



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
PURCHASING AGENCY'S MOTION TO
DISMISS APPELLANT'S PROCUREMENT
APPEAL**

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THIS MATTER came before the Hearing Officer on August 8, 2008, for a Hearing on General Services Agency's (Hereafter Referred to as "GSA") Motion to Dismiss Appellant's (Hereafter Referred to as "PDN") Procurement Appeal. After hearing the arguments of the

1 parties and reviewing the relevant Guam laws and regulations, the Hearing Officer has
2 determined the following:

3 1. **Timeliness of GSA's Motion to Dismiss.** As a Preliminary Matter, GSA's Motion to
4 Dismiss is timely and the Hearing Officer may consider it. PDN argues that GSA's Motion to
5 Dismiss is untimely because it was not filed within seven (7) days after the Notice of Appeal was
6 filed.¹ PDN relies on the language contained in the second sentence of 2 G.A.R., Div. 4, Chap.
7 12, §12104(c)(9) that states that objections to the Public Auditor Hearing the appeal must be
8 filed within seven (7) days after the Notice to Appeal is filed. However this argument has no
9 merit because the Hearing Officer finds that the term "objections" in the aforementioned
10 language applies to objections on grounds of disqualifying factors such as conflicts of interest
11 that may personally disqualify the Public Auditor from hearing a matter despite having
12 jurisdiction over it. Instead, the Hearing Officer finds that the first sentence of 2 G.A.R., Div. 4,
13 Chap. 12, §12104(c)(9) sets the appropriate standard for this issue. That sentence states that any
14 objection or motion addressed to the **jurisdiction** of the Public Auditor shall be promptly filed
15 (bold emphasis added). Id. Here, GSA promptly raised the issue of the Public Auditor's
16 jurisdiction to hear this matter due to PDN's alleged untimeliness, in GSA's Agency Report filed
17 on June 26, 2008.² Thus, the Hearing Officer finds that GSA's Motion to Dismiss is timely as it
18 was promptly filed on June 26, 2008.³

24 ¹ Page 1, PDN's Opposition to Motion to Dismiss filed August 1, 2008 (Hereafter referred to as "PDN's
25 Opposition.")

26 ² Page 2, Line 1, Agency Report filed June 26, 2008.

27 ³ Although the Agency Report was filed late, the Hearing Officer previously granted GSA's Motion for An
28 Extension to File the Agency Report which was granted by the Hearing Officer on August 4, 2008 and the Agency
Report was accepted into the record in this matter. See Decision and Order Re Appellant's Motion for Default
Judgment and Purchasing Agency's Motion for Extension of Time to File Procurement Record, Agency Report, and
Answer Appellant's Motion for Default Judgment filed on August 4, 2008.

1 **2. GSA's Motion to Dismiss PDN's Appeal.** GSA's argues that the Public Auditor
2 does not have the jurisdiction to hear PDN's appeal because the appeal was not timely filed or
3 based on a valid and timely protest.⁴ Generally, the Public Auditor's jurisdiction to review
4 matters is limited to those matters properly submitted before her. 2 G.A.R. Div. 4, Chap. 12,
5 §12103(a). A Procurement Protest Decision may be appealed to the Public Auditor within
6 fifteen (15) days after the protestor received the Notice of Decision. 5 G.C.A. §5425(e). Here,
7 GSA makes three (3) different arguments as to why the four (4) issues raised in PDN's appeal
8 are untimely and the merits of these arguments shall be addressed individually.
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11 There is no merit to GSA's first argument that two (2) grounds for PDN's appeal,
12 specifically the issue of whether GSA allegedly failed to properly disclose the specifications of
13 distribution of the procured notices, and the issue of whether the formats of the notices allegedly
14 favor formats utilized by another bidder, are untimely because they were the subject of PDN's
15 March 7, 2008, protest and GSA's March 10, 2008, Decision on that protest. GSA's March 10,
16 2008, Decision is not the subject of this appeal. Here, these issues were part of PDN's April 7,
17 2008, protest and they were part of GSA's May 1, 2008, Decision denying the aforementioned
18 protest.⁵ Further, PDN filed this appeal on May 14, 2008, which is within the fifteen (15) day
19 time period a protestor can appeal a protest decision. Thus, the Hearing Officer finds that these
20 issues are properly before the Public Auditor because they are part of GSA's May 1, 2008,
21 Protest Decision which is the subject of this appeal.
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24 There is no merit to GSA's second argument that the issue of whether Marianas Variety
25 is a responsive bidder because it did not submit a statement of qualifications is untimely. As this
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27 ⁴ Page 2, Line 1, GSA's Reply to PDN's Opposition to GSA's Motion to Dismiss filed August 6, 2008.

28 ⁵ See Protest of Award of Bid GSA-012-08 to Marianas Variety and Rejection of Bid by Pacific Daily News dated April 7, 2008 and GSA's Protest Decision dated May 1, 2008 as set forth in the Procurement Record filed on June 26, 2008.

1 issue was also part of PDN's April 7, 2008, protest and GSA's May 1, 2008, Decision denying
2 the protest which was timely appealed to the Public Auditor as set forth above, the Hearing
3 Officer finds that this issue is properly before the Public Auditor.
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5 There is merit to GSA's third argument that the Public Auditor does not have the
6 jurisdiction to decide the issue of whether the Marianas Variety is a daily newspaper of general
7 circulation. PDN admits that this issue is being raised for the first time on appeal.⁶ Here, the
8 Public Auditor's jurisdiction is limited to reviewing GSA's May 1, 2008, Decision denying
9 PDN's April 7, 2008, Protest. 5 G.C.A. §5425(e). The issue of whether the Marianas Variety is
10 a daily newspaper of general circulation was not raised in PDN's April 7, 2008 protest and was
11 not part of GSA's May 1, 2008 Decision denying the protest. As a result, there is simply no
12 decision concerning the issue of whether the Marianas Variety is a newspaper of general
13 circulation for the Public Auditor to review. Thus, the Hearing Officer finds that the Public
14 Auditor does not have the jurisdiction to hear this issue because it is not properly before her.
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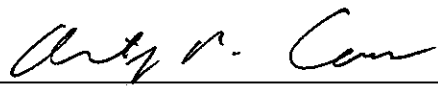
17 **3. GSA's Request for Attorney's Fees and Costs against PDN.** It is premature to
18 determine whether the PDN's protest underlying this appeal is a frivolous protest justifying the
19 award of GSA's attorney's fees. Although the Public Auditor has the power to assess reasonable
20 attorney fees incurred by the government against a protestant upon its finding that the protest
21 was made fraudulently, frivolously, or solely to disrupt the procurement process. 5 G.C.A.
22 §5425(h). The Hearing Officer finds that the time is not yet ripe to determine whether PDN's
23 protest underlying this appeal is frivolous because, as set forth above, there are at least three (3)
24 outstanding issues raised by PDN's appeal that must be decided on the merits.
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⁶ Page 4, PDN's Opposition to GSA's Motion to Dismiss filed on August 1, 2008.

1 **BASED ON THE FOREGOING**, GSA's Motion to Dismiss PDN's Appeal is hereby
2 **DENIED IN PART** and **GRANTED IN PART**. Specifically, the motion is denied on the issue
3 of whether GSA allegedly failed to properly disclose the specifications of distribution of the
4 procured notices, the issue of whether the formats of the notices allegedly favor formats utilized
5 by another bidder, and the issue of whether Marianas Variety is a responsive bidder because it
6 did not submit a statement of qualifications as set forth in PDN's Notice of Appeal. The motion
7 is granted as to the issue of whether the Marianas Variety is a daily newspaper of general
8 circulation as set forth in the PDN's Notice of Appeal and, pursuant to 2 G.A.R., Div. 4, Chap.
9 12, §12109(d) and (f), all evidence, lines of questing, and testimony, submitted to prove said
10 issue shall be excluded from the proceedings in this matter. GSA's request for its Attorney's
11 Fees and Costs pursuant to 5 G.C.A. §5425(h) is hereby **DENIED** at this time.
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14 **SO ORDERED** this 8th day of August, 2008 by:

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19 ANTHONY R. CAMACHO, ESQ.
20 Hearing Officer
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