

JOAQUIN C. ARRIOLA, JR., ESQ.
 LEEVIN T. CAMACHO, ESQ.
 ARRIOLA, COWAN & ARRIOLA
 259 MARTYR STREET, SUITE 201
 C&A BUILDING, HAGÁTÑA, GUAM
 P.O. BOX X, HAGÁTÑA, GUAM 96932
 TELEPHONE: (671) 477-9730/33
 TELECOPIER: (671) 477-9734
 Counsel for *MARIANAS VARIETY-GUAM*

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IN THE APPEAL OF)	Procurement Appeal No.
)	OPA-PA-08-007
GUAM PUBLICATIONS INC.,)	
)	INTERESTED PARTY'S
Appellant.)	HEARING BRIEF
_____)	

ARRIOLA, COWAN & ARRIOLA, HAGATÑA, GUAM 96910

MARIANAS VARIETY-GUAM, an Interested Party in the above-captioned appeal, hereby submits the following hearing brief.

I. GSA IS NOT REQUIRED TO SPECIFY A SPECIFIC NUMBER OF NEWSPAPERS THAT AN ELECTION AD OR NOTICE APPEARS IN.

Marianas Variety respectfully submits that the Invitation for Bid ("IFB") in this case complied with procurement regulations. PDN argues, without any supporting authority, that the IFB must specify the number of newspapers that an election notice appears. Guam law, however, does not contain such a requirement; instead, Guam law provides that ads and election notices be printed in a newspaper of "general circulation." In this case, the IFB gave adequate instructions and properly identified what items were being bid on. PDN does not contend it did not understand what was meant when GSA responded that "general circulation" was a requirement. PDN was essentially seeking a legal opinion from GSA on whether it could publish an election notice in less than half of its total distribution while still complying with Guam law. The IFB did not need to contain this information and GSA did not need to render a legal opinion and, therefore, the award should stand.

Marianas Variety notes that permitting a newspaper to publish election notices in anything less than **all** of its newspapers would create significant legal and practical problems. As stated above, Guam law requires that notices be published in a newspaper of general circulation. GSA notes that PDN's offer to publish the ad in less than half of its total distribution is literally a limited circulation. Furthermore, the purpose of publishing election notices is to educate and inform the voters of Guam. If PDN published election notices in just 10,000 newspapers, there would be approximately a sixty percent (60%) chance on any given day that the PDN you purchased **would not** have any election information. Therefore, GSA did not err in expecting that prices would be offered based on complete, rather than limited, circulation or distribution.

II. GSA DID NOT ERR BY AWARDING THE CONTRACT TO THE BIDDER WHO OFFERED THE LOWEST PRICES.

PDN's appears to be arguing that GSA erred by awarding the contract to the bidder who offered the lowest prices. The IFB in this case requested bidding for the publication of eight (8) items which included election notices and other election information. Appellee's Exhibit A. The IFB contained specifications for each item and the number of units per item. Id. Bidders were asked to submit a Unit Cost and Total Cost for each item. Id. PDN and Marianas Variety submitted bids which included Unit Costs and Total Costs. Appellee's Exhibits M and N. PDN offered two bids, one based on a limited circulation of 10,000 pieces. Appellee's Exhibit N.

When comparing the bids, it is clear that Marianas Variety offered lower Unit Costs and Total Costs for **every item it bid on**. PDN does not dispute this. Instead, PDN argues that "GSA could not adequately assess and compare the bids submitted by PDN versus the bid submitted by Marianas Variety." Appellant's Comments to Agency Report, p. 2. GSA knew what Marianas Variety and PDN would charge per unit. GSA knew what Marianas Variety and PDN would charge

to publish all of the various election notices. Marianas Variety submits that GSA did not err when it compared the prices offered and then awarded the bid to the lowest bidder.

PDN contends that the award in this case should not be based price, but rather on a per piece “value.” This reasoning is flawed for several reasons.

First, PDN’s argument appears based on the assumption that GSA is purchasing newspapers. GSA, however, was requesting bids for a service, i.e. publishing election notices. GSA knew exactly what it was paying for when it awarded the bid to Marianas Variety: Marianas Variety would publish the election notices in all of its newspapers.

Second, it is absurd to require GSA to award a contract to a bidder while disregarding price. Under PDN’s reasoning, a newspaper may demand any price it wants so long as the price to distribution ratio is lower than all other bidders. If the hearing officer adopts PDN’s argument, GSA could be forced to pay up to 300% more for the same service simply because PDN has a greater distribution. This position is contrary to public policy and the procurement rules.

III. THE STATEMENT OF QUALIFICATION IN THIS CASE WAS NOT MATERIAL TO THE OVERALL BID.

The Statement of Qualification in this case was not material to the overall bid. A procurement officer has the authority to waive “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, Chap 3. § 3109(m)(4)(B)(emphasis added). Furthermore, “[t]he Procurement Officer shall waive such informalities or allow the bidder to correct them depending on which is in the best interest of the territory.” Id. (emphasis added). PDN has failed to show how it was prejudiced in this matter. Furthermore, PDN has failed to show how the Statement of Qualification would effect price in this matter. PDN’s primary contention that the

Statement of Qualification had “substantive value” because it was “crucial in determining whether the bidder has the requisite qualifications to perform under the contract.” Appellee’s Comments to Agency Report, p. 5. The only apparent qualification that a bidder would need to have in order to be an eligible bidder is that it be a newspaper of general circulation. GSA knew that the Marianas Variety is a newspaper of general circulation. GSA had a history of publishing similar notices with the Marianas Variety prior to this IFB. Marianas Variety was, therefore, clearly qualified to publish the election notices. PDN has failed to show that GSA abused its discretion in waiving the Statement of Qualification in this matter and, therefore, the finding of GSA that it was a minor informality should be upheld.

IV. GSA DID NOT FAVOR MARIANAS VARIETY IN THE INVITATION FOR BIDS.


Marianas Variety joins in GSA’s position that there was no favoritism shown in the IFB. PDN claims that item 7.1 which was for 5x15 list of precinct officials, was skewed to favor the Marianas Variety. However, as GSA states, the original IFB was amended to include item 8.1, which permits a 5 x 14 ad size, in order to address PDN’s claims of favoritism. Moreover, PDN **bid** on that item and **lost**. PDN even goes so far as to describe, had it won the bid, how it would have published the notices. Appellant’s Comments in Response to Agency Report, p. 7.

CONCLUSION

Based on the foregoing, Marianas Variety joins in GSA’s position that the award of the contract to Marianas Variety should be upheld.

Dated at Hagåtña, Guam: August 18th, 2008.

ARRIOLA, COWAN & ARRIOLA
Counsel for *MARIANAS VARIETY-GUAM*



LEEVIN TAITANO CAMACHO