

OFFICE OF THE PUBLIC AUDITOR
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

IN THE APPEAL OF

GUAM PACIFIC ENTERPRISES, INC.,

Appellant.

APPEAL OPA-PA-09-003

DECISION

To: **Appellant: Guam Pacific Enterprises, Inc.**
Sedfrey M. Linsangan
P. O. Box 23128
GMF, Guam 96921
Facsimile (671) 649-6988

Attorney for Appellee: Guam Power Authority
D. Graham Botha, Esq.
Legal Counsel
Guam Power Authority
P. O. Box 2977
Hagatna, Guam 96932
Facsimile (671) 648-3290

INTRODUCTION

In a Notice of Appeal dated July 23, 2009, Guam Pacific Enterprises, Inc. (GPE) seeks reimbursement of liquidated damages assessed in a contract dispute with Guam Power Authority (GPA).

The Public Auditor has jurisdiction to hear this matter pursuant to 1 G.C.A. § 1909(k), 5 G.C.A. § 5703, and 5 G.C.A. § 5706.

Decision

1 The GPE appeal involves the proper application by GPA of the Liquidated Damages
2 clause contained within the Termination for Default clause in a contract for GPE to provide
3 various electrical supplies under a series of purchase orders. GPA's basis for assessing liquidated
4 damages was that the orders were not filled by GPE in a timely manner and that GPA took action
5 appropriate under the terms of the contract. GPE contends it made a reasonable request for an
6 extension of delivery time and that it should be excused from liquidated damages.
7

8 GPE also contends the bid bond requirement was improperly administered by GPA when
9 it deposited and then released a cashier's check instead of holding it in trust. Finally, GPE also
10 complains that GPA did not pay interest on due accounts. Unlike the liquidated damages issue,
11 the bid bond and late payment issues were not brought to GPA before being raised in this appeal.
12

13 A hearing was held on October 8, 2009. Appellant GPE was represented by its President,
14 Sedfrey M. Linsangan, proceeding pro se. Appellee GPA was represented by its Legal Counsel
15 D. Graham Botha, Esq. This decision is based on the Procurement Record, all documents
16 submitted by the parties in this appeal, and all testimony and arguments presented in the hearing.
17 The Public Auditor, in reaching this Decision, has considered and incorporates herein the
18 Findings of Hearing Officer Charles D. Stake, Esq.
19

20 **FINDINGS OF FACT**

21 1. GPE filed a Notice of Appeal on July 23, 2009, seeking to reverse a series of GPA
22 decisions applying liquidated damages to GPA Purchase Orders 13394, 12355, 12132, 12306,
23 12414, 12140, 9177, 5213, and 5215 for electrical supplies.
24

25 2. Although GPE eventually filled GPA Purchase Orders 13394, 12355, 12132, 12306,
26 12414, 12140, 9177, 5213, and 5215, GPE was not fully compensated by GPA due to an
27 assessment of liquidated damages.
28

3. The contract delivery dates required by GPA to supply Purchase Orders 13394, 12355, 12306, 12132, 12414, 12140, 9177, 5215, and 5213 were not timely met by GPE and liquidated damages were applied by GPA as follows:

GPA Purchase Order Number	GPE Inc. Invoice Number	GPE Inc. Invoice Amount	GPA Payment Date	GPA Check Number	GPA Payment Amount	Liquidated Damages
13394	35194	\$5,987.64	07/06/09	043980	\$5,314.03	\$673.61
12355	25403	\$1,029.50	05/20/08	039338	\$970.31	\$59.19
12132	25648	\$12,068.10	05/20/08	039338	\$12,068.10	\$0.00
12306	28154	\$985.68	08/20/08	040367	\$616.05	\$369.63
12132	26342	\$121.90	06/20/08	039663	\$111.54	\$10.36
12414	26493	\$191.30	06/20/08	039663	\$191.30	\$0.00
12140	24146	\$3,875.20	03/20/08	038726	\$3,623.31	\$251.89
9177	10379	\$2,988.70	07/07/05	028305	\$2,450.73	\$537.97
9177	10335	\$3,186.30	06/03/05	027936	\$2,811.91	\$374.39
5215	7473	\$12,374.04	04/04/02	015434	\$10,765.41	\$1,608.63
5213	7474	\$12,926.40	04/04/02	015434	\$11,245.97	\$1,680.43

4. GPE made written requests to GPA to grant extensions of the contract delivery dates for the appealed purchase orders. GPA denied these requests and responded to GPE with written ten-day cure notices requiring timely delivery for all the purchase orders.

5. The purchase orders were filled pursuant to applicable contract terms which include a Termination for Default Clause with a provision for liquidated damages in the amount of one-fourth of one percent of the outstanding order per calendar day from date set for cure until the

1 contractor is terminated for default or until the contractor provides the supplies. 2 G.A.R. §
2 6101(9)(a).

3 6. The Termination for Default Clause also contains a provision to excuse
4 nonperformance or delayed performance based on the following causes: acts of God; acts of the
5 public enemy; acts of the territory or other government entity in its sovereign or contractual
6 capacity; fires; floods; epidemics; quarantine restrictions; strikes or other labor disputes; freight
7 embargos; or unusually severe weather. 2 G.A.R. § 6101(8)(d).

9 7. GPE's requests to GPA to grant delivery date extensions did not list the above
10 enumerated excuses for delayed performance, but did note problems with its stateside suppliers
11 being unable to meet delivery dates due to prior sales and insufficient manufacturing capacity.

13 8. Guam Procurement Regulations provide that bid bonds or "other security" may be
14 required for supply contracts to protect the interest of the territory. 2 G.A.R. § 3102(f). A surety
15 "bid bond or cash deposit" may be submitted with a bid for procurement of supplies as a good
16 faith measure to protect against a successful bidder failing to enter into a contract. 2 G.A.R. §
17 3109(c)(3).

19 9. The Purchase Order contracts between GPE and GPA provided for payment by GPA
20 within 30 days of delivery. Purchase Order 13394 was delivered to GPA on May 29, 2009, and
21 payment was made 37 days later on July 6, 2009. 5 G.C.A. § 5475 and 2 G.A.R. § 9107 provide
22 for interest on amounts ultimately determined to be due a contractor.

24 10. GPE brought the liquidated damages issue to the attention of GPA when it requested
25 delivery extensions from that agency prior to bringing this appeal to the Public Auditor.
26 However, GPE did not bring the issues of alleged improper administration of the bid bond
27 requirement and late payments to GPA before raising them in this appeal.
28

1 **ANALYSIS**

2 GPA's basis for assessing liquidated damages was that the orders were not filled by GPE
3 in a timely manner and that GPA took the appropriate action under the terms of the contract.
4 GPE seeks reimbursement of liquidated damages. GPE contends it made reasonable requests for
5 delivery time extensions and should be allowed the full price amount for each order it filled.
6

7 **I. Statute of Limitations**

8 The time limit for filing a contract appeal is set by 5 G.C.A. § 5706(b). A contractor
9 may appeal a contract dispute to the Public Auditor within 60 days of the receipt of the agency's
10 final decision or within 60 days following the failure of the agency's failure to render a timely
11 final decision. The standards for an "agency decision" are defined in 5 G.C.A. § 5427(c). That
12 section clearly establishes the following two requirements for a final "agency decision":
13

14 "The decision shall:

- 15 (1) State the reasons for the action taken; and
16 (2) Inform the contractor of its rights to judicial review or administrative review...."
(Emphasis supplied)

17 **A. GPE's Appeal of GPA Purchase Order 13394 is Timely**

18 GPE filed this appeal with the Public Auditor within 60 days following the agency's
19 failure to issue a final "agency decision" and has met the statutory requirement for the Public
20 Auditor's jurisdiction.
21

22 On April 13, 2009, GPE provided GPA with a notice of delay for Purchase Order number
23 13394 for electrical supplies (disconnect switches) and requested a delivery date extension to
24 May 12, 2009. As an excuse for the delay, GPE cited that, "manufacturer's shipping estimate did
25 not materialized [sic]". GPE also attached a letter from its supplier, S & C Electric Company,
26 which cited a shortage of the supplies ordered due to "prior sales" and "manufacturing capacity."
27
28

1 GPA responded on April 14, 2009 with a 10-day cure notice and denied the request for an
2 extension. On April 22, 2009, GPA again acknowledged GPE's request for a delivery date
3 extension from April 13 to May 12, 2009 and denied it "based on the urgency of the item
4 awarded... The delivery date of April 13, 2009 shall remain in full force." GPA further noted
5 that it was "scrutinizing all requests for extensions based on projected planning within the
6 authority to ensure customer reliability and to support the island wide power system."

7
8 The GPA notification failed to meet the statutory requirement for a final agency decision
9 set out in 5 G.C.A. § 5427(c). While GPA's decision stated the reason for its decision as required
10 by 5 G.C.A. § 5427(c)(1), it failed to "inform the contractor of its right to judicial review or
11 administrative review" as required by 5 G.C.A. § 5427(c)(2). Therefore, the timeliness of GPE's
12 appeal is governed by the second prong of 5 G.C.A. § 5706 requiring a contractor to appeal
13 "within 60 days following the failure to render a timely decision as provided in § 5427 of this
14 Chapter." GPE received its payment from GPA for filling GPA Purchase Order 13394 with a
15 liquidated damages assessment of \$673.61 on July 6, 2009. GPE's appeal of Purchase Order
16 payment was well within the required 60 days, after it became clear that there would not be a
17 final "agency decision" in compliance with the terms set out in 5 G.C.A. § 5427(c)(1) and (2).
18
19

20 **B. GPE's Appeal of Purchase Orders 12355, 12132, 12306, 12414, 12140, 9177, 5215,**
21 **and 5213 Are Not Timely**

22 GPE's appeal of the remaining purchase orders cited above does not fall within the
23 required time guidelines. Consequently, OPA does not have statutory jurisdiction to hear these
24 time-barred appeals.
25

26 GPA refused written requests for delivery time extension in the above purchase orders,
27 but failed to inform GPE of its right to appeal which is a required element of the statutory
28

1 definition for a final “agency decision”. 5 G.C.A. § 5427(c)(1) and (2). Therefore, final “agency
2 decisions” on Purchase Orders 12355, 12306, 12132, 12140, 9177, 5215, and 5213 were not
3 rendered. However, unlike Purchase Order number 13394, these remaining purchase orders
4 were not appealed by GPE within 60 days following GPA’s failure to render a timely decision as
5 provided in 5 G.C.A. § 5427 and 5 G.C.A. § 5706. GPE received payment from GPA with
6 liquidated damages assessed as follows: Purchase Order 12355 on May 20, 2008; 12306 on
7 August 20, 2008; 12132 on June 20, 2008; 12140 on March 20, 2008; 9177 on July 7, 2005 and
8 on June 3, 2005; 5213 and 5215 on April 4, 2002. On these respective dates, it became clear that
9 a *de facto* final agency decision had been made by GPA as to a particular purchase order and
10 assessment of liquidated damages.
11

12
13 The Public Auditor is required by the applicable law to strictly adhere to statutory time
14 limits and has no discretion to consider personal circumstances or equity. Time provisions for
15 filing an appeal are considered jurisdictional and cannot be waived. The U.S. Supreme Court
16 held in *United States v. Holpuch*, 328 US 234 (1946), that a contractor’s claim was “outlawed”
17 by reason of the contractor’s failure to appeal within the prescribed time. Neither Boards of
18 Contract Appeal nor the Court of Federal Claims has authority to waive time requirements.
19 *Cosmic Construction v. United States* 697 F.2d 1389 (Fed. Cir. 1982). In *Gregory Lumber Co. v.*
20 *United States*, 229 Ct. Cl. 762, 763 (1982), the Court of Claims stated, “Congress has set the 12-
21 month limit and this court should not read into it exceptions and tolling provisions Congress did
22 not contemplate or authorize.” Boards will not consider personal circumstances or in any other
23 way exercise discretion as to acceptance of an appeal filed later than the statutory deadline. *DL*
24 *Woods Construction Inc. v. General Services Administration*, GSBICA 13822, 97-2 BCA
25 ¶29,009 (1996).
26
27
28

1 Under the statute, GPE then had 60 days to file a timely appeal. Even the most recent
2 date on which GPE knew or should have known a final agency decision had been rendered was
3 August 20, 2008 when liquidated damages were deducted from GPA's invoice payment to GPE
4 for Purchase Order 12306. GPE then delayed approximately 11 months before filing its appeal
5 with the Public Auditor on July 23, 2009. The remaining *de facto* agency decisions assessing
6 liquidated damages against GPE were rendered at even earlier dates ranging from April 4, 2002
7 through June 3, 2008. Consequently these appeals all exceed 60 days and the Public Auditor
8 lacks statutory jurisdiction to hear them. 5 G.C.A. § 5706 and 5 G.C.A. § 5427. The present
9 appeal must be restricted to considering only Purchase Order 13394 and the validity of the
10 liquidated damages assessed against GPE by GPA under that purchase order contract.
11
12

13 **II. Liquidated Damages**

14 **A Plain Meaning of Contract Provision for Liquidated Damages**

15 The propriety of an assessment of liquidated damages is dependent on the presence of a
16 liquidated damages clause in a contract and governed by the wording of that clause. In the
17 present case, the Guam Procurement Regulation standard provision was incorporated by
18 reference. Purchase Order 13394 contained the following statement:
19

20 "NOTE TO VENDOR:

- 21 1. Delivery is no later than the date indicated above (04/13/09).
- 22 2. All late deliveries and acceptance are subject to the Liquidated Damages Clause in
Section 6-101.09.1 of the Guam Procurement Regulations."

23 Guam Procurement Regulations 2 G.A.R. § 6101.09 provides in pertinent part:

24 Liquidated Damages

25 When the Contractor is given notice of delay or nonperformance ... and fails to cure it in
26 the time specified, the contractor shall be liable for damages for delay in the amount of
one-fourth of one-percent (1%) of the outstanding order per calendar day from date set
27 for cure...until the contractor provides the supplies ...if the contractor is not terminated
for default. To the extent that the contractor's delay or non-performance is excused under
28

1 Paragraph (4) (Excuse for Nonperformance or Delayed Performance) of the Termination
for Default Clause ...liquidated damages shall not be due the territory.

2 The Excuse for Delay clause referenced in the Liquidated Damages holds the contractor
3 responsible for the delays of his subcontractors and enumerates with specificity the delays which
4 are excusable. The excusable delay clause found in 2 G.A.R. § 6101(8)(d) is set out in relevant
5 part below.
6

7 **Excuse for Nonperformance or Delayed Performance**

8 The contractor shall not be in default if the contractor has notified the Procurement
9 Officer within 15 days after the cause of the delay and the failure arises out of causes
10 such as: acts of God; acts of the public enemy; acts of the territory and any other
11 government entity in its sovereign or contractual capacity; fires; floods; epidemics;
12 quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually
severe weather. If the failure to perform is caused by ...a subcontractor... and... arises
out of the causes similar to those set forth above, the contractor shall not be deemed to be
in default....

13 **B. Prior Course of Dealing**

14 Appellant GPE cites its prior dealings with GPA as a basis for finding liquidated damages
15 were improperly imposed under the purchase order contracts. In *Administration of Government*
16 *Contracts* (supra) p. 210, Professor Nash notes that the prior course of dealing between parties is
17 important extrinsic evidence as to whether an explicit requirement of a contract is binding or
18 would be waived. The Armed Forces Board of Contract Appeals in discussing interpretation and
19 waiver of contract terms has found that a contractor is bound by the acceptance criteria that had
20 been followed by both parties over many years. General Time Corporation ASBCA 21211, 79-1
21 BCA ¶13,611, recons.denied, 85-1 BCA ¶17,842.
22

23 In the present case, there is a history of liquidated damages being assessed by GPA eight
24 times against GPE for late deliveries from 2002 to 2009. GPA demonstrated by its prior actions
25 that the contractor would not be allowed to perform at variance with the explicit terms of the
26
27
28

1 contract. Therefore appellant, an experienced businessman, was on notice that the liquidated
2 provisions would continue to be enforced.

3 **III. Bid Bond and Late Payment Issues Are Not Ripe for Appeal**

4 In order for the Public Auditor to decide a contract dispute, there must either be an
5 agency decision or a failure by the agency to render a timely decision. Neither of these threshold
6 conditions exists here. Appellant attempts to raise the matters of improper administration of the
7 bid bond requirement and late payments without initially raising them with GPA. The Public
8 Auditor lacks jurisdiction to review contract controversies which have not been previously
9 brought to the attention of the appellee agency. 5 G.C.A. § 5427; 5 G.C.A. § 5706. Having failed
10 to present these issues to obtain a final agency decision below GPE may not now appeal them.
11 Consequently, these matters are not ripe for appeal.
12

13
14 **IV. Good Faith and Fair Dealing**

15 An implied duty of “good faith and fair dealing” is applicable to GPA’s enforcement of
16 contract terms. The Uniform Commercial Code § 1-304 clearly provides, “every contract or duty
17 within this Act imposes an obligation of good faith in its performance or enforcement”.
18 Restatement (Second), Contracts § 205 reiterates this rule and incorporates in Comments d and e
19 the “good faith and fair dealing” obligation not to abuse the power to specify terms or determine
20 compliance. The unfair use of economic duress is also prohibited in Restatement (Second),
21 Contracts § 175(1).
22

23 While most of GPE’s purchase order contract appeals must be denied based on the
24 technical defects described above, the appeal of Purchase Order Number 13394 is not time-
25 barred and may be considered on the basis of good faith and fair dealing. It is also within the
26 purview of the Office of Public Accountability to review the business practices of government
27
28

1 agencies, corporations, and authorities, including autonomous agencies. 4 G.C.A. §1908; 4
2 G.C.A. §1909.

3 The government's good faith and fair dealing mandate prohibits abuse of its discretion
4 and improper contract administration. There are a number of instances in which GPA has dealt
5 from its superior bargaining position to administer GPE's contracts in a one-sided manner. GPA
6 has consistently held GPE to the literal letter of the contract, while allowing itself significant
7 latitude. For example, GPE invoice 10379 for Purchase Order No. 9177 was submitted on May
8 13, 2005, but paid 54 days later on July 7, 2005, well beyond the 30-day limit without the
9 inclusion of interest. Also, a cashier's check provided by GPE as bid security was deposited by
10 GPA rather than being held in trust. Although procurement law and regulations mandate interest
11 on amounts due a contractor, 5 G.C.A. § 5475, 2 G.A.R. § 9107, GPA paid no interest in either
12 instance.
13
14

15 GPA has ignored its duty under the law and consequently impacted the rights of
16 appellant. During the appeal hearing GPA admitted it failed to provide a complete procurement
17 record as required by law and regulations. 5 G.C.A. § 5475; 2 G.A.R. § 3127. Furthermore, GPA
18 had a duty under 5 G.C.A. § 5427 to inform GPE of its right to administrative or judicial review
19 of its decisions but also failed to comply with this requirement.
20

21 GPA has insisted GPE rigidly adhere to the contract delivery dates. In *Orange Cove*
22 *Irrigation Dist. v. United States*, 28 Fed. Cl. 790 (1993) the court found the agency had set an
23 unreasonably short deadline for the performance of delinquent work. The Federal Claims Court
24 stated at 800-01, "When one party has the authority to exercise discretion to determine an
25 essential term of a contract...the covenant of good faith and fair dealing requires that the
26 exercise of discretion be reasonable." In addition, that discretion must be exercised "honestly to
27
28

1 effectuate the object the parties had in mind in providing for the exercise of such power...
2 although the parties to a contract are normally bound by the terms thereof, it is well settled that a
3 contract provision that produces an egregious, unfair, or unreasonable result will not be
4 enforced.”

5 Although GPA had discretion to extend delivery dates and waive damages, it repeatedly
6 chose to stringently enforce the contract terms. Liquidated damages were assessed eight times
7 between 2002 and 2009, including one instance (PO No.12132) for only \$10.36. Yet, there has
8 been no evidence presented by GPA demonstrating an urgent need for exact day delivery for all
9 eight purchase orders from 2002 to 2009. The government has a duty to cooperate and exercise
10 discretion fairly in responding to approval requests for a delivery date extension. This requires
11 approval be granted unless there is a valid government interest served in disapproving the
12 contractor’s request. Unreasonable denials of approvals allowed for by the contract have been
13 found to be an abuse of discretion. *Administration of Government Contracts* (supra), at page 306
14 citing *Hoel-Steffen Constr. Co. v. United States*, 231 Ct.Cl.128, 684 F.2nd 843 (1982).

15 GPA holds a superior economic and bargaining position and has an obligation,
16 particularly to small local contractors such as appellant, to properly exercise its discretion and to
17 administer its contracts fairly and in good faith. The totality of circumstances surrounding GPA’s
18 administration of these purchase order contracts fails to demonstrate that duty has always been
19 met. There is insufficient evidence in the record to establish that GPA has demonstrated a true
20 legitimate need or purpose for requiring immediate exact due date delivery of Purchase Order
21 13394. Therefore, GPE’s appeal of Purchase Order 13394 is granted.
22
23
24
25
26
27
28


DECISION

1
2 For the reasons stated above, the Public Auditor denies the Appellant's appeal except as
3 to Purchase Order 13394. With respect to Purchase Order 13394, Appellant's appeal is granted.

4 This is a Final Administrative Decision. The Parties are hereby informed of their right to
5 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
6 Part D of Article 9, of 5 G.C.A. within 14 days after receipt of a Final Administrative Decision.
7 5 G.C.A. § 5481(a).

8 A copy of this Decision shall be provided to the parties and their respective attorneys, in
9 accordance with 5 G.C.A. § 5702, and shall be made available for review on the OPA website
10 www.guamopa.org.

11
12 **SO ORDERED this 13th day of November, 2009:**

13
14 
15 _____
16 **DORIS FLORES BROOKS, CPA, CGFM**
17 **Public Auditor**

Suite 401 Pacific News Building
238 Archbishop Flores St.
Hagåtña, Guam 96910

Phone: (671) 475-0390
FAX: (671) 472-7951



Fax

To: Mr. D. Graham Botha; Mr. Sedfrey Linsangan	From: Doris Flores Brooks OPA Procurement Appeals
Agency: Guam Power Authority; Guam Pacific Enterprises, Inc.	Pages: 14 (Including cover)
CC: Guam Media	Date: Friday – November 13, 2009
Fax: 648-3290 / 649-6988	Phone: 648-3225 / 649-6994
Re: OPA-PA-09-003: DECISION	

Urgent For Review Please Comment Please Reply Please Recycle

●Comments:

See attached Decision and acknowledge receipt of this fax by re-sending this cover page with your agency name, date, and initials. Thank you.

Anne Camacho x.219 acamacho@guamopa.org

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.