



OFFICE OF THE PUBLIC AUDITOR

September 5, 2008

X To: **Appellant- Guam Publications Inc.**  
Rindraty Limtiaco  
President and Publisher  
Guam Publications Inc.  
PO Box DN Hagatna, Guam 96932

RECEIVED  
9/5/08  
*Atkinson*

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Transmitted herewith is a copy of the Public Auditor's Decision and Findings and Recommendations of Hearing Officer on OPA-PA-08-007 in the appeal of Guam Publications Inc. relative to the procurement of Invitation for Bid (IFB) No. GSA-012-08



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CARLSMITH BALL

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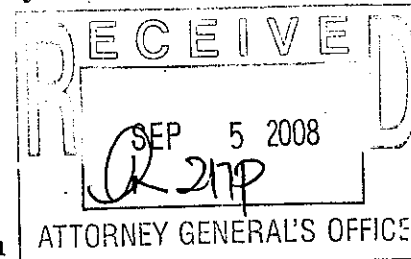
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Law Offices

ARRIOLA, COWAN, ARRIOLA

SEP 05 2008

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TIME 2:00pm

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Advertisement Notices Pursuant to Title 3 G.C.A. and Publication of Board Meetings  
Pursuant to the Open Government Law.

A complete copy of the Decision and Findings and Recommendations will be posted on  
our website within the next day and available for public view at [www.guamopa.org](http://www.guamopa.org).

Senseramente,

A handwritten signature in black ink, appearing to read 'Doris Brooks', written in a cursive style.

Doris Flores Brooks, CPA, CGFM  
Public Auditor



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

1  
2  
3  
4  
5 IN THE APPEAL OF,  
6 GUAM PUBLICATIONS, INC.,  
7 Appellant

APPEAL NO: OPA-PA-08-007

DECISION

8  
9 I. INTRODUCTION

10 This is the Public Auditor's Decision on an appeal filed on May 14, 2008, by Guam  
11 Publications, Inc., (Hereafter "PDN") regarding the General Service Agency's (Hereafter  
12 "GSA") denial of PDN's April 7, 2008 protest of GSA's award of GSA's Bid No. GSA-012-08  
13 (Advertisement Notices Pursuant to Title 3 G.C.A. and Publication of Board Meetings Pursuant  
14 to the Open Government Law) (Hereafter "IFB") to the Marianas Variety-Guam. (Hereafter  
15 "Marianas Variety") and GSA's Rejection of PDN's Bid. The Public Auditor holds that  
16 Marianas Variety was not a responsive bidder because it failed to submit a Statement of  
17 Qualifications as required by the IFB. Accordingly, PDN's May 14, 2008, appeal is sustained in  
18 part and denied in part.

19  
20 II. FINDINGS OF FACT

21 The Public Auditor in reaching this Decision, has considered and incorporates herein the  
22 Findings of the Hearing Officer, Anthony R. Camacho, Esq., issued on September 5, 2008. In  
23 addition, this Decision is based on the Procurement Record, all documents submitted by the  
24 parties in the appeal, as well as all testimony and arguments presented at the August 22, 2008,  
25 Hearing in this matter.

26 1. On February 5, 2008, GSA issued the IFB via publication of the Bid Invitation in the  
27  
28

Decision- 1

1 Marianas Variety.<sup>1</sup>

2 2. The IFB sought bids for the following election notices:

3	<u>Item</u>	<u>Specification</u>	<u>Unit of Measure (UOM)</u>
4	1.1	2 x 4 Notice of Board Meetings & Other Election Information	28
5	2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25
6	3.1	3 x 6 Election Notices regarding polling sites	10
7	4.1	4 x 5 Election Notices regarding Candidates	11
8	5.1	4 x 13 Sample Ballots	10
9	6.1	5 x 7 Precinct Official Seminar Schedules	8
10	7.1	5 x 15 List of Precinct Officials	6 <sup>2</sup>

11 3. The IFB was amended four (4) times as follows:

12 a. Amendment #1 amended the bid opening date from February 19, 2008 to  
13 February 29, 2008.<sup>3</sup>

14 b. Amendment #2 amended the bid opening date from February 29, 2008 to  
15 March 4, 2008, and amended the IFB by adding Item 8.1 for a 5 x 14 ad size for a List of  
16 Precinct Officials.<sup>4</sup>

17 c. Amendment #3 amended the bid opening date from March 4, 2008 to March 7,  
18 2008.<sup>5</sup>

19 d. Amendment #4 amended the bid opening date from March 7, 2008 to March  
20 12, 2008.<sup>6</sup>

21  
22  
23  
24 <sup>1</sup> Bid Announcement, Tab 13, Procurement Record.

25 <sup>2</sup> IFB Specifications, Tab 12, Procurement Record.

26 <sup>3</sup> IFB Amendment No. 1, Tab 9d, Procurement Record.

27 <sup>4</sup> IFB Amendment No. 2, Tab 9c, Procurement Record.

28 <sup>5</sup> IFB Amendment No. 3, Tab 9b, Procurement Record.



1 4. PDN submitted two (2) written inquiries to GSA which GSA and said inquiries and  
2 answers are as follows:

3 a. On February 28, 2008, PDN inquired what distribution/circulation (number of  
4 newspapers the notices would be published in) amount was the IFB requesting, and PDN  
5 inquired whether IFB Item No. 7.1 was a full page ad, whether the ad size of 5 x 15 was  
6 mandatory, and whether GSA would accept a 5 x 14 ad size.<sup>7</sup> That same day, GSA responded to  
7 PDN's inquiries by stating that the distribution/circulation amount was general circulation, and  
8 that IFB Item No. 7.1's 5 x 15 ad size was not required by law and that it would amend the IFB  
9 to include a 5 x 14 ad size as Item No. 8.1.<sup>8</sup>  
10  
11

12 b. On March 3, 2008, PDN inquired as to what the distribution requirement was  
13 for the notices and PDN inquired what the justifications were for the advertising notice  
14 specification sizes.<sup>9</sup> On March 5, 2008, GSA answered PDN's second inquiry by stating that the  
15 distribution requirement for the notices was general circulation and that the size of the  
16 advertisement is the specification that is required.<sup>10</sup>  
17

18 5. On March 12, 2008, GSA received bids for the IFB and PDN and the Marianas  
19 Variety were the only bidders for the IFB.<sup>11</sup>  
20

21 6. PDN submitted two alternative bids on IFB Items Nos. 1.1 to 8.1 for a distribution of  
22 26,000 and a distribution of 10,000 which were as follows:

23 <sup>6</sup> IFB Amendment No. 4, Tab 9a, Procurement Record.

24 <sup>7</sup> Letter from Jae F. Medina to Claudia Acfalle dated February 28, 2008, Tab 10b, Procurement Record.

25 <sup>8</sup> Letter from Claudia S. Acfalle to Jae Medina dated February 28, 2008, Id.

26 <sup>9</sup> Letter from Jae F. Medina to Claudia Acfalle dated March 3, 2008, Tab 10a, Procurement Record.

27 <sup>10</sup> Letter from Claudia S. Acfalle to Jae F. Medina dated March 5, 2008, Id.

28 <sup>11</sup> Abstract of Bids dated March 12, 2008, Tab 7, Procurement Record.

a. PDN's bid for a distribution of 10,000 was as follows:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$91.20	\$2,553.60
2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$114.00	\$2,850.00
3.1	3 x 6 Election Notices regarding polling sites	10	\$205.20	\$2,052.00
4.1	4 x 5 Election Notices regarding Candidates	11	\$228.00	\$2,508.00
5.1	4 x 13 Sample Ballots	10	\$592.80	\$5,928.00
6.1	5 x 7 Precinct Official Seminar Schedules	8	\$399.00	\$3,192.00
7.1	5 x 15 List of Precinct Officials	6	\$855.00	\$5,130.00
8.1	5 x 14 List of Precinct Officials	6	\$798.00	\$4,788.00 <sup>12</sup>

b. PDN's bid for a distribution of 26,000 pieces was as follows:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$236.80	\$6,630.40
2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$296.00	\$7,400.00
3.1	3 x 6 Election Notices regarding polling sites	10	\$532.80	\$5,328.00
4.1	4 x 5 Election Notices regarding Candidates	11	\$592.00	\$6,512.00
5.1	4 x 13 Sample Ballots	10	\$1,539.20	\$15,392.00
6.1	5 x 7 Precinct Official Seminar Schedules	8	\$1,036.00	\$8,288.00
7.1	5 x 15 List of Precinct Officials	6	\$2,220.00	\$13,320.00
8.1	5 x 14 List of Precinct Officials	6	\$2,072.00	\$12,432.00 <sup>13</sup>

7. Marianas Variety submitted one (1) bid for IFB Items Nos. 1.1 thru 7.1 which was as follows:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
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<sup>12</sup> Bid Submittals, Tab 8a, Procurement Record

<sup>13</sup> Id.

1	1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$86.40	\$2,419.20
2	2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$108.00	\$2,700.00
3	3.1	3 x 6 Election Notices regarding polling sites	10	\$194.40	\$1,944.00
4	4.1	4 x 5 Election Notices regarding Candidates	11	\$216.00	\$2,376.00
5	5.1	4 x 13 Sample Ballots	10	\$561.60	\$5,616.00
6	6.1	5 x 7 Precinct Official Seminar Schedules	8	\$378.00	\$3,024.00
7	7.1	5 x 15 List of Precinct Officials	6	\$810.00	\$4,860.00 <sup>14</sup>

8. Marianas Variety did not submit a bid for item 8.1 of the IFB.<sup>15</sup>

9. Marianas Variety did not submit a Statement of Qualifications as required by the IFB.<sup>16</sup>

10. GSA waived Marianas Variety's failure to submit a Statement of Qualifications as a minor informality.<sup>17</sup>

11. GSA determined that Marianas Variety was the lowest responsible and responsive bidder for IFB Items Nos. 1.1 thru 7.1.<sup>18</sup>

12. GSA rejected PDN's bid for IFB Item Nos. 1.1 thru 7.1 due to high price.<sup>19</sup>

13. On April 7, 2008, twelve (12) days after GSA issued its March 26, 2008 bid status, PDN protested GSA's Award of the Bid to Marianas Variety and GSA's rejection of PDN's bid.<sup>20</sup>

<sup>14</sup> Bid Submittals, Tab 8b, Procurement Record

<sup>15</sup> Marianas Variety's Bid, Tab 8b, Procurement Record.

<sup>16</sup> Id.

<sup>17</sup> Bid Status addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

<sup>18</sup> Analysis and Recommendation for Bid No. GSA-012-08 dated March 26, 2008, Tab 6, Procurement Record.

<sup>19</sup> Bid Status addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

<sup>20</sup> PDN's April 7, 2008 Protest Letter, GSA Exhibit S.

1 14. On May 1, 2008, GSA denied PDN's April 7, 2008 protest.<sup>21</sup>

2 15. On May 9, 2008, GSA issued Purchase Order No. PO086A04396 to Marianas  
3 Variety for the amount of \$17,568.00.<sup>22</sup>

4  
5 16. On May 14, 2008, thirteen (13) days after their April 7, 2008 protest was denied,  
6 PDN filed its appeal in this matter.

7 17. Marianas Variety published notices pursuant to the specifications set forth in the IFB  
8 on August 13, 15, and 18, 2008.<sup>23</sup>

9  
10 **III. ANALYSIS**

11 As will be discussed in detail below, the Public Auditor must analyze a procurement  
12 process that was flawed due to mistakes caused by GSA. GSA's most significant error was  
13 requiring a Statement of Qualifications as a material part of the bids. This initial error was  
14 compounded by GSA's failure to correctly apply Guam Procurement Law and Regulations when  
15 evaluating whether the bids were responsive. These errors now result in the necessity of finding  
16 that the bid award to Marianas Variety violates Guam Procurement Laws and Regulations. As a  
17 preliminary matter, the Public Auditor must first address, for a second time, whether PDN's  
18 appeal is properly before her.

19  
20 **A. None of the issues presented in PDN's Appeal were time barred by GSA's denial of  
21 PDN's March 7, 2008 protest.**

22 GSA argues that the Public Auditor does not have the jurisdiction to hear the three (3)  
23 issues raised by PDN's appeal because it was untimely. GSA argues that two (2) of the issues,  
24 specifically the issue of whether the bid award is defective due to a distribution not being

25  
26  
27 <sup>21</sup> GSA's May 1, 2008 Denial of PDN's April 7, 2008 Protest, GSA Exhibit T.

28 <sup>22</sup> Purchase Order No. PO86A04396, Tab 4a, Procurement Record.

<sup>23</sup> PDN Exhibit Nos. 13, 14, 15, and 16.

1 specified or due to the bids not being assessed on a distribution specification and the issue of  
2 whether the bid award was defective due to specifications favoring Marianas Variety, were  
3 untimely because they were a part of PDN's March 7, 2008 protest which was denied by GSA  
4 and not appealed by PDN. Additionally, GSA argues that the remaining issue of whether the bid  
5 award was defective because Marianas Variety's bid was non-responsive was untimely because  
6 PDN did not file its protest fourteen (14) days after the bid opening on March 12, 2008 when  
7 PDN first became aware of the fact that Marianas Variety did not submit a Statement of  
8 Qualifications with its bid. The Public Auditor finds that GSA's jurisdictional arguments were  
9 previously raised in GSA's Motion to Dismiss PDN's Appeal which was denied by the Hearing  
10 Officer's August 8, 2008 Decision and Order. As stated in that decision, all three (3) issues are  
11 properly before the Public Auditor because they were part of PDN's April 7, 2008 protest and  
12 they were part of GSA's May 1, 2008 Decision denying the aforementioned protest. Further,  
13 PDN filed this appeal on May 14, 2008, which is within the fifteen (15) day time period a  
14 protestor can appeal a protest decision. 5 G.C.A. §5425(e). The Public Auditor finds, pursuant  
15 to the Hearing Officer's August 8, 2008 Decision and Order, that she has the jurisdiction to hear  
16 these matters because they are properly before her.  
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21 Additionally, the Public Auditor finds that there is no merit to GSA's arguments that the  
22 issues concerning the distribution and specifications are the same issues raised in PDN's March  
23 7, 2008 protest or that PDN waived these issues by submitting a bid. PDN's March 7, 2008  
24 protest was limited to the terms of the IFB, specifically the IFB's lack of specifications for  
25 distribution and the IFB's notice formats favoring formats used by Marianas Variety.<sup>24</sup> In  
26 contrast, PDN's April 7, 2008 protest concerned GSA's award of the IFB to Marianas Variety  
27

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28 <sup>24</sup> Page 2, PDN's Protest dated March 7, 2008, GSA Exhibit Q.

1 and the Rejection of PDN's bid. Although the issues are similar, the key difference is that in its  
2 second protest, PDN is arguing that the alleged lack of a distribution specification and the  
3 allegedly biased 5 x 15 notice specification resulted in or substantially contributed to GSA's  
4 award of the IFB to Marianas Variety and GSA's rejection of PDN's bid for IFB Item Nos. 1.1  
5 through 7.1. Thus, the issues in PDN's March 7, 2008, protest are not the same as the issues in  
6 PDN's April 7, 2008 protest.  
7

8 Further, the Public Auditor finds that there is no merit to Marianas Variety's argument  
9 that PDN waived its right to raise these two (2) issues on appeal because PDN submitted a bid in  
10 response to IFB. Marianas Variety's argument relies on the ruling in *Kohl Partners, LLC, v. City*  
11 *of Manchester*, 2003 WL 22474626 (D.N.H.). In that unpublished case, the U.S. District Court  
12 of New Hampshire ruled that the Plaintiff waived any complaints about the format of the RFP by  
13 submitting a proposal. *Id.* at page 6. However, that case is distinguishable from this matter  
14 because the terms of the RFP in *Kohl Partners* had a pre-proposal protest procedure specifically  
15 for challenging the terms of the RFP which was the Plaintiff's exclusive remedy and the  
16 Plaintiff's claims were waived because the Plaintiff failed to protest the terms of the RFP prior to  
17 submitting a proposal in violation of said exclusive remedy. *Id.* page 5. Guam procurement law  
18 and regulations have no such pre-proposal protest procedure. Instead, Guam Procurement Law  
19 and Regulations merely require a protest to be filed within fourteen (14) days after an aggrieved  
20 bidder or potential bidder knew or should have known of the facts giving rise to the protest. 5  
21 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). As set forth above, on April 7,  
22 2008, PDN filed a timely protest concerning GSA's bid award to Marianas Variety and GSA's  
23 rejection of PDN's bid for IFB Item Nos. 1.1 thru 7.1, twelve (12) days after PDN became aware  
24 of the facts giving rise to its protest.  
25  
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1 The Public Auditor also finds that there is no merit to GSA's argument that the issue  
2 concerning whether Marianas Variety was a responsive bidder is untimely. This issue was also  
3 raised by GSA's Motion to Dismiss and decided by the Hearing Officer's August 8, 2008  
4 Decision and Order. The Public Auditor finds, pursuant to said Decision and Order, that this  
5 issue is properly before her.  
6

7 Additionally, there is no merit to GSA's argument that PDN should have filed its protest  
8 concerning Marianas Variety's failure to submit a statement of qualifications with its bid  
9 fourteen (14) days after the bid opening on March 12, 2008. Although the issue of Marianas  
10 Variety's missing Statement of Qualifications was an element of PDN's protest, as stated above,  
11 PDN's underlying protest concerns GSA's award of IFB Item Nos. 1.1 thru 1.7 to Marianas  
12 Variety and GSA's rejection of PDN's bid for the same items. PDN was not aware of the award  
13 or the rejection of its bid until it received GSA's Bid Status on March 26, 2008.<sup>25</sup> PDN filed a  
14 timely protest, to include its allegations concerning Marianas Variety's missing Statement of  
15 Qualifications, twelve (12) days later on April 7, 2008.  
16  
17

18 Finally, the Public Auditor notes that GSA did not raise the issue of PDN's timeliness in  
19 GSA's May 1, 2008 decision denying PDN's April 7, 2008 protest. Instead, GSA evaluated and  
20 denied PDN's protest on its merits. Here, as the Public Auditor has found that the three (3) main  
21 issues, described above, raised in the PDN's appeal are properly before the Public Auditor, the  
22 Public Auditor will review *De Novo* GSA's May 1, 2008 decision denying each of these issues.  
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<sup>25</sup> GSA Bid Status Addressed to PDN dated March 26, 2008, Tab 5a, Procurement Record.

1 **B. The bid award is not defective due to a distribution not being specified or due to the**  
2 **bids not being assessed pursuant to a distribution specification.**

3 GSA correctly found no merit in PDN's allegation that the bid award to Marianas Variety  
4 was defective because a distribution, defined by PDN as the number of newspapers the ads were  
5 to be published in, was not specified or because the bids were not assessed pursuant to a  
6 distribution specification. The terms of the IFB do not support this argument. The IFB states that  
7 it is an indefinite quantity bid and that the quantities stated in the IFB are annual estimated  
8 requirements projected within a twelve (12) month period.<sup>26</sup> Generally, an indefinite quantity  
9 contract is a contract for an indefinite amount of supplies or services that establishes unit prices  
10 of a fixed-price type. 2 G.A.R., Div. 4, Chap. 3, §3119(i)(2). Here, the IFB states the number of  
11 ads that it is seeking for each ad size described in IFB Item Nos. 1.1 thru 8.1 and seeks bids  
12 based on unit costs for each size of ad.<sup>27</sup> Thus, the Public Auditor finds that the IFB  
13 specifications conformed with Guam Procurement Regulations governing indefinite quantity  
14 contracts because the IFB sought bids for unit costs for each ad size for the number of times such  
15 ad sizes were to be published.

16 Further, Guam law does not require that the IFB's ads be printed in a specific number of  
17 newspapers. The IFB states that the election notices are to be published pursuant to Title 3  
18 Guam Code Annotated and that the board meeting notices were to be published pursuant to the  
19 Open Government Law.<sup>28</sup> Title 3, Guam Code Annotated states for every notice that must be  
20 published, that such publication be in a newspaper of general circulation or a newspaper  
21 published on Guam.<sup>29</sup> Likewise, Guam's Open Government Law only requires that notices be  
22 published by a newspaper of general circulation which said statute defines as a newspaper which  
23 is printed and distributed not less than once a week, at regular intervals, throughout Guam, which  
24 has a paid circulation and holds a valid second class mailing permit from the United States Post

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26 <sup>26</sup> Special Provisions, IFB, Tab12, Procurement Record

27 <sup>27</sup> Specifications, IFB, Tab 12, Procurement Record.

28 <sup>28</sup> Id.

<sup>29</sup> 3 GCA §4108, §5105, §6112, §6114, §7104, and §16202.



1 Office, and which contains news, articles of opinion, features, and other matters of current  
2 interest published for public dissemination. 5 G.C.A. §8104(a)(5) and §8108. The term “general  
3 circulation” as used in the aforementioned statutes does not, in and of itself, require publication  
4 in a specific number of newspapers. General circulation of a newspaper is not determined by the  
5 number of subscribers but by diversity of subscribers. *Eisenberg v. Wabash*, 189 N.E. 301, 302  
6 (Ill. 1934) and *Board of Commissioners of Decatur County v. Greensburg Times*, 19 N.E.2d 459,  
7 476 (Ind. 1939). Thus, the Public Auditor finds that neither of the statutes cited in the IFB  
8 specifications requires publication in a specific number of newspapers.

9 The Public Auditor finds that there is no merit in PDN’s arguments that without a  
10 specification concerning a distribution number, GSA could not properly assess that the award to  
11 Marianas Variety maximized the purchasing value of the public funds used for the ads. As stated  
12 above, the IFB complied with Guam Procurement Regulations by requiring the bids specifying  
13 unit cost per ad. Clearly, GSA could determine who the lowest bidder was by comparing the  
14 unit costs submitted by each bidder and GSA in fact determined that Marianas Variety was the  
15 lowest bidder based on the unit costs in this bid.<sup>30</sup>

16 Finally, the Public Auditor finds that there is no merit to PDN’s argument that without a  
17 specified distribution, GSA has no assurance that its award to Marianas Variety results in GSA  
18 obtaining the highest value for its dollar. Generally, Guam Procurement Regulations governing  
19 competitive sealed bidding prohibit an award to a bidder submitting a higher quality item than  
20 that designated in the invitation for bid if such bidder is not also the lowest bidder. 2 G.A.R.,  
21 Div. 4, Chap. 3, §3109(n)(5). Thus, even assuming that PDN’s bid offered a higher quality item  
22 than what was specified in the bid because PDN specified the number of newspapers the ads  
23 would be published in, GSA could not award PDN IFB Item Nos. 1.1 thru 7.1 unless PDN was  
24 also the lowest bidder for said IFB Items and it is undisputed that Marianas Variety’s bid was  
25 lower than both of PDN’s bids for IFB Item Nos. 1.1 thru 7.1.

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<sup>30</sup> Testimony of Claudia S. Acfalle.

1 Despite the foregoing, the Public Auditor finds some merit in PDN's argument that the  
2 purchasing power of government funds would be improved by specifying the number of  
3 newspapers the ads will be printed in. Generally, one of the primary purposes of the  
4 procurement code is to maximize to the fullest extent practicable the purchasing value of public  
5 funds. 5 G.C.A. §5001(b)(5). Here, GSA could improve the purchasing value for these ads by  
6 specifying at least a minimum number of papers of the ads would run in. Without such a  
7 specification, in future bids for these ads, as here, GSA risks an unscrupulous bidder making a  
8 very low bid complying with the unit of cost and unit of measure specifications, but only  
9 publishing the ad in one (1) newspaper. Further, future procurements for these ads will benefit  
10 by not using an indefinite quantify contract because the laws requiring these ads, described  
11 above, clearly state the types of ads required for the elections and the number times such ads  
12 must be published. GSA should review the specifications provided by the purchasing agencies  
13 to ensure they will result in a procurement that maximizes the purchasing value of public funds  
14 and amend such specifications to ensure that purpose is achieved.

15  
16 **C. The bid award is not defective due to specifications favoring Marianas Variety.**

17 GSA correctly found no merit in PDN's allegation that the bid award was defective  
18 because the 5 x 15 ad size required by IFB Item No. 7.1 is a format primarily used by Marianas  
19 Variety. Generally, all specifications shall seek to promote overall economy for the purposes  
20 intended and encourage competition in satisfying the Government's needs, and shall not be  
21 unduly restrictive. 5 G.C. A. §5265. Further, specifications shall not include requirements, such  
22 as but not limited to restrictive dimensions, weights, or materials, which unnecessarily restrict  
23 competition nor shall they specify a product having features peculiar to the products of one  
24 manufacturer, producer, or distributor unless it has been determined in writing by the Director of  
25 the using agency that those particular features are essential to its requirements and specifying the  
26 reason that similar products lacking those features would not meet minimum requirements for  
27 the item. 5 G.C.A. §5268(a) and (b). Initially, the IFB Item No. 7.1's requirement for and ad  
28 size of 5 x 15 was an unduly restrictive specification. The specification is for a full page ad and

1 PDN's full page ad size is approximately one (1) inch shorter than Marianas Variety's full page  
2 ad size. PDN's full page ad size is 5 x 14 which is approximately one inch shorter than the  
3 specification.<sup>31</sup> The specification clearly favored Marianas Variety because its full page ad size  
4 is 5 x 15.<sup>32</sup> However, the Public Auditor finds that GSA cured this issue by amending the IFB to  
5 include Item No. 8.1 which specified an ad size of 5 x 14.

6 Despite GSA's cure, the Public Auditor is troubled by the testimony of GSA's Chief  
7 Procurement Officer, Claudia S. Acfalle who testified that she merely used the specifications  
8 requested by the Guam Election Commission to solicit for the 5 x 15 ad size. As stated above,  
9 said specification was unduly restrictive and better screening of the specifications given by the  
10 Guam Election Commission to ensure they complied by Guam Procurement laws governing  
11 specifications could have prevented this issue. In fact, had the original specification been  
12 modified to require a "full-page ad," it is unlikely this issue would have resulted in two (2)  
13 inquiries, two (2) protests, and this issue being made a part of this appeal. As, full page ad sizes  
14 will most likely be required for future elections, the Chief Procurement Officer should ensure  
15 that restrictive ad specifications that favor one bidder over another are not used, and that any  
16 specifications provided by the Guam Election Commission are properly screened and amended  
17 when necessary to prevent such restrictive specifications from appearing in future IFBs.

18  
19 **D. The bid award is defective because Marianas Variety was not a responsive bidder.**

20 GSA erroneously determined that PDN's allegation that the Marianas Variety was a non-  
21 responsive bidder had no merit. In competitive sealed bidding, contracts shall be awarded to the  
22 lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth  
23 in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R. Div. 4, Chap. 3, §3109(n)(1). The  
24 term "responsive bidder" is defined as a bidder who has submitted a bid which conforms in all  
25 material respects to the invitation for bids. 5 G.C.A. §5201(g) and 2 G.A.R. Div. 4, Chap. 3,  
26

27  
28 <sup>31</sup> Testimony of Rindraty Limtiaco and Jae Medina.

<sup>32</sup> Id.

1 §3109(n)(2). Here, the plain language of the IFB specifically required all bidders to submit a  
2 Statement of Qualifications and that the failure to do so will mean disqualification and rejection  
3 of the bid.<sup>33</sup> Pursuant to this language, the Statement of Qualifications was a material  
4 requirement because its omission would automatically disqualify a bidder and reject the bid.  
5 Therefore, based on the IFB's plain language, the Public Auditor finds that the Statement of  
6 Qualifications was a material requirement of the IFB and Marianas Variety was non-responsive  
7 because it failed to comply with this material requirement. The Public Auditor finds that  
8 Marianas Variety is disqualified as a bidder and its bid is rejected because it failed to submit a  
9 Statement of Qualifications with its bid.

10 The Public Auditor finds that there is no merit to GSA's and Marianas Variety's  
11 arguments that the Statement of Qualifications was not material to this bid. GSA's Chief  
12 Procurement Officer, Claudia S. Acfalle, testified that the Statement of Qualifications was not  
13 necessary in the IFB and that it is usually used for Request for Proposals. The general rule is that  
14 an invitation for bids must set forth the requirements and criteria which will be used to determine  
15 the lowest responsible and responsive bidder and shall be evaluated based on the requirements  
16 set forth in the invitation for bids. 5 G.C.A. §5211(e) and 2 G.A.R., Div. 4, Chap. 3,  
17 §3109(n)(1). As stated above, the Statement of Qualifications was one of the material  
18 requirements set forth in the IFB. Thus, the Public Auditor finds that, pursuant to IFB's plain  
19 language, the Statement of Qualifications was a material requirement and its presence or lack  
20 thereof in a bid must be evaluated to determine whether a bidder was responsive.

21 The Public Auditor finds that there is no merit to GSA's and Marianas Variety's  
22 arguments that GSA properly waived Marianas Variety's failure to submit the Statement of  
23 Qualifications as a minor informality. A minor informality is a matter of form, rather than  
24 substance evident from the bid document, or insignificant mistakes that can be waived or  
25 corrected without prejudice to other bidders; that is, the effect on price, quantity, quality,  
26 delivery, or contractual conditions is negligible. 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(B).

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<sup>33</sup> Specification Reminder to Prospective Bidders, IFB, Tab 12, Procurement Record.

1 The Public Auditor finds that the Marianas Variety's failure to submit a Statement of  
2 Qualifications was not an insignificant mistake because the IFB mandates that disqualification of  
3 bidders and rejection of bids submitted without a Statement of Qualifications. Further, as the  
4 PDN submitted its Statement of Qualifications, the Public Auditor finds that the PDN was  
5 prejudiced by GSA's waiver of Statement of Qualifications for Marianas Variety because,  
6 pursuant to the express terms of the IFB, Marianas Variety should have been disqualified as a  
7 bidder and its bid should have been rejected for failing to submit a Statement of Qualifications,  
8 leaving PDN as the sole responsive bidder to the IFB.

9 In addition to the foregoing, the Public Auditor finds that GSA should have stated what  
10 the bidders should have included in the Statement of Qualifications. Here, the IFB only  
11 mandated that the bidders submit a Statement of Qualifications with their bid and it did not  
12 specify what a bidder should include in such statement. Thus, with such open-ended and non-  
13 specific requirements an unscrupulous bidder could include a document entitled "Statement of  
14 Qualifications" and regardless of what was in such statement, it would comply with the terms of  
15 the IFB. To prevent such issues in future IFBs, GSA should improve its review and editing of  
16 draft IFBs to ensure that Statement of Qualifications are necessary for the solicitation and that  
17 the IFB states specifically what bidders must include in a Statement of Qualifications.

18  
19 **E. PDN was the IFB's only responsive bidder.**

20 The Public Auditor finds that PDN was the sole responsive bidder to the IFB. GSA's  
21 argument that PDN was not a responsive bidder has no merit. GSA argues that PDN's bid was  
22 not responsive because PDN failed to submit a signed bid cover sheet. However, the record in  
23 this matter does not support this argument.<sup>34</sup> GSA's official evaluation of PDN's bid does not  
24 indicate GSA made a determination that PDN's bid was non-responsive.<sup>35</sup> GSA rejected PDN's  
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27 <sup>34</sup> GSA did submit the Declarations of GSA Employees Anita Cruz, Angel Cruz-Wusstig, and Alma Fama-Alcantara  
28 who stated that they raised this issue with PDN at the March 12, 2008 bid opening, however, their declarations are  
not official GSA determinations concerning this issue.

<sup>35</sup> Analysis and Recommendation for IFB, dated March 26, 2008, Tab 6, Procurement Record.

1 bid for IFB Item Nos. 1.1 thru 7.1 solely on the grounds of PDN's higher price for those items.<sup>36</sup>  
2 In fact, GSA's Chief Procurement Officer Claudia Acfalle testified that she waived PDN's  
3 omission of the signed cover sheet of the bid. Unlike the Statement of Qualifications, the IFB  
4 did not require the automatic disqualification of bidders and rejection of bids for the omission of  
5 signed bid cover sheets. Further, Guam Procurement Regulations specifically allow this  
6 situation to be waived as minor informality when an unsigned bid is accompanied by other  
7 material indicating the bidder's intent to be bound. 2 G.A.R., Div. 4, Chap. 3,  
8 §3109(m)(4)(B)(2). Here, PDN submitted its Statement of Qualifications with its bid which was  
9 signed by its President and Publisher, Rindraty Limtiaco. PDN's Statement of Qualifications  
10 states that PDN has met all requirements for the services needed and outlined in the IFB and  
11 PDN was ready to accept this job.<sup>37</sup> The Public Auditor finds that PDN's Statement of  
12 Qualifications indicates its intent to be bound and that PDN's failure to submit a signed bid cover  
13 page could be properly waived as a minor informality by GSA.

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15 **F. The Award of IFB Item Nos. 1.1 thru 7.1 to Marianas Variety is void and said**  
16 **award shall be made to PDN.**

17 The Public Auditor finds that the award of IFB Item Nos. 1.1 thru 7.1 to Marianas  
18 Variety is void. If after an award it is determined that a solicitation or award of a contract is in  
19 violation of law, and the person awarded the contract has not acted fraudulently or in bad faith,  
20 the contract may be: (1) ratified or affirmed if doing so is in the best interests of Guam; or (2)  
21 the contract may be terminated and the person awarded the contract shall be compensated for the  
22 actual expenses reasonably incurred under the contract plus a reasonable profit, prior to the  
23 termination. 5 G.C.A. §5452(a)(1). Here, as set forth above, the Public Auditor finds that the  
24 award of IFB Item Nos. 1.1 thru 7.1 violates 5 G.C.A. §5211(g) and 2 G.A.R. Div. 4, Chap. 3,  
25 §3109(n)(1) because Marianas Variety was not a responsive bidder. Further, the Public Auditor  
26 finds that there is nothing in the record indicating Marianas Variety acted fraudulently or in bad

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28 <sup>36</sup> Bid Status Addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

<sup>37</sup> PDN's Bid Submittal, Tab 8a, Procurement Record.

1 faith in procuring the contract. The Public Auditor finds that ratifying or affirming GSA's  
2 contract with Marianas Variety is not in the best interests of the Government because GSA's  
3 failure to evaluate the bids in accordance with the express terms of the IFB, which is the root  
4 cause of the unlawful award to Marianas Variety, is a serious threat to the integrity of the  
5 procurement process and must not be condoned by ratification of this contract. The Public  
6 Auditor finds that the contract awarded to Marianas Variety shall be terminated as of the date of  
7 this Decision, and Marianas Variety shall be compensated for the actual expenses it reasonably  
8 incurred under the contract plus a reasonable profit, prior to the termination. (i.e. using unit  
9 prices for ad sizes specified in its Bid).

10  
11 **G. No grounds exist justifying the award of attorney fees or interest.**

12 The Public Auditor finds that there is no merit to GSA's argument that it should be  
13 awarded its attorney's fees in this matter because PDN's protest was frivolous and not made in  
14 good faith. Generally, the Public Auditor has the power to assess reasonable attorney's fees  
15 incurred by the Government against a procurement protestor upon its finding that the protest was  
16 made fraudulently, frivolously, or solely to disrupt the procurement process. 5 G.C.A.  
17 §5425(h)(2). As set forth above, the Public Auditor has sustained PDN's protest by finding that  
18 GSA's award of IFB Item Nos. 1.1 thru 7.1 was improper because Marianas Variety was not a  
19 responsive bidder. Thus, the Public Auditor finds that PDN's April 7, 2008 protest and its  
20 subsequent appeal of the GSA's May 1, 2008 denial of the protest was not fraudulent or  
21 frivolous. Further, the record in this matter and Guam's Procurement Laws and Regulations do  
22 not support GSA's arguments that PDN attempted to disrupt the procurement process by making  
23 inquiries or by filing its April 7, 2008 protest. The IFB expressly states that any explanation  
24 desired by a bidder regarding the meaning or interpretation of solicitation or specifications must  
25 be submitted in writing with sufficient time allowed for written reply to reach all bidders before  
26 the submission of their bids.<sup>38</sup> Bidder or potential bidders have the right to file protests in

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<sup>38</sup> Paragraph 3, Sealed Bid Solicitation Instructions, IFB, Tab 12, Procurement Record.

1 connection with the method of source selection, solicitation, or award of a contract. 5 G.C.A.  
2 §5425(a) and 2 G.A.R., Div. 4, Chap. 9, §9101(c)(1). Thus, the Public Auditor finds that PDN's  
3 compliance with the IFB's inquiry provisions and PDN's exercise of its right to protest are not  
4 disruptions to the procurement process justifying an award of attorney's fees to GSA.

5 The Public Auditor finds that there is no merit to PDN's request for attorney's fees from  
6 GSA or Marianas Variety for Marianas Variety's publication of the notices after PDN filed its  
7 appeal in this matter. At issue here is whether the automatic stay provisions were triggered by  
8 PDN's appeal. Generally, in the event of a timely protest, the Government shall not proceed  
9 further with the solicitation or award of the contract prior to the final resolution of such protest.  
10 5 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9, §9101(e). These automatic stay provisions are  
11 triggered when a protest is timely and the protest is filed before the award was made. *Guam*  
12 *Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15, ¶24 (Supreme Court of Guam, August 12,  
13 2004). As set forth above, the Public Auditor finds that PDN's April 7, 2008 protest and this  
14 appeal were timely filed. However, the record in this matter clearly shows that PDN filed this  
15 appeal after the award of IFB Item Nos. 1.1 thru 7.1 was made to Marianas Variety. As set forth  
16 above, GSA denied PDN's April 7, 2008 protest on May 1, 2008. Further, GSA completed the  
17 award of IFB Item Nos. 1.1 thru 7.1 to Marianas Variety by issuing Purchase Order No.  
18 PO86A04396 on May 9, 2008.<sup>39</sup> As set forth above, PDN filed this appeal on May 14, 2008.  
19 Thus, the Public Auditor finds that the automatic stay provisions were not triggered as a result of  
20 this appeal because GSA completed its award to Marianas Variety between GSA's denial of  
21 PDN's April 7, 2008 protest and PDN's appeal. Further, there is no statutory authority  
22 authorizing an award of attorney fees to PDN regarding this matter.

23 The Public Auditor finds that there is no merit for PDN's request for interest. Generally,  
24 interest on amounts ultimately determined due to a contractor shall be payable at the statutory  
25 rate from the date the claim arose through the date of decision or judgment, whichever is later. 5  
26 G.C.A. §5475. Here, PDN's appeal is based on the unlawful award of the contract under the IFB  
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<sup>39</sup> Purchase Order No. PO86A04396, Tab 4a, Procurement Record.



1 to Marianas Variety and not sums owed by GSA to PDN pursuant to an existing contract. Thus,  
2 the Public Auditor finds that PDN is not entitled to interest in this matter.

#### 3 4 **IV. CONCLUSION**

5 Based on the foregoing, the Public Auditor hereby determines the following:

6 1. PDN's April 7, 2008 Protest and PDN's Appeal in this matter were timely.

7 2. GSA's award of Item Nos. 1.1 thru 7.1 to Marinas Variety violates Guam  
8 Procurement Laws and Regulations because Marinas Variety was not a responsive bidder.

9 3. PDN's Appeal is denied as to the issue of whether the award of the bid was defective  
10 because a distribution was not specified or because the bids were not assessed pursuant to a  
11 distribution specification and as to the issue of whether the bid award was defective because the  
12 5 x 15 ad size required by IFB Item No. 7.1 is a format primarily used by Marianas Variety.

13 4. PDN's Appeal is sustained as to the issue of whether Marianas Variety was a  
14 responsive bidder.

15 5. GSA's contract with Marianas Variety for IFB Item Nos. 1.1 thru 7.1 is hereby  
16 terminated as of the date of this decision and Marianas Variety shall be compensated for the  
17 actual expenses it reasonably incurred under the contract plus a reasonable profit, prior to the  
18 termination. (i.e. using unit prices for ad sizes specified in its Bid)

19 6. PDN shall be awarded the remainder of the contract for IFB Item Nos. 1.1 thru 7.1 as  
20 of the date of this Decision and PDN shall be allowed to print the remaining notices and  
21 accordingly be compensated per its Bid. GSA shall decide which of PDN's alternate bids it shall  
22 use as the basis for the contract. Although the majority if not all of the ads required for the  
23 primary election have already been duly published, clearly PDN will at least have the  
24 opportunity to publish the ads required for the general election.

25 7. PDN is hereby awarded, pursuant to 5 G.C.A. §5425(h), PDN's reasonable costs  
26 incurred in connection with the solicitation and its April 7, 2008 protest, including PDN's  
27 reasonable bid preparation costs, excluding PDN's attorney's fees, because PDN should have  
28 been awarded the contract under the IFB but was not. GSA may object to the PDN's cost

1 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days  
2 after PDN submits such cost demand to GSA.

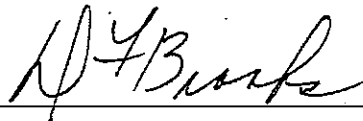
3 8. GSA's request for Attorney Fees is hereby denied.

4 9. PDN's request for Attorney Fees and interest is hereby denied.

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

9 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
10 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website  
11 [www.guamopa.org](http://www.guamopa.org).

12  
13 **DATED** this 5<sup>th</sup> day of September, 2008.

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17 \_\_\_\_\_  
18 DORIS FLORES BROOKS, CPA, CGFM  
19 PUBLIC AUDITOR  
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