

CARLSMITH BALL LLP

ELYZE J. McDONALD
emcdonald@carlsmith.com
Bank of Hawaii Bldg., Suite 401
134 West Soledad Avenue, P.O. Box BF
Hagåtña, Guam 96932-5027
Telephone No. 671.472.6813
Facsimile No. 671.477.4375

Attorneys for Appellant
Guam Publications, Inc.

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OFFICE OF THE PUBLIC AUDITOR
GUAM

IN THE APPEAL OF
GUAM PUBLICATIONS, INC.

Appellant.

APPEAL NO. OPA-PA-08-007

APPELLANT'S HEARING BRIEF

I. Standard of Review

The standard of review on this appeal is *de novo*. 2 GAR Div. 4 § 12103(a). "No prior determination shall be final or conclusive" on the Public Auditor. 2 GAR Div. 4 §§ 12103(a), 12109. Accordingly, the OPA has the authority to consider the issues raised in this appeal anew, without deference to the decisions made by GSA.¹

II. Appellant's List of Issues

In its List of Issues, PDN lists four issues to be heard by the Office of the Public Auditor on August 22, 2008: (a) Whether the bid award is defective because GSA did not specify the distribution for the procured election notices, or assess the bids based on such specifications? (b)

¹ GSA makes references to the "arbitrary and capricious" standard in its List of Issues. The proper standard of review, however, is *de novo*.

Whether the bid award is defective because the formats of the procured election notices favored formats utilized by the Marianas Variety? (c) Whether the bid award to Marianas Variety is defective because Marianas Variety failed to be a responsive and responsible bidder? and (d) Whether the award should be made to Pacific Daily News?

A. Whether the bid award is defective because GSA did not specify the distribution for the procured election notices, or assess the bids based on such specifications?

1. Appellant's Factual Contentions.

This case pertains to the publication of election notices. Prior to the bid opening, PDN asked GSA twice to clarify the intended distribution and circulation for the procured election notices, as the intended distribution has an effect on price as well as the reach of readership. GSA responded both times that the distribution was "General Circulation." Exs. 4, 6.

PDN handled this non-responsiveness by submitting bids for an intended distribution of 10,000 and 26,000. Ex. 8. Marianas Variety submitted a bid without specifying an intended distribution. Ex. 9.

GSA awarded the bid without taking into account the distribution levels. Ex. 10. It awarded the bid to Marianas Variety and rejected PDN's bid due to "high price." Ex. 11. However, as PDN will demonstrate at trial, PDN is the lower bidder at certain distribution levels for each of the procured notices.

2. Legal Issues.

A primary underlying purpose of the procurement code is "to maximize to the fullest extent practicable the purchasing value of the public funds of the Territory." 5 G.C.A. § 5001(b)(5).

Because GSA failed to specify a distribution number or analyze the bids based on a distribution number, GSA did not and could not assess that the award to Marianas Variety

maximized to the fullest extent practicable the purchasing value of the public funds of the Territory. For example, if the notices are published with Marianas Variety, GSA does not know in how many papers Marianas Variety will print the notices. In contrast, under either PDN's 10,000 circulation bid or 26,000 circulation bid, GSA knows exactly how many papers will carry the notice, and thus, the extent of the public's awareness of the notices. Under either of PDN's bids, for each paper that will carry each election notice, the Territory knows exactly the price it will pay. This is significant because the Territory receives a higher value for its dollar if more people are aware of the critical information contained in the election notices.

Without a clear distribution amount specified, GSA could not adequately compare the two bidders' figures, or even evaluate Marianas Variety's bid. In fact, if Marianas Variety's bid 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. GSA has no assurance that it has the highest value for its dollar, or even if it has made an award to the lowest bidder. The award is therefore defective.

B. Whether the bid award is defective because the formats of the procured election notices favored formats utilized by the Marianas Variety?

1. Appellant's Factual Contentions.

The evidence at the hearing will demonstrate that GSA's award was based on an invitation for bids which favored the Marianas Variety. Specifically, the IFB specified a 5 x 15 format which is used primarily by Marianas Variety.

2. Legal Issues.

Guam law requires all parties involved in the negotiation, performance and administration of territorial contracts to act in good faith. 5 G.C.A. § 5003. To act in good faith includes allowing "effective broad-based competition within the free enterprise system" and the

fair and equitable treatment of all persons dealing with the procurement system of this Territory.
5 G.C.A. § 5001(b)(4), (6).

Utilizing a format that can only be printed by one newspaper on island defeats the goals of effective broad-based competition, and treats bidders unfairly and inequitably. PDN was treated unfairly by being forced to bid on a paper that only fits one newspaper's regular format. The award was made based on an unfair and inequitable invitation for bids, and therefore was made in violation of Guam's procurement laws.

C. Whether the bid award to Marianas Variety is defective because Marianas Variety failed to be a responsive and responsible bidder?

1. Appellant's Factual Contentions.

The Invitation for Bids speaks for itself. The IFB's Specification Reminder to Prospective Bidders provided a checklist of mandatory documentation to be submitted, which included a Statement of Qualifications. Ex. 1. The Specification Reminder also advised bidders, without qualification, that "[f]ailure to comply with the above requirements will mean a disqualification and rejection of the bid." Ex. 1.

It is undisputed that Marianas Variety failed to submit a Statement of Qualifications, and that this failure was waived and deemed by GSA to be a "minor informality." Exs. 9, 11. There is also nothing in the procurement record that shows what knowledge GSA possessed about Marianas Variety's ability to perform as a responsible bidder which would justify waiving the requirement of a statement of qualifications.

2. Legal Issues.

The definition of a "Responsive Bidder" relates to a bidder's compliance with the IFB: it "means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids." 5 G.C.A. § 5201(g). The definition of a "Responsible Bidder" relates to a

bidder's qualifications: a "Responsible Bidder . . . means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance." 5 G.C.A. § 5201(f). Bid requirements relating to a bidder's qualifications are material and omission thereof cannot be waived as a minor informality. *See In re Dick Pacific Construction Co., Ltd.*, OPA-PA-07-007 Decision at 12.

It is without question the language of the IFB itself automatically disqualified bidders who failed to submit a statement of Qualifications. It is also without question that Marianas Variety did not submit a Statement of Qualifications. Its bid is therefore noncompliant and nonresponsive, and should have been rejected.

Moreover, Marianas Variety's failure to submit a Statement of Qualifications means that GSA did not assess whether Marianas Variety was a responsible bidder. GSA will claim that the lack of a Statement of Qualifications is a "minor informality." "Minor informalities are matters of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity, quality, delivery, or contractual conditions is negligible." 2 GAR Div. 4 § 3109(m)(4)(B). A Statement of Qualifications is a *substantive* matter, as opposed to one of form. The information contained in a Statement of Qualifications is material and crucial to determining whether the bidder has the requisite qualifications to perform under the contract. For example, PDN's Statement of Qualifications states that it is a daily newspaper that offers a circulation of 26,000, and a readership of 100,000. Ex. 8. PDN also states that it has the capability to design, layout and distribute the election notices in accordance with all statutory requirements. Ex. 8. Under these assurances, GSA becomes aware that PDN can perform the requirements of the contract.

On the other hand, GSA has no assurances from Marianas Variety that it can perform under the contract. This signifies that Marianas Variety was not a responsive or responsible

bidder conforming in all material respects to the invitation for bids. 5 G.C.A. § 5201(g) and 2 GAR Div. 4, § 3109(n)(2). Being responsive and qualified to perform under a bid is *material*, and the only assurance of those qualifications is through a submittal of the Statement of Qualifications.

Moreover, just as in *In re Dick Pacific Constr. Co., Ltd.*, OPA-PA-07-007 at 12, because GSA required PDN to submit a Statement of Qualifications, but waived Marianas Variety's failure to provide one, GSA has acted to PDN's prejudice.

By law, GSA cannot waive the submittal of the Statement of Qualifications, and cannot award a bid to a non-compliant, non-responsive and unqualified bidder.

D. Whether the award should be made to Pacific Daily News?

1. Factual Contentions.

PDN submitted all documentation required by the IFB, and signed its bid. *See* Ex. 8. At no time leading up to and including the opening of bids was PDN given notice that its bid was incomplete due to PDN not submitting the cover sheet of the Invitation for Bids.

2. Legal Issues.

PDN is the only responsive and responsible bidder and should be awarded GSA-08-012.

Even if PDN's bid was incomplete, it was a minor informality that can be waived, particularly here where PDN submitted a signed bid wherein PDN agreed to be bound. *See* Ex. 8; 2 GAR Div. 4 § 3109(m)(4)(B)(2) (mistake of failure to sign bid can be waived if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound).

III. Response to GSA's Issues Nos. 1 - 3

GSA's List of Issues previews that it will attempt to relitigate an issue that the OPA has already resolved and found to be without merit. Specifically, GSA intends to argue that PDN's protest was untimely. The OPA has issued a decision and order that the issues discussed above

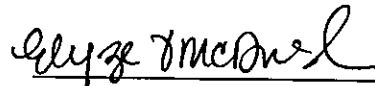
"are properly before the Public Auditor because they are part of GSA's May 1, 2008, Protest Decision which is the subject of this appeal." Aug. 8, 2008 Decision at 3-4. PDN will vigorously object to GSA's attempts to relitigate this issue.

IV. Remedies

PDN will defer all discussion related to its ability to obtain fees and costs, and the amount of fees and costs, related to this appeal to after the hearing, as allowed by the OPA in its August 8, 2008 Scheduling Order.

DATED: Hagåtña, Guam, August 18, 2008.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
Attorneys for Appellant
Guam Publications, Inc.