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Counsel for *MARIANAS VARIETY-GUAM*

**OFFICE OF THE PUBLIC AUDITOR
TERRITORY OF GUAM**

IN THE APPEAL OF) Procurement Appeal No.
GUAM PUBLICATIONS INC.,) OPA-PA-08-007
Appellant.) **INTEREST PARTY'S OPPOSITION**
) **TO APPELLANT'S MOTION FOR**
) **DEFAULT JUDGMENT**

MARIANAS VARIETY-GUAM, an Interested Party in the above-captioned appeal, by and through undersigned counsel, hereby opposes the Motion for Default Judgment filed by Appellant Guam Publications, Inc. ("PDN") on June 5, 2008. This opposition is supported by the accompanying Memorandum of Points and Authorities and any additional evidence which may be adduced at the hearing held on the matter.

Dated at Hagåtña, Guam: June 20, 2008.

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



LEEVIN TAITANO CAMACHO

MEMORANDUM OF POINTS AND AUTHORITIES

7of default judgment. PDN relies on 2 GAR Div. 4 § 12104(c)(5) which provides in its entirety “[t]he failure of an Appellant or any Interested Party to comply with the time limits stated in this section may result in resolution of the Appeal without consideration of the comments untimely filed.” Id. (emphasis added). This provision immediately follows subsection (c)(4) which gives the Appellant or any Interested Party ten (10) days to file a comment on an agency report. Reading these two sections together, section 12104(c)(5) provides that the Public Auditor may disregard comments submitted by Appellants and Interested Parties more than ten days after an agency has submitted its report. Section 12104(c)(5) does **not provide**, as PDN has submitted, that the Public Auditor may enter default judgment against an agency if it fails to submit an agency report¹ within the time prescribed by the rules. PDN has failed to cite to any other authority to support its contention that its request for relief is proper because no such authority appears to exist.² Accordingly, the Public Auditor should deny PDN’s Motion for Default Judgment.

II. The Rules of Procedure for Procurement Appeals Require a Hearing on the Merits.

The Rules of Procedure for Procurement Appeals require a hearing on the merits. Specifically, the rules provide that in appeals of protests or contract disputes, “the parties shall either request a hearing in writing or waive their right to a hearing and submit the case on the record without a hearing.” 2 GAR Div. 4 § 12108(a). In this case, PDN has requested a hearing in writing.

¹ Marianas Variety submits that rules recognize a difference between an Appellant, an Interested Party and an Agency. See generally 2 GAR Div. § 4 12102 (a), (b) and (e). Marianas Variety also submits that rules recognize a difference between a “comment,” a “procurement record” and an “agency report.”

² PDN has also failed to identify any authority to support its request for attorney fees.

See Procurement Appeal, p. 7 (which states "PDN requests a hearing."). Furthermore, neither GSA nor Marianas Variety have waived their right to a hearing. In fact, this appears to be the only agreement among the parties: a hearing on PDN's appeal should be conducted. Pursuant to the rules, the Public Auditor should deny PDN's Motion for Default Judgment and conduct a hearing on PDN's appeal.

III. Public policy weighs against awarding a contract to an inferior bid because of a one month delay.

Public policy weighs against awarding a contract to an inferior bid because of a one month delay. The Supreme Court of Guam (in interpreting the Rules of Civil Procedure which, in contrast to the Rules of Procedure for Procurement Appeals, actually provide for default judgments) has observed that "a default judgment is considered to be a drastic measure, only appropriate in extreme circumstances because, whenever possible, cases should be decided on their merits." Midsea Industrial Inc. v. HK Engineering Ltd., 1998 Guam 14 ¶ 6 (citation omitted). In this case, PDN has failed to establish that there are extreme circumstances that exist which would warrant default judgment, if the Rules of Procedure for Procurement Appeals actually provided for such relief. PDN has based its request for such drastic relief because, after approximately three weeks, GSA did not file a procurement record or agency report. That is all. PDN's appeal can and should be decided on the merits.

Finally, PDN's requested relief would also significantly impact Marianas Variety, which was awarded the bid, even though the Marianas Variety has done nothing wrong.

CONCLUSION

Based on the foregoing, Marianas Variety respectfully requests that the Public Auditor allow GSA to submit its Agency Report, permit PDN and Marianas Variety an opportunity to file comments on the Agency Report, and conduct a hearing on the merits. To do otherwise would be contrary to the Rules of Procedure for Procurement Appeals and public policy.

Dated at Hagåtña, Guam: June 20, 2008.

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



LEEVIN TAITANO CAMACHO