination services were professional services.

[10] Although "professional services" is not defined within the Guam Procurement Law, Chapter 5 of Title 5 of the GCA, this term is defined with regard to business structures. "Professional services" is defined in the chapter governing professional corporations as "any type of professional services which may be lawfully rendered only pursuant to a license, certification or registration authorized by the Business License Law (11 GCA Chapter 26)." 18 GCA § 8102(a) (2005). This term is also defined in relation to limited liability companies as "any type of personal service that requires as a condition precedent to the rendering of the service the obtaining of a license, permit, registration, or other legal authorization, including but not limited to the personal service rendered by an architect, attorney-at-law, certified public accountant, dentist, doctor, physician, public accountant, surgeon, or veterinarian." 18 GCA § 15102(7) (2005).

[25] Heights appealed, arguing *inter alia*, that the trial court incorrectly found that the professional services exclusion in the policy excluded coverage. Yasuda countered that professional services was no longer limited to the traditional fields of law and medicine. *Id.* ¶ 25. This court "adopt[ed] a definition of professional services which stays truer to a literal interpretation of the language--the rendering of services professionally" and in doing so, made the distinction between "the professional versus the amateur." *Yasuda*, 1998 Guam 5 ¶ 28. In *Yasuda*, this court plainly interpreted "professional" as one who receives money, while at the same time stating that "[g]etting paid is not the issue, but rather the status of the service provider as one generally paid for rendering such services. . . . [T]his court views the status of the service provider as having weight equal to that of the service or act provided." *Id.* ¶ 28. Although this definition is somewhat lacking in clarity, we do not overrule our holding that both the status of the service provider and the service or act provided should be considered equally.[11]

a. status of the service provider

[26] We now apply the two factors articulated in *Yasuda* to the case at bar. With regard only to "status of the service provider," it is undisputed that a business responsible for the management, operation and maintenance of a public transit system would "generally [be] paid for rendering such services." *Id.* ¶ 28. Based on this factor alone, the procurement in this case may be interpreted as falling within the professional services exception, and therefore excluded from competitive sealed bidding. Our inquiry, however, must also consider "the act or service" sought by the RFP.

b. service or act provided

[27] Both KEI and DOA rely on cases that, like *Yasuda*, expanded the scope of the "professional services" exception in procurement disputes. In *Shively v. Belleville Township High School*, 769 N.E.2d 1062 (Ill. App. Ct. 2002), the court applied the statutory professional services exception to

[11] We believe, however, that this court in *Yasuda Fire & Marine Ins. Co. v. Heights Enters.*, 1998 Guam 5, apparently accorded greater weight to "the status of the service provider as one generally paid for rendering such services." *Id.* ¶ 28. This is because the court omitted any analysis of the "service or act" of pest extermination, and instead focused on the status of the service provider.

a construction management agreement, and articulated the following rule: "Where the services require the exercise of professional and significant business judgment in providing important services on behalf of the government body, then the award of those contracts is exempt from the competitive-bidding process pursuant to the relevant professional-services exception." *Id.* at 1068.

[28] KEI and DOA also cite *Malloy v. Boyertown Area School Board*, 657 A.2d 915, 919 (Pa. 1995) and *County Council v. SHL System House Corp.*, 60 F. Supp. 2d 456, 462 (E.D. Pa. 1999), where the courts held that professional services were those that "involve quality as the paramount concern and require a recognized professional and special expertise," with both courts quoting *In re: 1983 Audit Report of Belcastro*, 595 A.2d 15, 21 (Pa. 1991). *Malloy* involved a construction management contract, while *County Council* involved a contract for the design, development, operation and support of emergency telephone services.

[29] KEI and DOA also rely on *Autotote Ltd. v. New Jersey Sports & Exposition Authority*, 427 A.2d 55 (N.J. 1981), where the New Jersey Supreme Court acknowledged "that the term 'professional services' is no longer limited to the traditional professions such as law and medicine." *Id.* at 59. *Autotote* involved a dispute over an award of a contract for a totalisator system,[12] which "involve[d] the inextricable integration of a sophisticated computer system and services of such a technical and scientific nature as to constitute 'professional services' within the statutory exception to the requirement of public bidding." *Id.* at 59. Finally, they cite *Nachtigall v. New Jersey Turnpike Authority*, 694 A.2d 1057, 1059 (N.J. Super. Ct. App. Div. 1997), where the contract was for "an integrated electronic toll collection system" to service New Jersey's toll roads, bridges and tunnels. The court in *Nachtigall* recognized that "the proposal has some individual aspects that are not themselves professional services, such as digging the trench for the fiber optic cable and laying it, and providing the patented hardware," however, "these elements of the proposal are inseparable from the predominant nature of the entire proposal, which is, essentially, an agreement . . . to provide a

[12] The totalisator system is "a complex computer network designed to tabulate and categorize the bets made on every horse in each race. The system also determines the payoff for each race, including the specialty wagers (exacta, daily double, etc.)." *Autotote Ltd. v. N.J. Sports & Exposition Auth.*, 427 A.2d 55, 56 n.1 (N.J. 1981).

combination of coordinated professional services, namely traffic-consulting services." *Id.* at 1063. Therefore, despite certain non-professional elements, the contract as a whole was "an integrated combination of sophisticated banking, financial, marketing, and traffic consulting services" and thus, the professional services exception applied. *Id.* at 1064.

[30] Taken collectively, these cases reveal that courts have expanded "professional services" beyond traditional fields, and have recognized that services may be professional even if they include some elements of a manual, non-professional nature. Yet, even if we accepted these courts' interpretations, the procurement in this case could not be interpreted as one for professional services.

2. The requirements of the RFP

[31] In general terms, the RFP was for the management, operation and maintenance of the island's public transit system, and additionally required that the winning awardee provide all the buses to be used in the operation of the system. Close examination of the RFP, however, reveals that DOA retained virtually all management and planning duties. For example, the RFP stated DOA's planning responsibilities were as follows:

> *DOA will have the exclusive right to plan the operations* of the public and complementary paratransit services, including, but not limited to, the right to determine and modify from time to time the following matters:
>
> 1. Times of day services are to be rendered;
> 2. Routes of which buses are to run;
> 3. Schedules by which buses are to run;
> 4. Location and identification of stops to pick-up and discharge passengers, as well as schedule of pick-ups per stop;
> 5. Fare and fare collection procedures;
> 6. Number and sizes, including seat capacity of buses in service;
> 7. Advertising, promotion and public information.
>
> *DOA will have the right to increase or decrease the scope of public and complementary paratransit services . . . without renegotiating with Operator . . . .*

Appellant's Excerpts of Record ("ER"), CVA05-006, at 41 (Req. for Proposal) (emphases added).

DOA also retained certain Operational and Management Supervision responsibilities, which included the right "[t]o monitor the records, facilities, equipment, and personnel . . . as well as schedule adherence and fare box recovery procedures" and "[t]o establish rules which are reasonable for the operations and/or maintenance of the public and complementary paratransit service." Appellant's ER, CVA05-006, at 41 (Req. for Proposal).

[32] In contrast, the RFP detailed the offeror's Extent of Services as follows:

> *The Operator will be engaged by DOA to operate, maintain, and repair the buses* for DOA's transit services. *Generally, the Operator will be responsible for maintaining and repairing the buses including bus washing, providing drivers* and other supervisory, maintenance, and administrative personnel, providing training as necessary, developing administrative procedures and financial records, developing methods to improve effectiveness and service efficiency.
>
> *Operator will operate buses on routes and pursuant to schedules set forth in written instructions to be prepared by DOA* before the effective date, or as said routes and schedules may be extended, reduced, or otherwise modified from time to time by DOA.

Appellant's ER, CVA05-006, at 43 (Req. for Proposal). The RFP further lists the offeror's operations responsibilities, which were:

> 1. *[To o]perate buses* in accordance to established routes, schedules, hours, days, and time of services.
>
> 2. Provide qualified personnel for the management and operations of the Guam Public and Complementary paratransit services.
>
> 3. Provide such training and administering such tests as may be required by local and federal regulations, including, at a minimum, first aid and CPR, ADA orientation workshops . . . defensive driving courses . . . as required by DOA.
>
> 4. Serving as the principle [sic] source of information for the operations of the public transit system.
>
> 5. *Selling public transit passes and disseminating route, schedule, and fare brochures.*

Appellant's ER, CVA05-006, at 43 (Req. for Proposal) (emphases added).

[33] Fleet and DOA assert on appeal that the services for the RFP were "far more complex and extensive than simply and solely performing bus driver or dispatcher work." Intervenor and

Defendant-Appellees' Supp. Brief, CVA05-006, at 4. The RFP itself clearly contradicts this statement, as it states that the offeror's primary duties were indeed operating, maintaining and repairing the buses, and selling bus tickets. Unlike *Autotote* and *Nachtigall*, the professional and non-professional elements in this case were expressly bifurcated, and the non-professional elements fall far short of being of a technical and scientific nature. Moreover, the duties of driving, repairing and washing buses, and selling bus tickets, simply do not require "recognized professional and special expertise" as was described by the courts in *Malloy* and *City Council*. Finally, even if in maintaining Guam's public transit system, the winning offeror would "provid[e] important services on behalf of the government body," *Shively*, 769 N.E.2d at 1068, here DOA was responsible for planning the operations, including the schedules, routes, fares and fare collection procedures. The remaining duties of operating, maintaining and repairing the buses simply do not "require the exercise of professional and significant business judgment" as was contemplated in *Shively*. *Id.* at 1068.

[34] Taking into consideration the two *Yasuda* factors, we first acknowledge that with regard to the "status of the service provider," a business would generally receive payment for managing, maintaining and operating a mass transit system. As discussed above, this factor weighs toward interpreting the procurement here as one for professional services. In contrast, the second factor weighs against interpreting the RFP as one for professional services. Our analysis of the RFP itself reveals that, apart from providing the buses to be used in the system, the services and acts requested were primarily operating, repairing and washing and cleaning the buses to be used; thus, we cannot interpret the "service or act provided" in this case as being professional. Weighing both *Yasuda* factors equally, the procurement method used in this case does not fall within the professional services exception of 5 GCA § 5121.

[35] Because none of the statutory exceptions to competitive sealed bidding apply in this case, we hold that using the competitive sealed proposal process was contrary to law. We further hold that the contract in this case should have been procured using the competitive sealed bidding process, in

accordance with 5 GCA § 5210(a). For these reasons, the procurement violated Guam's Procurement Code, and therefore the procedure is invalidated, and the proposed award to KEI should be set aside.

3. Remedy

[36] Our holding today invalidates the procurement process used in this case, and therefore, it is unnecessary to discuss the other arguments raised by the parties in their briefs. We look instead to available remedies in light of our holding. The contract, which was the subject of the RFP process erroneously used here, had not yet been awarded.[13] The appropriate remedies, therefore, are found in 5 GCA § 5451 (2005), which states: "If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be: (a) cancelled; or (b) revised to comply with the law." As discussed above, based on the current specifications of the RFP, the only procurement method applicable here is the competitive sealed bid process. While the specifications could be rewritten to qualify as "professional services" as defined herein, the current RFP would still have to be canceled and a new RFP pursued. Therefore, the only remedy available is cancellation of the proposed award pursuant to 5 GCA § 5451(a).

V.

[37] We hold that using Request for Proposal DOARFP 03-001 to procure the operation, management and maintenance of the Guam Mass Transit system, violated the Guam Procurement Code. Title 5 GCA § 5210 mandates that government contracts in the Executive Branch be awarded using the competitive sealed bidding process, subject to limited statutory exceptions. The procurement in this case did not fall within any of the exceptions; specifically, it was not a procurement for professional services as contemplated by 5 GCA § 5121. Because the procedure

[13] Fleet's protest letters and lawsuits are based on DOA's intent to award the contract to KEI, rather than an actual award, because no award has been made. We recognize that although the transit system is currently operating, statements made by counsel for Fleet during oral argument indicate that it is possible only through an emergency procurement to ensure continued service despite the litigation, and not because of an award pursuant to the RFP. Because no award was made, KEI may not seek any remedy pursuant to 5 GCA § 5452 (2005), which would apply if an award had been made, but later found in violation of the law.

was conducted in violation of Guam law, the procurement is invalidated, and the proposed award is canceled.

[38] Accordingly, the trial court is **REVERSED.**