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**BEFORE THE OFFICE OF PUBLIC AUDITOR  
PROCUREMENT APPEAL**

In the Appeal of: ) Docket No.: OPA-PA-08-007  
)  
)  
)  
Guam Publication, Inc., ) **GSA'S HEARING BRIEF**  
)  
Appellant. )

**INTRODUCTION**

PDN filed the current appeal on May 14, 2008. Three issues are set to be heard at the upcoming hearing on August 22, 2008, before the OPA, relating to IFB-GSA-012-08. PDN based its appeal on its letter of protest dated April 7, 2008. This protest was denied by GSA on May 1, 2008.<sup>1</sup>

<sup>1</sup> Procurement Record, Tab 2, and GSA Exhibit T.

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1 Prior to the hearing, a Stipulation regarding admitted relevant facts will be presented to  
2 the OPA. GSA has already submitted a separate Statement of Admitted Facts, which include  
3 additional facts GSA contends are admitted but that will not be included in the joint stipulation.

4 In addition to the exhibits to be introduced at the hearing, it is requested that the OPA  
5 take judicial notice of the Agency reports, the complete procurement record, as well as all legal  
6 authorities cited in all previous and current pleadings.

7 I. Two of PDN's issues on appeal were previously protested prior to April 7, 2008

8 In its letter of protest, dated April 7, 2008, PDN raises the same two issues PDN raised  
9 in its earlier protest dated March 7, 2008, with almost exactly the same language.<sup>2</sup> These two  
10 issues were:  
11

- 12 (a) **GSA did not properly disclose the specifications for distribution of the  
13 procured notices; and**
- 14 (b) **The formats of the notices have appeared to be geared toward formats  
15 utilized by the Marianas Variety, inferring that the Invitation for Bids is  
16 unfairly skewed in favor of the Marianas Variety.**

17 The March 7, 2008, protest was denied on March 10, 2008, by GSA.<sup>3</sup> PDN did not  
18 timely appeal the denial of this protest. PDN raised the same two issues from its March 7,  
19 2008, protest, again, in its April 7, 2008, protest. PDN claimed it made a timely protest of  
20 these issues on April 7, 2008, because it allegedly became aware of the bid recommendation on  
21 March 26, 2008.  
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23 <sup>2</sup> See PDN March 7, 2008, first protest letter (Procurement Record, Tab. 3) and GSA Exhibit Q, and PDN's second  
24 protest letter dated April 7, 2008, Supplemental Procurement Record and also GSA Exhibit S.

25 <sup>3</sup> The March 10, 2008, denial letter by GSA is attached as Exhibit G to PDN's Notice of Appeal, is part of the  
Supplemental Procurement Record, and has also been submitted as GSA Exhibit R.

1           *These same two issues were previously protested prior to PDN's bid on March 12,*  
2 *2008, and were not affected in any manner by the actual recommendation of the award to*  
3 *Marianas Variety on March 26, 2008. To allow consideration of these issues now would be*  
4 *unfair and would certainly undermine the purposes of the procurement regulations.*

5           GSA respectfully requests that the OPA find it does not have jurisdiction to hear these  
6 two issues that were previously protested. GSA further requests a finding that PDN is estopped  
7 from now raising these same two issues on appeal, and/or that PDN has waived the right to  
8 protest these issues on appeal by bidding on the IFB, rather than appealing the denial of its  
9 protest.<sup>4</sup>

10  
11           PDN waived the right to assert these two issues by failing to appeal the denial of the  
12 March 7, 2008, protest. To have preserved these two issues for appeal, the appeal should have  
13 been filed on or before March 25, 2008, and not May 14, 2008, when PDN filed the appeal in  
14 this case.

15           Assuming arguendo that the OPA determines that these issues were not previously  
16 waived by PDN or time-barred on this appeal, then it is requested that these two issues be  
17 denied after the hearing in this matter. GSA further contends that these two bases of PDN's  
18 protest are frivolous, without merit and were protested solely in an effort to delay the  
19 procurement process. *PDN was not aggrieved in law in any manner as to the specifications of*  
20 *the IFB as will be set forth more fully herein and thus cannot sustain its burden of proof.*  
21

22  
23  
24 <sup>4</sup> Under 5 G.C.A., Ch. 5, § 5425 (a), and 2 G.A.R., Div. 4, Ch. 9, § 9101(c)(1), PDN had to protest within fourteen (14) days  
25 after it knew or should have known of the facts giving rise to the protest. Moreover, under 5 G.C.A., Ch. 5, § 5425 (e), "A  
decision . . . may be appealed by the protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the  
notice of decision." PDN did not appeal GSA's protest denial on March 10, 2008. PDN then subsequently bid on the IFB.

1           A.     The IFB Specifications Were Clear and Not Contrary to Law

2           The specifications in the IFB were clear and not contrary to law. Both GSA and  
3 Marianas Variety contend that Guam law does not require that an ad or notice be printed in a  
4 specific number of newspapers; instead; it requires that ads and election notices be printed in a  
5 newspaper of "general circulation." GSA did not need to specify a number of newspapers that  
6 the ads and notices appeared in in order to determine that Marianas Variety offered the lowest  
7 prices for all of the items it bid on. PDN, without offering any authority, is essentially asking  
8 GSA to come up with a minimum number of newspapers that an ad or notice can appear in  
9 while still complying with Guam law.<sup>5</sup>

10  
11           GEC submitted a request for ad sizes and notices to be published under Title 3. The  
12 applicable requisition is part of the procurement record, in addition to the initial and modified  
13 specifications page.<sup>6</sup> Nothing in the specifications was unclear, vague or ambiguous. The IFB  
14 advertisement indicated that the election notices were to be published under Title 3. Title 3  
15 thus controlled the distribution/circulation. *Despite PDN's written inquiries attempting to*  
16 *somehow limit the distribution or circulation, GSA responded in writing to those inquiries by*  
17 *stating that the circulation is "general circulation," as stated in Title 3 of the Elections Code.*<sup>7</sup>

18           GSA had no obligation to respond to PDN's written inquiries, but GSA did so promptly  
19 and in good faith to ensure fairness and neutrality and to confirm the understanding from the  
20

21  
22           <sup>5</sup> See Interested Party's Comments to Agency Report, pps. 1-2.

23           <sup>6</sup> Procurement Record, Tabs 9c, 12, and 14. See also GSA's Exhibits A and I submitted for this hearing.

24           <sup>7</sup> See GSA's responsive letters dated February 28, 2008, and March 5, 2008. Procurement Record, Exhibits 10a and  
25 10b. These exhibits have also been submitted as GSA's Exhibits D and F, respectively.

1 applicable law. There was no requirement that any number of distribution be specified, since  
2 by its nature, advertisements must be placed in newspapers of general circulation. The quantity  
3 and the quality of the distribution are irrelevant. What is of paramount importance is a general  
4 diverse readership, among other factors.<sup>8</sup> As of the date of the IFB, both PDN and Marianas  
5 Variety were newspapers of general circulation. See the Attorney General Opinions attached to  
6 the Agency report which specifically relate to Marianas Variety.<sup>9</sup>

7  
8 If PDN believed that any part of the IFB package, including the specifications, was  
9 contrary to law, or vague and ambiguous, PDN could have sought court intervention prior to  
10 the bid opening to determine this issue or it could have appealed to the OPA. PDN did not seek  
11 either option.

12 *The fact that PDN bid on the IFB No. GSA-012-08, on March 12, 2008, after PDN*  
13 *received two responses to its two inquiries and GSA's denial of its written protest on March 7,*  
14 *2008, should foreclose PDN from arguing in any manner that the IFB specifications were*  
15 *allegedly unlawful or the IFB was contrary to law or unclear in any manner.*<sup>10</sup> Prior to its bid,  
16 the IFB specifications were amended per PDN's requests. PDN also made two bids on each of  
17 the items in the IFB, with two different distribution amounts. Marianas Variety was still the  
18 lowest bidder on items 1.1-7.1 of the IFB.

19  
20  
21 <sup>8</sup> See GSA's Agency Report, p. 10 [general circulation defined].

22 <sup>9</sup> These opinions are attached to GSA's agency report and have also been submitted as GSA Exhibits Y and Z.

23 <sup>10</sup> See L.P. Ganacias Enterprises dba Radiocom v. Guam International Airport Authority and Guam Cell  
24 Communications, Civil Case No. CV 1787-00, Decision and Order (11/3/00), p. 19 (Superior Court of Guam).  
25 A person who believes an actual Invitation to Bid was itself improper or illegal should seek to enjoin the bid  
process. A protestor who submits a bid pursuant to an IFB cannot claim after the bid is submitted and the deadline

1           B.     The Ad Sizes Were not Unfairly Skewed in Favor of Marianas Variety

2           PDN submitted its initial March 7, 2008, protest relating to this issue *prior* to  
3 submitting its bid package on March 12, 2008. *There was no good faith basis for PDN to*  
4 *protest, on April 7, 2008, the fact that the 5 x 15 ad size was included in the specifications to*  
5 *somehow favor Marianas Variety.* This issue was untimely raised by PDN in its April 7, 2008,  
6 protest, since the issue was previously protested, denied by GSA, and not appealed. Besides  
7 being untimely raised, PDN's protest, on April 7, 2008, relating to the 5 x 15 ad size, is moot  
8 and improper as set forth more fully herein.  
9

10           *On February 28, 2008, the IFB specifications were amended to add Item 8.1, which*  
11 *was the addition of the 5 x 14 ad size for the List of Precinct Officials, requested by PDN.*<sup>11</sup>  
12 *This amendment was made before PDN's March 7, 2008, protest, and before PDN bid on*  
13 *March 12, 2008.*

14           PDN was not obligated to bid on the 5 x 15 ad size for the list of precinct officials, yet  
15 it did so anyway. PDN even received the recommendation for the award on Item 8.1, which  
16 allowed for the publishing of ads/notices for the 5 x 14 ad size requested by PDN.<sup>12</sup> A second  
17 protest raising this issue is now untimely and moot since PDN bid on the IFB after its specified  
18 ad size was actually included by GSA.

19           Even without Amendment # 2 to the IFB allowing PDN's requested ad size, the 5 x 14  
20 ad, PDN had no legitimate basis to protest this issue, especially since PDN has now asserted  
21

22  
23 for submission has past, that the IFB was contrary to law. See also 5 G.C.A § 5480 (c).

24 <sup>11</sup> See Amendment # 2 of the IFB and the modified IFB in the Procurement Record (Tab 9c), as well as GSA  
25 Exhibit I.

<sup>12</sup> See Bid Status Notice to Marianas Variety regarding award to PDN for Item 8.1. Procurement Record, Tab 5b.

1 that it has the ability to publish 5 x 15 ads and could have performed the contract if it had  
2 received the bid for the 5 x 15 ads.<sup>13</sup> This new assertion on appeal makes this alleged basis of  
3 its first and second protests now moot for all future IFBs. PDN even bid on the 5 x 15 ad size  
4 after making its protest on March 7, 2008, despite the fact that it was not required to do so.

5 This was clearly not an all or nothing IFB.

6 *PDN has not offered any evidence or argument to show that any other ad size, other*  
7 *than the initial 5 x 15 ad size, was unfairly skewed in favor of Marianas Variety.* PDN bases its  
8 protest and the subsequent appeal on mere speculation relating to the ad size. Such speculation  
9 is not evidence, and no supporting evidence can be found on which to base this protest in good  
10 faith. PDN has never stated that it has never used such an ad size.

11  
12 GSA's amendment to the IFB is evidence that all parties were treated equally and fairly  
13 by GSA and GEC. GEC immediately authorized the amended IFB after PDN's written inquiry,  
14 although not required to do so, since even PDN's pleadings suggest the specifications were  
15 understood.<sup>14</sup>

16 II. PDN's Third Issue on Appeal Relates to Marianas Variety's Failure to Submit a  
17 Statement of Qualifications With Its Bid Package

18 A. GSA Deemed Marianas Variety's Failure to Submit a Statement of Qualifications  
19 as Being Minor

20 A third issue that PDN protested and appealed in this case relates to Marianas Variety's  
21 non-submission of a Statement of Qualifications with its bid package. GSA deemed that the  
22 non-submittal of the Statement of Qualifications was minor, and determined that Marianas

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23  
24 <sup>13</sup> See PDN's Comments to Agency Report, p. 7 of 12 and Jae Medina Declaration, GSA Exhibit U.

25 <sup>14</sup> PDN's Notice of Appeal, p. 5 of 8.

1 Variety was a responsible and responsive bidder. The submission of the Statement of  
2 Qualifications was waived for Marianas Variety due to the past record of performance between  
3 the parties. Marianas Variety was deemed qualified to perform the IFB by GSA.

4 B. PDN's Protest Relating to This Issue Is Untimely

5 At the bid opening on March 12, 2008, PDN was aware that Marianas Variety had not  
6 submitted a Statement of Qualifications. PDN's representatives, including Jae Medina, were  
7 actually present at the bid opening on March 12, 2008, when it was discovered that Marianas  
8 Variety did not submit a Statement of Qualifications.<sup>15</sup> Ms. Medina specifically states in  
9 Paragraph 6 of her Declaration that "Marianas Variety's bid was opened first. GSA personnel  
10 went through the checklist . . . and stated that the Variety's bid was non-compliant because it  
11 failed to submit a Statement of Qualifications."<sup>16</sup> *Despite knowledge of this fact on March 12,*  
12 *2008, PDN did not timely protest this issue by filing a protest within fourteen (14) days of that*  
13 *date or no later than March 26, 2008.*

14 However, the underlying issue of whether or not Marianas Variety was qualified to  
15 Perform the bid, *if indeed PDN has any standing to challenge this issue*, was known or should  
16 have been known to PDN prior to its March 7, 2008, protest. The protest of any issue relating in  
17 any manner to Marianas Variety's qualifications or its failure to submit a Statement of  
18 Qualifications was thus untimely protested by PDN in its letter of protest dated April 7, 2008.  
19  
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21  
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23 <sup>15</sup> See PDN's Comments to GSA's Agency Report, pps. 6-7 of 12, and the Declaration of Jae Medina, p. 11 of 12, attached as  
GSA Exhibit U.

24 <sup>16</sup> Declaration of Jae Medina submitted as GSA Exhibit U. It is also attached to PDN's Comments to Agency  
25 Report, pps. 11-12.



1 The notice of the IFB was published in the Marianas Variety newspaper on February 5, 2008, that  
2 GSA was seeking proposed bidders relating to the publication of election ads and notices under  
3 Title 3.

4 *PDN did not contest the qualifications of Marianas Variety at any time until after it lost*  
5 *the award. PDN was on notice that Marianas Variety was a proposed bidder, because it*  
6 *received notice of amendments to the IFB, which also had to be served on Marianas Variety.*  
7 *PDN did not seek any type of declaratory relief or other injunctive relief relating to any*  
8 *qualifications required under the IFB prior to bidding on the IFB on March 12, 2008*

9  
10 Marianas Variety is well qualified to publish legal and election notices. This is commonly  
11 known in the industry. GSA also respectfully requests that the OPA and Hearing Officer take  
12 judicial notice of the two Attorney General opinions submitted with the Agency Report and to be  
13 offered into evidence at the hearing in this matter, relating to the determination that Marianas  
14 Variety was deemed to be a newspaper of general circulation for years prior to the IFB being  
15 issued in this case. These two opinions were provided in 2003 and 2006.<sup>17</sup>

16 C. PDN does not have standing to assert claim that Marianas Variety is not qualified

17  
18 GSA made the determination that Marianas Variety's failure to submit the Statement of  
19 Qualifications was minor. The actual determination of Marianas Variety's qualifications to  
20 perform the IFB (issue of responsibility to be set forth herein) is left to the discretion of GSA's  
21 procurement officer.

22  
23  
24  
25 <sup>17</sup> See attachments to Agency Report; see also GSA's Exhibits Y and Z previously submitted.

1 GSA contends PDN does not have any standing to assert whether or not Marianas  
2 Variety was qualified, but rather, PDN can only argue before the OPA whether or not GSA's  
3 decision was arbitrary or capricious, contrary to law, or that GSA abused its discretion in  
4 making such a determination. GSA requests that the OPA find that GSA properly exercised its  
5 discretion in making its decisions relating to the IFB, and thus did not act arbitrarily or  
6 contrary to law. GSA's discretionary decisions include its determination that Marianas Variety  
7 was in fact qualified to perform the IFB from all available information, and that Marianas  
8 Variety's failure to submit a Statement of Qualifications was a minor irregularity or an  
9 insignificant mistake that can be waived by GSA. Moreover, the submission of a Statement of  
10 Qualifications in this case was not material to the bid.

11  
12 D. A Bidder's Qualifications Relate to the Issue of Bidder Responsibility That Can Be  
13 Determined Outside the Bid Envelope

14 1. Parties' Positions Regarding this Issue

15 PDN's appeal contends that the issue of qualifications relates to the issue of the  
16 *responsiveness* of a bidder.<sup>18</sup> Yet, on page 4 of PDN's April 7, 2008, protest, PDN indicates  
17 that the Statement of Qualifications goes to the *heart of the bidders' abilities to effectively*  
18 *produce and deliver on the bid requirements*. PDN then asserts that the omission of this  
19 statement should not have been waived as a mere informality.<sup>19</sup>

20 GSA contends that the issue of whether or not Marianas Variety had the qualifications  
21 necessary to perform the bid, speaks to the issue of bidder responsibility and not  
22 responsiveness.

23  
24 <sup>18</sup> See PDN's Comments to the Agency Report, p. 6 of 12, and PDN's Notice of Appeal, p 5 of 8.

25 <sup>19</sup> See PDN's April 7, 2008, protest, page 4.

1                   2.     Guam Law

2                   *Bidder capability* is an element of *responsibility*. 5 G.C.A. 5201(f). Additionally,  
3                   “*capability*” is determined “*at the time of the award.*” 2 G.A.R. 3101(1). Responsiveness is  
4                   generally described as concerning whether a bidder has offered unequivocally to provide the  
5                   goods or services sought to be procured, whereas responsiveness refers to whether the bidder has  
6                   the apparent ability, capacity, and intent to perform.

7                   Additionally, under 5 G.C.A § 5201 (g), a responsive bidder means a person who has  
8                   submitted a bid which conforms in all material respects to the Invitation for Bids. 5 G.C.A  
9                   § 5201 (f) defines a responsible bidder as a person who has the capability in all respects to  
10                  perform fully the contract requirements, and the integrity and reliability which will assure good  
11                  faith performance.

12                  Under 2 G.A.R § 3116 (b)(2)(A), factors to be considered in determining the standard  
13                  of *responsibility*, include whether a prospective contractor has:

- 14                  (i)     available the appropriate financial, material, equipment, facility, and  
15                  personnel resources and expertise, or the ability to obtain them,  
16                  necessary to indicate its capability to meet all contractual requirements;  
17                  (ii)    a satisfactory record of performance;  
18                  (iii)  a satisfactory record of integrity;  
19                  (iv)   qualified legally to contract with the territory; and  
20                  (v)    supplied all necessary information in connection with the inquiry  
21                  concerning responsibility.

22                  Under 2 G.A.R § 3116 (b)(2)(B), if the contractor fails to supply the requested  
23                  information, the procurement officer shall base the determination of responsibility upon any  
24                  available information. Under 2 G.A.R (b)(4), *the procurement officer must be satisfied that the*  
25                  *prospective contractor is responsible before awarding the contract, as opposed to the time of*  
*the bid opening.*

1 In the present case, Marianas Variety was well-qualified based on its prior history of  
2 dealings, its record of performance, its integrity, and its ability to contract and its actual  
3 repeated dealings with the Territory. Additionally, Marianas Variety had the necessary  
4 resources available to meet the contractual requirements for the IFB. Marianas Variety was  
5 deemed to have been responsible based on all of these factors.

6 As stated herein, the issue of the *responsibility* of a bidder, unlike responsiveness, *can*  
7 *be determined after bid opening and prior to the issuance of an award.* PDN's pleadings  
8 suggest that the issue is really one of responsibility by the words used in its protest. The issue  
9 of Marianas Variety's qualifications goes to its ability to perform the contract and to its  
10 capability. Thus, the issue to be determined is one bearing on responsibility and not  
11 responsiveness. Marianas Variety, however, was both a responsive and responsible bidder.  
12

13 In the present case, GSA did not need a Statement of Qualifications from Marianas  
14 Variety to determine it was qualified to publish election notices, because under the IFB  
15 package and the procurement laws, GSA could rely on all information in its possession prior to  
16 the bid opening and even after the bid opening, until such time as it recommended the award to  
17 Marianas Variety.

18 PDN did not seek court intervention or a determination by the OPA prior to bid  
19 opening to challenge this issue. Rather, it actually bid on the IFB on March 12, 2008. The  
20 fact that PDN bid on the IFB should preclude it from asserting any issue as to Marianas  
21 Variety's qualifications and status as a responsible and responsive bidder, if the OPA  
22 determines that PDN's protest was timely and that it has standing to assert this issue on appeal.  
23

### 24 3. Procurement Decisions in Other States Relevant to this Issue

25 Bid responsiveness concerns whether a bidder has offered unequivocally in its bid

1 documents to provide services in conformity with all material terms and conditions of a  
2 solicitation for sealed bids, and is determined as of the time of the opening of the bids.<sup>20</sup>  
3 *However, responsibility refers to a bidder's apparent ability and capacity to perform, and it is*  
4 *determined any time prior to award.* Triton Marine Constr. Copr., B-255373, Oct. 20, 1993,  
5 93-2 CPD 255 (bidder's failure to submit with its bid pre-award information to determine the  
6 bidder's ability to perform the work solicited does not render bid non-responsive).

7  
8 In In The Appeal of Century Construction, Inc., it was stated that "[where matters of  
9 responsibility are concerned, 'even where solicitation documents mandate submission of an  
10 item', [a] procurement officer may waive as a minor informality the failure to supply requested  
11 documents or information at time of bid opening bearing on responsibility."<sup>21</sup> [emphasis added].

12 In that case, the IFB included a set of blank forms and affidavits which were to be filled in by  
13 the contractors submitting their bids. The low bidder failed to properly complete the forms and  
14 provide the required information. The Board's decision stated:

15 "We have observed that, in contrast to matters of responsiveness, which concern a  
16 bidder's 'legal obligation to perform the required services in exact conformity with the IFB  
17 specifications,' responsibility concerns "a bidder's capability to perform a contract," and  
18 information concerning a bidder's responsibility may be submitted after bid opening. National  
19 Elevator, MSBCA 1252, 2 MSBCA 114 (1985) citing Carpet Land, Inc., MSBCA 1093, 1  
20 MSBCA 34 (1983). *So long as the bid unequivocally demonstrates the bidder's intent to*  
21

22  
23 <sup>20</sup> Data Express, Inc., B-234685, July 11, 1989, 89-2 CPD 28. (As stated throughout GSA's pleadings on appeal,  
24 PDN was not an actual responsive bidder because it failed to submit an unequivocal and irrevocable offer in its bid  
25 package).

<sup>21</sup> In the Appeal of Century Construction, Inc., MSBCA 2385, March 26, 2004,  
<http://www.msbc.state.md.us/decisions/pdf/2385century.pdf>.

1 pursue the requirements of the contract, affidavits accompanying a bid that pertain to such  
2 requirements will relate to the issue of responsibility, not responsiveness . . . The bidder may  
3 supply such requested information after bid opening but before award of the contract”<sup>22</sup>  
4 [emphasis added].

5 Moreover, in In the Appeal of Jailcraft, Inc., NO. 2147 (MSBCA Oct. 27, 1999,  
6 <http://www.msbc.state.md.us/decisions/pdf/jailcraft.pdf>), it was said,

7 “Although Certified (who offered the low bid) failed to submit this information [going  
8 to issues of responsibility] with its bid, such an omission may be considered a minor  
9 irregularity, and a procurement officer may accept, at any time prior to award, information  
10 necessary to establish the bidder’s responsibility. Covington Machine and Welding Company,  
11 MSBCA 2051, 5 MSBCA 436 (1998); Peninsula General Hospital Medical Center, MSBCA  
12 1248, 1 MSBCA 109 (1985); Construction Management Associates, Inc., MSBCA 1238, 1  
13 MSBCA 108 (1985). This Board stated the rationale for this rule at page 4:

14 *Since an issue of responsibility does not affect the competitive*  
15 *position of the bidders, it is appropriate for the procurement officer*  
16 *to invite a bidder to cure an omission of information bearing on*  
17 *responsibility through receipt and evaluation of such information*  
18 *after bid opening. . . Furthermore, such an omission may be cured*  
19 *after bid opening even when the solicitation purports to require that*  
20 *the information must be submitted with the bid. [emphasis added].*  
21 *Niedental Corp.*, MSBCA 1783, 4 MSBCA 353 (1994); *Aquatel*  
22 *Industries, Inc.*, MSBCA 1192, 1 MSBCA 82.”

23 Another important decision helpful to the analysis of the OPA in this case is In the  
24 Matter of Browning-Ferris Industries of Hawaii, Inc., June 8, 2000, Office of Administrative  
25 Hearings, Department of Commerce and Consumer Affairs, State of Hawaii,  
[www.hawaii.gov/dcca/areas/oah/oah\\_decisions/Procurement/PCH-2000-004-Browning Ferris.](http://www.hawaii.gov/dcca/areas/oah/oah_decisions/Procurement/PCH-2000-004-Browning_Ferris)

In Browning-Ferris, a higher, losing bidder tried to contest the determination that was  
made that the low bidder was responsible. The review tribunal ruled that the contracting

<sup>22</sup> Id.

1 agency was not obliged to make any responsibility determination from the bid package and  
2 could do so on evidence later submitted. *In Browning-Ferris, as in the present case, at the*  
3 *time of bid opening, the prospective contractor did not submit a qualification statement.*  
4 Moreover, unlike Marianas Variety, the prospective bidder had no equipment, personnel,  
5 licenses, facilities or much, if anything, else required to perform a substantial contract to  
6 provide garbage collection services for the Honolulu airport. *Yet, the reviewing tribunal*  
7 *refused to second guess the determination of the bidder's responsibility and ruled against the*  
8 *complaining high bidder.*

9  
10 E. If a Bidder's Qualifications Relate to the Issue of Responsiveness, Then GSA  
11 Contends that Marianas Variety's Failure to Submit a Statement Qualifications Was  
12 A Minor Informality or Insignificant Mistake

13 GSA deemed Marianas Variety's failure to submit a Statement of Qualifications to be  
14 minor. *A minor informality is a matter of form, rather than substance, evident from the bid*  
15 *document, or insignificant mistakes that can be waived or corrected without prejudice to other*  
16 *bidders; that is, the effect on price, quantity, quality, delivery, or contractual condition is*  
17 *negligible.* 2 G.A.R., Div. 4, Chap. 3, § 3109(m)(4)(B).

18 In the present case, the non-submission of a Statement of Qualifications at the bid  
19 opening was a minor informality because it was insignificant and could be waived or corrected  
20 without prejudice to PDN. GSA waived this requirement for Marianas Variety. By omitting  
21 the Statement of Qualifications, Marianas Variety did not have an effect at all on the price,  
22 quantity, quality, delivery or contractual conditions, much less a negligible effect. Marianas  
23 Variety is qualified to print the election advertisements specified, and these qualifications did  
24 not prejudice PDN. Had PDN not submitted a Statement of Qualifications, the reverse would  
25 be true in this case, since the IFB was only for advertising certain election notices.

1           F. Marianas Variety was the Lowest Responsible and Responsive Bidder

2           In the present case, GSA determined that PDN and Marianas Variety were both  
3 responsible and a responsive bidders. Marianas Variety was deemed to be the lowest  
4 responsible and responsive bidder as to Items 1.1-7.1 of the IFB. GSA respectfully requests  
5 that the OPA uphold this finding by GSA that Marianas Variety was the lowest responsible and  
6 responsive bidder, if this issue is heard on the merits.

7           G. In Actuality, PDN Was Not a Responsible and Responsive Bidder Since it Did Not  
8 Submit a Binding and Irrevocable Offer with its Bid Package

9           In its appeal and subsequent pleadings, PDN incorrectly asserts that it “complied  
10 precisely with all requirements.” See PDN’s appeal, p. 5 of 8. In its agency report, GSA  
11 responded by indicating PDN did not submit the bid cover sheet as required. PDN’s own  
12 exhibits attached to the appeal and its bid submittal in the Procurement Record confirm that  
13 PDN did not comply with the IFB requirements.

14           The failure to submit a bid cover sheet is fatal to the bid, as there was no unequivocal  
15 and irrevocable offer for any period of time to bind PDN. PDN was in reality a non-responsive  
16 bidder<sup>23</sup>. PDN was fortunate to have been able to continue with the bid after the bid opening.

17 \_\_\_\_\_  
18 <sup>23</sup> Under 5 G.C.A § 5201 (g), a responsive bidder means a person who has submitted a bid which conforms in all  
19 material respects to the Invitation for Bids. 5 G.C.A § 5201 (f) defines a responsible bidder as a person who has the  
20 capability in all respects to perform fully the contract requirements, and the integrity and reliability which will  
21 assure good faith performance. The failure of PDN to submit a binding statement agreeing to be bound to perform  
22 the bid is a matter of responsiveness, and is material. Responsiveness is generally described as concerning whether a  
23 bidder has offered unequivocally to provide the goods or services sought to be procured, whereas responsiveness  
24 refers to whether the bidder has the apparent ability, capacity, and intent to perform. PDN’s failure to submit a  
25 “responsive” bid (i.e. because it did not submit a binding offer) should have been automatically fatal to the bid,  
because such a bidder can, with the knowledge of bid prices, refuse to perform the award, arguing that nothing was  
signed obligation the bidder to do so. On the other hand, Marianas Variety’s failure to submit a statement of  
qualifications is not fatal, because the issue of “responsibility” (i.e. whether MV had the ability, capacity and intent  
to perform) can be determined after bid opening and prior to the award. 2 G.A.R § 3116.



1 Marianas Variety was awarded the bid for Nos. 1.1 – 7.1, since it was the lowest responsive  
2 and responsible bidder under 2 G.A.R, Div. 4, § 3109 (n)(1)-(5), 5 G.C.A § 5201 (g) and  
3 5211(g). Since both bidders made omissions in this case, GSA determined it was only fair to  
4 provide both the opportunity at bid opening to continue with the bid process.

5 In PDN's comments to the Agency report, PDN now asserts for the first time that  
6 "GSA has never raised the issue of PDN being non-compliant, because that newly-created  
7 reason is false. GSA did not mention any such non-compliance at the bid opening, but only  
8 mentioned Marianas Variety's non-compliance." See PDN's comments, p. 6 of 12.

9 PDN's above statements were misleading and inaccurate statements, whether or not  
10 made intentionally or negligently. *GSA did notify PDN employees after the bid was opened*  
11 *that PDN failed to submit the bid cover sheet.* See Declarations of Anita Cruz, Angel Cruz-  
12 Wusstig, and Alma Fama-Alcantara. All three GSA employees were present at the bid opening  
13 and subsequently, where Jae Medina acknowledged that date that she forgot to attach the bid  
14 cover sheet. In fact, it was Jae Medina who admitted she forgot to attach the bid cover sheet.  
15 Ms. Medina's declaration filed with the OPA omits this very important point. Technically, it is  
16 irrelevant whether or not GSA employees mentioned at bid opening that PDN forgot to submit  
17 a bid cover sheet, although in this case it was discussed between GSA and PDN employees.  
18 The reason it is irrelevant is because once the bids are opened, and there was no irrevocable bid  
19 (IFB cover sheet) produced by PDN, its bid should have been immediately rejected as being  
20 non-responsive and incapable of being waived or cured, since it was not a minor informality or  
21 insignificant mistake.

22 When submitting its documents for the appeal, PDN submitted the incomplete and  
23 unsigned IFB form as an exhibit to its appeal, which is an implied admission by PDN that it did  
24 not complete or sign the IFB cover sheet at any time. Ex. B to PDN's Notice of Appeal. See  
25 also GSA Exhibit N and PDN Exhibit 8. PDN only signed the specifications page, which did

1 not bind it. PDN has never indicated in its pleadings that it ever completed and returned a  
2 signed bid cover sheet, because it did not do so at any time

3 III. PDN Has Not Met Its Burden of Proof on this Appeal

4 Assuming arguendo that the OPA does not dismiss PDN's appeal for lack of  
5 jurisdiction as requested by GSA, PDN's appeal still should be denied, since PDN cannot meet  
6 its burden of proof to show any prejudice in this case or that it was actually aggrieved in law.  
7 PDN was not actually aggrieved in this case by any of the three issues raised. If anyone was  
8 potentially prejudiced or aggrieved in this case, it was Marianas Variety, had PDN been  
9 awarded the bid.

10 Generally, a disappointed bidder can find relief from a government agency's  
11 procurement decision if it can show either the government's decision lacked a rational basis *or*  
12 there was a clear and prejudicial violation of applicable laws, regulations or statutes. Tumon  
13 Corporation vs. Guam Memorial Hospital Authority; CV1420-01, Line 9, Page 9 of Decision  
14 and Order (Superior Court of Guam, November 28, 2001). This requires a two part analysis.

15 GSA's decisions were rational in this case and were not arbitrary or capricious or  
16 without legal cause or justification. GSA awarded the bid to in essence the only responsive  
17 bidder, and certainly to the lowest responsible and responsive bidder. GSA materially  
18 complied with the applicable laws and regulations in the procurement process. If anything,  
19 GSA erred on the side of caution. PDN was not a responsive bidder, but yet was allowed to  
20 proceed with the bid.

21 PDN was certainly not prejudiced by GSA's decision in determining that the failure to  
22 submit a Statement of Qualifications was minor. The determination of Marianas Variety's  
23 qualifications, or responsibility, does not prejudice PDN. This determination does not give  
24 another prospective bidder an opportunity to obtain advantage over another bidder's price nor  
25

1 to provide a service other than the one specified in the solicitation. There was simply no  
2 prejudice to PDN in this case.

3 Moreover, there is no prejudice to be considered in this case if the OPA deems the  
4 failure to submit a Statement of Qualification to be a minor irregularity, since the effect on  
5 price, quantity, delivery or contractual conditions is negligible. The Procurement Officer shall  
6 waive such informalities or allow the bidder to correct them. 2 G.A.R. 3109 (m)(4)(B).

7 Both bidders were treated fairly and equally to ensure that the underlying purposes of  
8 the procurement laws and regulations were met. At every turn, PDN was accommodated. PDN  
9 was allowed to bid on the ad size it suggested, and it made two bids on all of the ad sizes,  
10 despite Marianas Variety's single bid on the items. It was only after PDN lost the award, that it  
11 decided to untimely appeal this matter. Had PDN really believed that Marianas Variety was  
12 not qualified, this issue could have been raised in litigation well before the IFB in this case, or  
13 certainly prior to PDN's bid in this case. PDN cannot now challenge Marianas Variety's  
14 qualifications, but can only argue whether or not GSA abused its discretion in making its  
15 decisions related to the IFB. PDN has not met this burden of proof in its pleadings, and GSA  
16 contends that PDN will not meet this burden of proof even at a hearing on the merits.

17 IV. GSA Requests a Finding That These Three Issues Are Frivolous and/or Were  
18 Raised Solely to Delay the Procurement Process

19 PDN has impliedly admitted that its second protest was late in its pleadings on appeal,  
20 although not directly admitted by PDN. PDN has been significantly evasiveness by failing to  
21 directly respond to GSA's responsive pleadings. PDN has asserted that any untimeliness of its  
22 protest was waived by GSA, because GSA considered the protest dated April 7, 2008, on the  
23  
24  
25

1 merits.<sup>24</sup> GSA has not waived the right to assert the lack of jurisdiction for these issues to be  
2 heard on appeal, because jurisdiction issues can be raised at any time, and even by the OPA on  
3 its own motion. GSA continues to preserve this issue for the record, despite the rulings made  
4 on GSA's Motion to Dismiss.

5 GSA contends that PDN's protests were frivolous and not made in good faith, since the  
6 issues were untimely protested, not timely appealed, and lack merit as stated herein and  
7 previously throughout GSA's pleadings.

8 As a result of the receipt of PDN's two written inquiries, dated February 28, 2008  
9 (undated, but received by GSA on this date), and March 3, 2008, and its protest, dated March  
10 7, 2008, the bid opening was delayed. Amendments were made to the IFB reflecting the new  
11 bid opening dates. Additionally, the IFB specifications were amended to allow the 5 x 14 ad  
12 requested by PDN. The bid opening dates on each amendment were changed so GSA could  
13 respond to PDN's inquiries, its protest and to provide all proposed bidders with the notice of  
14 these changes and GSA's responses.<sup>25</sup>

15  
16 V. GSA's Counsel Requests Attorney's Fees and Costs Against PDN Pursuant to 5  
17 G.C.A. § 5425(h)

18 5 G.C.A. § 5425 (h) states in pertinent part as follows:

19 (2) . . . [T]he Public Auditor *shall* have the power to assess *reasonable attorneys*  
20 *fees incurred by the government, including its autonomous agencies* and public  
21 *corporations, against a protestant* upon its finding that the *protest was made*  
22 *fraudulently, frivolously or solely to disrupt the procurement process.* [emphasis  
23 added]

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24 <sup>24</sup> See PDN's comments to Agency Report, p. 7 of 12.

25 <sup>25</sup> See Amendments to IFB, # 2-# 4. Procurement Record Tabs 9a-9d, and GSA Exhibits H-K previously submitted.

1 GSA requests a finding from the OPA that PDN, the protestant, made a frivolous  
2 protest and then filed the present appeal based on that frivolous protest, in addition to filing a  
3 new issue on appeal not previously raised in any prior protest.

4 PDN's actions in filing this frivolous appeal and including a new issue not previously  
5 protested, show PDN's sole intent to disrupt the procurement process. If anyone has  
6 undermined the procurement laws in this case and has requested unequal and unfair treatment,  
7 it has been PDN. As a result of its inquiries and protest, the bid opening in this case was  
8 delayed and the work has still yet to be performed. GSA contends that none of the issues  
9 protested are timely and have any merit, even if actually heard on the merits at the upcoming  
10 hearing.  
11

#### 12 CONCLUSION

13 Based on the foregoing and the record in this case, it is requested that the appeal be  
14 dismissed in its entirety as lacking the necessary jurisdiction and standing to proceed.  
15 Alternatively, if the OPA finds that some or all of the issues have a jurisdictional basis to be  
16 heard, then that the OPA determine that PDN has not met its burden of proof on this appeal,  
17 and that GSA's actions during the bid process and in recommending the award of the IFB to  
18 Marianas Variety was proper. GSA requests reasonable attorney's fees as stated herein.

19 Submitted this 18th day of August 2008.

20 OFFICE OF THE ATTORNEY GENERAL

21 **Alicia G. Lintiacco, Attorney General**

22  
23 By:



24 Donna E. Lawrence,  
25 Assistant Attorney General