

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

RECEIVED  
OFFICE OF THE PUBLIC AUDITOR  
PROCUREMENT APPEALS

AUG 26 2008  
TIME: 4:37 PM  
BY: J. Carlsmith  
FILE No. OPA-PA-08-007

Attorneys for Appellant  
Guam Publications, Inc.

OFFICE OF THE PUBLIC AUDITOR

GUAM

IN THE APPEAL OF  
GUAM PUBLICATIONS, INC.

Appellant.

APPEAL NO. OPA-PA-08-007

APPELLANT'S BRIEF RE REMEDIES

I. Remedies if PDN Prevails: Award the Contract to PDN and Sanction Marianas Variety and GSA

If the OPA finds that GSA's award to Marianas Variety has been in violation of Guam's procurement laws and regulations, section 5425(a)(2) of Title 5 of the Guam Code Annotated contains the applicable remedies:

If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

... (2) if the person awarded the contract has acted fraudulently or in bad faith:

(i) the contract may be declared null and void; or

(ii) the contract may be ratified and affirmed if such action is in the best interests of the Territory, without prejudice to the Territory's rights to such damages as may be appropriate.

5 G.C.A. § 5452(a).

As demonstrated at the August 22, 2008 hearing, this case involves a procurement award made in violation of Guam's procurement laws, and it also involves an awardee which has acted in bad faith by printing the election notices in violation of the automatic stay. When a party files a protest or an appeal of a protest decision, the award is automatically stayed. The stay can only be lifted if the Chief Procurement Officer makes a written determination that award of the contract without delay pending appeal is necessary to protect the substantial interests of the government of Guam. 2 GAR Div. 4 § 12501. No such written determination has been made in this case, and thus all parties, including Marianas Variety, were required to stay performance of the award. However, the evidence at the hearing showed that Marianas Variety has acted in bad faith by continuing to print the election notices which are the subject of this appeal. PDN's Exs. 13 - 16. While GSA claimed that it had nothing to do with publication of the notices, the Procurement Record demonstrates that GSA issued a purchase order for \$17,568.00 on May 9, 2008. Procurement R., Tab 4a. The Procurement Record, which Cynthia Acfalle testified was complete and accurate, contains no documentation which shows that the purchase order was rescinded or cancelled. The Purchase Order demonstrates GSA's knowledge of the publication of the notices. Furthermore, Marianas Variety's presence at the hearing, and its silence on this issue, should be noted.

Therefore, pursuant to section 5452(a), the contract to Marianas Variety should be declared null and void, and PDN should be awarded the bid. 5 G.C.A. § 5452(a)(2). As part of the nullification of the Marianas Variety contract, Marianas Variety should be required to pay back all sums it has received from GSA, specifically, the \$17,568.00. Moreover, PDN should be allowed to print all notices under the contract, including those notices which Marianas Variety has already printed, and be compensated per the full contract, that is, under either of its bids for

10,000 pieces or 26,000 pieces. In the alternative, PDN should be allowed to print the remaining notices which have not been printed by Marianas Variety, and accordingly be compensated per the contract. PDN is also entitled to interest at the statutory rate, which should be assessed as of the date of the purchase order to Marianas Variety, May 9, 2008. 5 G.C.A. § 5475.

Yet, nullifying and voiding Marianas Variety's contract and awarding the contract to PDN does not make the situation whole in light of the willful violation of the stay. The OPA's rules and regulations have been disregarded once again, just as its deadlines have been disregarded by GSA on at least four occasions.<sup>1</sup> The OPA should take action to demand compliance with and respect of its rules and regulations. The violation of the stay also harms PDN: but for the violation of the stay, PDN would be able to print *all* notices under the contract, whereas, now, it may only be necessary to print some of the notices. For the violation committed by Marianas Variety and GSA, the sanction should be significant enough to deter future misconduct.

The Hearing Officer has the authority to impose sanctions against any party or person failing to obey an order under the OPA's regulations. 2 GAR Div. 4 § 12109(h). Accordingly, PDN requests that the Hearing Officer exercise its sanctions authority and order that PDN be reimbursed its attorneys fees and costs in litigating this appeal. Appellants are liable for attorneys fees if they are found to have acted fraudulently, frivolously, or with the aim of disrupting the procurement process. 5 G.C.A. § 5425(h). When the converse occurs, that is, the government or an interested party has acted in violation of the procurement process and in violation of the procurement code and regulations, the violators should similarly be held liable for the appellant's attorneys fees.

---

<sup>1</sup> As the OPA has already ruled, GSA has committed a number of violations in this case, including a willful disobedience of the June 13, 2008 Scheduling Order. Aug. 4, 2008 Decision and Order at 3 and 3 n.6.

Should the OPA allow PDN reimbursement of its attorneys fees for the willful violation of the automatic stay, PDN asks that it be permitted to furnish a complete and detailed Bill of Costs for the OPA's assessment.

II. Remedies if GSA Prevails.

A. GSA is not entitled to attorneys fees if the protest decision is affirmed.

There has been no evidence that PDN has acted fraudulently, frivolously, or solely to disrupt the procurement process, so as to justify a sanction against PDN in the amount of the government's attorneys fees. 5 G.C.A. § 5425(h). The evidence at the hearing demonstrated that PDN asked legitimate questions as to the issues of favoritism and distribution, and based its appeal on those issues. There is no basis for the government's claim that PDN has tried to disrupt the procurement process; rather, the evidence has shown that the government and Marianas Variety have published the advertisements at issue in this case, demonstrating that there has been no disruption to the procurement process. Moreover, as the OPA is aware, the government has delayed this appeal by filing documents late, or not filing them at all. PDN, on the other hand, has always complied with the OPA's deadlines and has not unduly delayed or disrupted the process. For these reasons, PDN should not be required to reimburse the government's attorneys fees.

B. Sanctions should still be awarded even if the protest decision is affirmed.

The willful violation of the stay warrants sanctions in order to deter future misconduct. As already noted, the Hearing Officer may impose appropriate sanctions against a party or person failing to obey an order under the OPA's procedures. PDN respectfully requests that the OPA issue a monetary sanction at its discretion against GSA and Marianas Variety, even if GSA prevails on appeal.

DATED: Hagåtña, Guam, August 26, 2008.

CARLSMITH BALL LLP



---

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