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Guam Publications, Inc.

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GUAM

IN THE APPEAL OF
GUAM PUBLICATIONS, INC.

Appellant.

APPEAL NO. OPA-PA-08-007

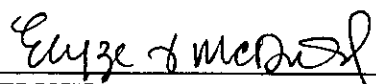
**MOTION FOR DEFAULT
JUDGMENT; MEMORANDUM IN
SUPPORT OF MOTION**

**APPELLANT GUAM PUBLICATIONS, INC.'S MOTION FOR DEFAULT JUDGMENT
AGAINST GENERAL SERVICES AGENCY**

Appellant Guam Publications, Inc., the publisher of the Pacific Daily News ("PDN") hereby moves the Office of the Public Auditor for default judgment against General Services Agency, and for a judgment in favor of PDN. This motion is supported by the attached Memorandum in Support of Motion and the records and files for this action.

DATED: Hagåtña, Guam, June 5, 2008.

CARLSMITH BALL LLP


ELYZE J. MCDONALD
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Guam Publications, Inc.

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

General Services Agency has failed to comply with the deadlines established by the OPA and by the Rules and Regulations governing Procurement Appeals, 2 GAR Division 4, Chapter 12. Specifically, after the PDN filed its appeal of the denial of its protest of Invitation for Bids ("IFB") No. GSA-012-08 on May 14, 2008, the next day the Office of the Public Auditor notified Claudia Acfalle, Chief Procurement Officer of the General Services Agency of PDN's Notice of Appeal. The OPA advised Ms. Acfalle that "immediate action is required of your office," including a complete copy of the procurement record by May 22, 2008. Also, according to the OPA's website, on May 30, 2008, GSA was required to submit its agency report pursuant to 2 GAR Div. 4 §§ 12104(c)(3) and 12105. **GSA failed to file either document, making this appeal uncontested.**

PDN asks the OPA to enter default against GSA, award a judgment in favor of PDN reversing the denial of its protest, and to award PDN the bid for GSA-012-08. In the alternative, PDN asks that the OPA require the reissuance of GSA-012-08 with two modifications, specifically, that GSA be required to define "general circulation" and that it utilize advertisement formats that are not unfairly skewed for the format requirements of the competing, but unqualified, bidder, the Marianas Variety.

II. LEGAL DISCUSSION

"The failure of . . . any Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed." 2 GAR Div. 4 § 12104(c)(5). As GSA has not filed an agency record or a report, the record properly before the OPA consists of that provided by PDN, including the background facts set forth below.

A. GENERAL BACKGROUND

IFB GSA-012-08 pertains to advertisement notices for "Election Notices Pursuant to Title 3 GCA & Publication of Board Meeting Pursuant to the Open Government Law." IFB GSA-012-08 specifies the following notices and advertisements: 2 x 4 Notices of Board Meetings and Other Election Information; 2 x 5 Election Notices regarding Early Voting/Absentee & other election information; 3 x 6 Election Notices regarding polling sites; 4 x 5 Election Notices regarding Candidates; 4 x 13 Sample Ballots; 5 x 7 Precinct Official Seminar Schedules; and a 5 x 15 List of Precinct Officials. Notice of Appeal ("NOA"), Ex. B.

Upon receipt of IFB GSA-012-08, PDN was curious as to the 5 x 15 format for the List of Precinct Officials, as that format is used not by PDN, but primarily by the Marianas Variety, another community newspaper. PDN asked GSA whether it was mandatory that the advertisement be 5 x 15, or whether a 5 x 14 ad, a format utilized by PDN, would be acceptable. NOA, Ex. C. GSA amended the Invitation for Bids to include, in addition to the 5 x 15 ad, a 5 x 14 ad for the List of Precinct Officials. NOA, Ex. D. PDN later inquired as to the justification for the specification sizes, and received the response that "The size of the advertisement is the specification that is required." NOA, Ex. F.

In addition, in order to determine a unit cost for the solicited advertising space, PDN needed to know the breadth of the intended distribution. PDN therefore submitted the following question: "In order for a unit cost to be determined, what is the distribution/circulation amount requested? (Number of newspapers your wanting your ad to be in)." NOA, Ex. C. GSA responded "General Circulation." NOA, Ex. E. As this response did not address the question posed, PDN again posed the following question: "What is the distribution requirement for the advertising notices? To price the advertising notices fairly the distribution amount is needed." NOA, Ex. F. GSA again responded "General Circulation." NOA, Ex. F.

On March 12, 2008, PDN submitted its bid. GSA also received a bid from the Marianas Variety. When GSA opened the Marianas Variety's bid, it was noted that the Marianas Variety did not submit a Statement of Qualification. However, GSA continued with the bid opening. GSA recommended that the bid be awarded to the Marianas Variety, and deemed the Marianas Variety's failure to submit a statement of qualification to be minor. NOA, Ex. A.

B. RECOMMENDATION OF THE BID TO THE MARIANAS VARIETY SHOULD BE REVERSED AND PDN SHOULD BE AWARDED THE BID.

As PDN's appeal states, GSA has recommended award of IFB GSA-012-08 to the Marianas Variety. That recommendation (or award) should be reversed, and PDN should be awarded the bid, on the following grounds:

1. **As Marianas Variety is not a daily newspaper of general circulation, it cannot be awarded the bid.** The IFB specified that the election notices would be published pursuant to Title 3. Of the items that bidders were to publish included sample ballots and the listing of precinct officials. Under Title 3, such notices may only be published in a *daily* newspaper of general circulation. 3 G.C.A. §§ 4108, 7104. Marianas Variety is not a daily newspaper of general circulation, as it is published only five days a week;¹ PDN, on the other hand, is published every day of the week and therefore meets the definition of a daily newspaper of general circulation. Should any of the sample ballots or listing of precinct officials be published in the Marianas Variety, such notices would be published in violation of Guam law.

2. **The Variety failed to be a responsive and responsible bidder as it did not fulfill the bid requirements by submitting a statement of qualification.** The IFB specifically required submittal of a statement of qualification for each bidder. In competitive sealed bidding, the contract shall be awarded to the lowest responsible and responsive bidder

¹ See http://www.mvarietynews.com/index.php?option=com_content&view=category&layout=blog&id=22&Itemid=40 ("The publication . . . is printed from Monday to Friday.").

whose bid meets the requirements set forth in the invitation for bids. 5 G.C.A. § 5211(g) and 2 GAR Div. 4, Ch. 3, § 3109(n)(1). The Marianas Variety failed to submit a statement of qualification as required and was therefore not a responsive and responsible bidder. A "responsive bidder" is one who has submitted a bid which conforms in all material respects to the invitation for bids. 5 G.C.A. § 5201(g) and 2 GAR Div. 4, Ch. 3, § 3109(n)(2). The IFB clearly required a statement of qualification from all bidders, yet the Variety failed to submit this required document, thus not complying in all material respects with the IFB. PDN, on the other hand, complied precisely with all requirements and was both a responsive and responsible bidder.

In the Bid Status notice, GSA stated that it deemed the omission "a minor informality" in light of budget constraints. It should be noted, however, in a very recent opinion by the Office of the Public Auditor that bid requirements relating to a bidder's qualifications are material and omission thereof cannot be waived as a minor informality. *See* OPA-PA-07-007 at 12. This is so even if that bidder is the lowest bidder "because Guam Procurement Laws and Regulations require that a successful bidder be the lowest bidder and be a responsive bidder." *Id.* at 8-9. Indeed it is curious why GSA or GEC would award a bidder without even knowing if they are "qualified." Here, PDN has been prejudiced by being required to comply with a requirement about its qualifications, while GSA's non-compliance has been waived.

The statement of qualification goes to the heart of the bidders' abilities to effectively produce and deliver on the bid requirements. Thus, complete omission of said statement cannot be and should not have been waived as a mere minor informality.

- C. IN THE ALTERNATIVE, THE IFB SHOULD BE REISSUED TO DISCLOSE THE EXTENT OF THE INTENDED CIRCULATION AND SHOULD BE MODIFIED TO PERMIT A FAIR BID FOR A FULL-PAGE AD.

The definition of "General Circulation" fundamentally affects how a bidder responds to

the Invitation for Bids, and GSA's refusal to define this term prejudiced PDN. PDN is able to circulate advertisements to its entire readership, or a fraction thereof, and it offers differing price structures for, for example, distribution to 1,000 subscribers versus a distribution to 10,000 subscribers. PDN twice inquired as to whether the GEC intended distribution to PDN's full readership of 26,000, or to a more limited number of readers. After not receiving clarification on this point, PDN submitted prices on the basis of distribution to both 10,000 readers and 26,000 readers, and the difference in the quotes submitted shows why clarification was necessary. For example, the Marianas Variety's bid did not state what circulation its bid was based upon (i.e., 1000, 2000, 10,000, or 26,000). Thus, it is impossible for GSA to properly assess whether the Marianas Variety was truly the lowest bidder and whether the Marianas Variety's bid is in the best interest of the government of Guam. If the pricing submitted by the Marianas Variety was based on anything less than 10,000 newspapers, it is not comparable to any of the bids submitted by the PDN and is likely a higher bid per paper. Should the OPA grant this appeal, and allow for the IFB to be reissued, the definition of "General Circulation" should be clarified and specified.

In addition, should the OPA grant this appeal, and allow for the IFB to be reissued, the advertisement formats specified should be neutral, rather than unfairly skewed in favor of the Marianas Variety. It is well-known that PDN is Guam's only daily newspaper and that the Variety, which runs only on weekdays, is another community newspaper. The 5 x 15 format for the List of Precinct Officials is a format that is specifically and solely used by the Marianas Variety, whereas the 5 x 14 format is more regularly used by the PDN. PDN protests the specification of the 5 x 15 format as it appears that it is specifically intended to fit the format of the Marianas Variety newspaper. It is unlawful for the Invitation for Bids and the bid selection process to favor one bidder over another. Rather, in all fairness, the IFB should be rectified to specify a full page ad, whether in a 5 x 14 format or a 5 x 15 format. GSA's answer to the PDN's

question regarding justification for the specified size requested was "The size of the advertisement is the specification that is required." This answer is completely unresponsive as it does not list any justifications such as a cited statutory requirement or some other reason for the specification, but instead basically asserts that GSA is requiring a certain size with no further explanation. PDN understood the specification requirement from the IFB, but asked an appropriate question for clarification purposes because of the differing formats of community newspapers; however, the response received failed to clarify the matter in the least but simply reasserted the specification without explanation. PDN was prejudiced by this non-responsiveness, as it was required to bid on a format used only by the Marianas Variety. Thus, the IFB and the award of the bid to the Marianas Variety is also defective in this regard.

III. CONCLUSION

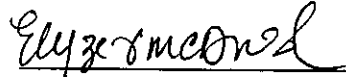
GSA has wholly failed to comply with the OPA's May 15, 2008 Notice specifying deadlines, with the regulations governing advertising notices, with Guam's procurement laws, and with Chapter 12 of 2 GAR Division 4 governing procurement appeals to the Public Auditor. Default should be entered against GSA, and a judgment should be issued in favor of the PDN.

In the record before the OPA, PDN has established that Marianas Variety cannot be awarded Invitation for Bids No. GSA-012-08 because it does not fit the definition of a daily newspaper of general circulation, and because it did not submit a complete bid package. Therefore, PDN, the only other bidder, and which meets all aforementioned requirements, should be awarded the bid.

In the alternative, the IFB should be reissued with two modifications: that "general circulation" be specified, and that the advertisement formats be neutral, rather than unfairly skewed in favor of the Variety.

DATED: Hagåtña, Guam, June 5, 2008.

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