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From: OPA Procurement Appeals

Agency: Carismith Ball LLP
Office of the Attorney General
Arriola, Cowan, & Arriola

Pages: 11 (Including cover)

CC: Claudia S. Acfalle – Chief Procurement Officer
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Date: Monday – 8/4/08

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Re: (1) Decision and Order re Appellant's Motion for Default
(2) Decision re Marianas Variety Guam's Request for
Disqualification of Hearing Officer: OPA-PA-08-007

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OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF
GUAM PUBLICATIONS, INC.,

Appellant.

APPEAL NO. OPA-PA-08-007

**DECISION AND ORDER RE
APPELLANT'S MOTION FOR DEFAULT
JUDGEMENT AND PURCHASING
AGENCY'S MOTION FOR EXTENSION
OF TIME TO FILE PROCUREMENT
RECORD, AGENCY REPORT, AND TO
ANSWER APPELLANT'S MOTION FOR
DEFAULT JUDGEMENT**

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1 **THIS MATTER** came before the Hearing Officer on July 25, 2008 for a hearing on
2 Appellant's (Hereafter Referred to as "PDN") June 5, 2008 Motion for Default Judgment and the
3 Purchasing Agency's (Hereafter Referred to as "GSA") June 12, 2008 Motion for Extension of
4 time to File Procurement Record and to Answer Appellant's Motion for Default Judgment, and
5 PDN's July 3, 2008 Motion to Stay Deadline to File Comments on Agency Report and Request
6 for Expedited Hearing. At the hearing, PDN withdrew, without opposition, it's Motion to Stay
7 Deadline to File Comments on Agency Report and Request Expedited Hearing and said motion
8 shall not be considered in this decision. After reviewing the remaining motions and hearing the
9 arguments of the parties, the Hearing Officer finds as follows:

10 **1. GSA's failure to file an opposition to Appellant's Motion for Default Judgment.**

11 As a preliminary matter, the Hearing Officer must determine whether he will consider GSA's
12 written responses to PDN's Motion for Default Judgment. The deadline to file oppositions to
13 PDN's Motion for Default judgment was clearly and unambiguously scheduled for June 26,
14 2008.¹ PDN argues that on that date GSA filed their untimely Procurement Record and Agency
15 Report instead of their opposition as required by the scheduling order. The Hearing Officer
16 agrees and finds that the Procurement Record and Agency Report are not the opposition to
17 PDN's Motion that was required to be filed on June 26, 2008.

18 GSA improperly attempts to use the scheduling order for this motion to justify their
19 untimely filing of the Procurement Record and Agency report by claiming that the scheduling
20 order authorized them to file the aforementioned documents on June 26, 2008.² The Hearing
21 Officer finds that this argument has no merit because the OPA's previous orders and
22 procurement regulations required GSA to file their Procurement Record on May 22, 2008, and to
23 file their Agency Report on May 30, 2008.³ GSA's furthers this attempt by arguing that it's
24 opposition is consolidated with it's Agency Report and that said response is sufficient opposition

26 ¹ Page 2, Line 14, Order Scheduling Hearing on Appellant's Motion for Default Judgment, June 13, 2008.

27 ² Page 2, Line 14, Agency Report, June 26, 2008.

28 ³ See OPA Notice of Receipt of Appeal dated May 15, 2008 and 2 G.A.R., Div. 4, Chap. 12, §12104(c)(3).

1 in form and substance.⁴ The Hearing Officer finds that argument has no merit because an agency
2 report is the answer to the underlying procurement appeal and not an opposition to a party's
3 motion. 2 G.A.R., Div. 4, Chap. 12, §12104(c)(3) and §12105. Finally, GSA defiantly states
4 that filing a separate response to the PDN's motion would be superfluous, and a waste of time
5 and resources.⁵ The Hearing Officer finds that this argument indicates that GSA willfully
6 disobeyed its June 13, 2008 Scheduling Order because GSA simply did not agree with the
7 Hearing Officer's requirement to file an opposition by June 26, 2008. GSA is hereby reminded
8 that the Hearing Officer has the authority to require the parties to state their positions with
9 respect to various issues in the proceeding, the power to regulate the course of the hearing and
10 conduct of the participants therein, and the power to set deadlines for the submission of written
11 documents. 2 G.A.R., Div. 4, Chap. 12, §12109(b), (e), and (g). Thus, the parties, to include
12 GSA, must comply with the filing deadlines ordered by the Hearing Officer and their failure to
13 do so may subject them to sanctions.

14 GSA's willful disobedience of the June 13, 2008 scheduling order merits a sanction. The
15 Hearing Officer finds that GSA has failed to comply with its June 13, 2008 order by failing to
16 file a timely opposition on June 26, 2008, and that this is at least the third (3rd) time GSA has
17 failed to comply with a filing deadline ordered by the OPA.⁶ Therefore, pursuant to 2, G.A.R.,
18 Div. 4, Chap. 12 §12109(h)(1), GSA is hereby sanctioned by the exclusion of all of GSA's
19 responses to PDN's Motion for Default Judgment contained in GSA's untimely Agency Report
20 and their untimely responses to PDN's Motion for Default Judgment in GSA's Rebuttal to
21 Appellant's Comments on Agency Report and such responses shall not be considered in deciding
22 PDN's Motion for Default Judgment.

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26 ⁴ Page 3, Line 17, Agency's Rebuttal to Appellant's Comments on Agency Report, July 14, 2008 (Hereafter
Referred to as "Agency's Rebuttal").

27 ⁵ Page 3, Line 20, and Page 4, Line 11, Agency's Rebuttal to Appellant's Comments on Agency Report, etc., July
28 14, 2008 (Hereafter Referred to as "Agency's Rebuttal").

⁶ GSA's failure to file the Procurement Record on May 22, 2008 and its failure to file its Agency Report on May
30, 2008 are included in this count.

1 **2. Appellant's Motion for Default Judgment.** The ends of justice require excusing
2 GSA's untimely filing of its Procurement Record and Agency Report. There is no dispute that
3 GSA filed its Procurement Record and Agency Report on June 26, 2008 and that such filing was
4 untimely because it was after the May 22, 2008 filing deadline for the Procurement Record and
5 the May 30, 2008 filing deadline for the Agency Report. PDN argues that the Office of the
6 Public Auditor (Hereafter Referred to as "OPA") should enter a default judgment against GSA
7 and award judgment in favor of PDN reversing the denial of its protest and award PDN the bid
8 for GSA. GSA's oral arguments, made during the motion hearing will be considered in deciding
9 the PDN's Motion for Default Judgment. In relevant part, GSA argued that no authority exists
10 supporting PDN's Motion for Default Judgment. GSA also argued that PDN suffered no
11 prejudice as a result of the approximate one (1) month delay in filing the Procurement Record
12 and Agency Report. Finally, GSA states that they did not file the Procurement Record and
13 Agency Report because they were attempting to resolve the appeal by canceling Bid Invitation
14 No. GSA-012-08. Interested Party Marianas Variety also argues that no authority exists
15 supporting PDN's Motion for Default Judgment and that, due to the fact that none of the parties
16 have waived their right to hearing, the Rules of Procedure for Procurement Appeals require a
17 hearing on the merits.

18 The OPA has the authority to exclude the untimely Procurement Record and the Agency
19 Report from being considered in these proceedings. The Hearing Officer may impose the
20 appropriate sanction against any party or person, to include a purchasing agency such as GSA,
21 for failing to obey a procedural order and the sanction may include refusing to allow a
22 disobedient party to support or oppose designated claims or defenses and prohibiting that party
23 from introducing designated matters into evidence. 2 G.A.R., Div. 4, Chap. 12, §12109(h)(1).
24 Here, the real issue is whether exclusion of the untimely Procurement Record and Agency
25 Report is the appropriate sanction for GSA's filing of said documents approximately one (1)
26 month late. The general rule is that administrative agencies have the discretion to relax or
27 modify their procedural rules adopted for the orderly transaction of business when in a given
28 case the ends of justice require it. *Neighborhood T.V. Co., Inc. v. F.C.C.*, 742 F.2d 629, 636
(D.C. Cir., 1984). The Hearing Officer finds that GSA's failure to file the Procurement Record

1 and Agency Report on May 22, 2008 and May 30, 2008 respectively, were caused by simple
2 neglect and not any willful defiance of the OPA's orders or the procedural rules for procurement
3 appeals. Although GSA's untimely filing caused a one (1) month delay in these proceedings, the
4 sanction of excluding the Procurement Record and Agency Report in this matter is not
5 appropriate because it is too heavy a sanction for the delay. Thus, the Hearing Officer finds that
6 the ends of justice require accepting GSA's Procurement Record and Agency Report filed on
7 June 26, 2008.

8 **3. GSA's Motion for Extension of Time to File Procurement Record, Agency**
9 **Report, and to Answer Appellant's Motion for Default Judgment.** Sufficient good cause
10 exists justifying the extension of the filing deadline for the Procurement Record and the Agency
11 Report to June 26, 2008. GSA argues that such extension was necessary because their attorney
12 had just received the case and the additional time was necessary to review and assemble
13 information, allow the attorney and agency officials to meet, and allow a review of all documents
14 prior to their submission to the OPA.⁷ At the hearing, GSA also argued that it was attempting to
15 informally resolve the PDN's appeal by attempting to cancel the solicitation during the period
16 that the Procurement Record and Agency Report was due. PDN argues that an extension is not
17 warranted and if one is granted, it should only be for five (5) working days, and PDN also asks
18 for sanctions in the amount of its attorney's fees for preparing its Motion for Default Judgment in
19 this matter.⁸ At the hearing, Marianas Variety did not oppose the extension and argued that the
20 stricter rules and standards of the Superior Court of Guam should not be applied in this matter.

21 The Hearing Officer finds that GSA's need for additional time to meet with their attorney
22 and assemble and review the documents prior to their submission to the OPA has merit and
23 constitute good cause for extending the deadline to file the Procurement Record and Agency
24 Report on June 26, 2008. Therefore, the deadline for the filing of the Procurement Record and

27 ⁷ Page 1, Line 23, Request for Extension of Time to File Procurement Record, Agency Report, and to Answer
28 Appellant's Motion for Default Judgment.

⁸ Page 1, Appellant's Opposition to Request for Extension of Time to File Procurement Record, Agency Report, and
to Answer Appellant's Motion for Default Judgment, June 16, 2008.

1 Agency Report shall be extended to June 26, 2008, the date when said documents were actually
2 filed with the OPA

3 There is no merit to PDN's argument that it should be awarded its attorney's fees for
4 filing its Motion for Default Judgment. The Hearing Officer does not have the authority to
5 sanction a party in the form of ordering a disobedient party to pay the attorney fees for another
6 party. 2 G.A.R, Div. 4, Chap. 12, §12109(h). Thus, PDN is not entitled to its attorney's fees for
7 preparing its Motion for Default Judgment.

8 GSA's request for additional time to respond to PDN's Motion for Default Judgment has
9 no merit. GSA made the aforementioned request on June 12, 2008 and, as set forth above, on
10 June 13, 2008, the Hearing Officer ordered GSA to file its opposition to the motion on July 3,
11 2008. As set forth above, GSA willfully disobeyed this order by filing its Procurement Record
12 and Agency Report on July 3, 2008 instead of its opposition. Thus, the Hearing Officer finds
13 that the three (3) week period between GSA's request and the July 3, 2008 opposition filing
14 deadline gave GSA sufficient reasonable time to prepare and file it's opposition, and any
15 additional time was not justified.

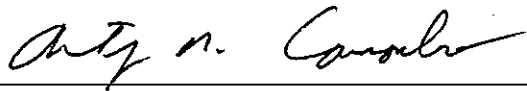
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17 **BASED ON THE FOREGOING**, PDN's Motion for Default Judgment is hereby
18 **DENIED**. GSA's Motion to Extend the Deadline to file an opposition to PDN's Motion for
19 Default Judgment is hereby **DENIED**. PDN's request for sanctions against GSA in the amount
20 of PDN's attorney's fees for preparing PDN's Motion for Default Judgment is hereby **DENIED**.
21 GSA's Motion to Extend the Deadline for filing its Procurement Record and Agency Report is
22 hereby **GRANTED**. The deadline for GSA to file its Procurement Record and Agency Report is
23 hereby extended to June 26, 2008, and the Procurement Record and Agency Report GSA filed on
24 that date are hereby accepted as part of the record in this matter. Further, PDN's July 7, 2008
25 Comments to the Agency Report, and GSA's July 14, 2008 Rebuttal to PDN's Comments on the
26 Agency report are hereby accepted as part of the record in this matter. Interested parties shall

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1 file their comments on the Agency Report no later than 5:00 p.m. on August 14, 2008, and GSA
2 shall file any rebuttals to the same no later than 5:00 p.m. on August 21, 2008. GSA is further
3 ordered to file a response to the OPA's Conflict Information Request by 5:00 p.m. on August 8,
4 2008.

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6 **SO ORDERED** this 4th day of August, 2008 by:

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11 ANTHONY R. CAMACHO, ESQ.
12 Hearing Officer
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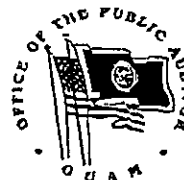
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