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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

AUG 01 2008

TIME: 3:35 PM
BY: AC
FILE No. OPA-PA 08-007

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GUAM

IN THE APPEAL OF
GUAM PUBLICATIONS, INC.

Appellant.

APPEAL NO. OPA-PA-08-007

**OPPOSITION TO MOTION TO
DISMISS**

I. Introduction.

GSA has filed yet another untimely document. In violation of the OPA regulations requiring that motions addressing the OPA's jurisdiction be raised within seven days of the filing of the Notice of Appeal, GSA has waited, yet again, for two months to raise this issue. GSA has also waived this issue by failing to address it earlier. Lastly, the untimely motion lacks merit as the earliest protestable event in this matter is the award of the contract to Marianas Variety, which GSA recommended on March 26, 2008. As PDN filed its protest on April 7, 2008, within fourteen days after receiving the notice of the award, PDN's protest, and this appeal, are timely.

II. GSA Has Not Timely Raised its Motion.

ORIGINAL

Continuing its pattern of dilatory behavior,¹ GSA has once again failed to comply with the time limits set forth in the OPA's Rules and Regulations.

Any objection or motion addressed to the jurisdiction of the Public Auditor shall be *promptly* filed. Objection to the Public Auditor hearing the Appeal shall be filed within seven (7) days after the notice of Appeal is filed. The Public Auditor shall have the right at anytime and on her or his own motion to raise the issue of its jurisdiction to proceed with an Appeal and shall do so by an appropriate order.

2 GAR Div. 4 § 12104(c)(9) (emphasis added). Abandoning its duty of candor to the OPA, GSA has cited only the second half of second 12104(c)(9). However, by the express language of the first two sentences of section 12104(c)(9), GSA's Motion to Dismiss is untimely.

GSA filed its "motion"² on July 14, 2008, *two months* after PDN filed its appeal on May 14, 2008. In no sense was GSA's motion prompt, as required by the regulation. In fact, GSA's pattern of dilatory conduct directly violates the purpose of these proceedings, which are to address procurement appeals in an expeditious manner. *See* 2 GAR Div. 4 § 12101. Just as it disregarded its *obligation* to file a timely Agency Report or Procurement Record,³ it also disregarded the deadline for filing motions disputing jurisdiction. For its untimeliness, GSA's motion should be denied outright. Indeed, denial of the motion is mandatory in order for the OPA to enforce compliance with its regulatory deadlines.

GSA's untimely motion has also prejudiced these proceedings. The Hearing Officer has already heard two motions, including PDN's substantive Motion for Default Judgment. Had GSA raised its motion to dismiss within the seven days allotted by section 12104(c)(9), the Hearing Officer could have resolved these jurisdictional issues prior to entertaining substantive

¹ GSA's dilatory behavior is the subject of PDN's Motion for Default Judgment, filed on June 6, 2008.

² The motion was submitted as part of the Agency's Rebuttal, however, there is no clearly delineated motion within that Rebuttal.

³ Other deadlines disregarded by GSA include the request by the OPA to file information for conflicts purposes, and to file an Opposition to PDN's Motion for Default Judgment.

motions. GSA's disregard of the Regulations causes and has caused detriment to the valuable resources of the OPA and the parties involved.

III. GSA Has Waived the Issue of Untimeliness.

At no point during the protest process did GSA ever raise the issue of the untimeliness of PDN's protest. *See* Procurement R., Tab 6. Rather, GSA continued to consider the merits of the protest without regard to timeliness. Timeliness of the protest was therefore waived by GSA, and is now a newly created objection which need not be considered and which fails to hold any merit.

IV. The Appeal is Timely.

Section 5425(a) of Title 5 of the Guam Code states that an actual or prospective bidder who may be aggrieved in connection with the method of source selection,⁴ solicitation or award of a contract may protest within fourteen days after the person knows or should know of the facts giving rise to the protest.

At the earliest, the relevant protestable event on all issues raised in this protest is the award of the contract to Marianas Variety, of which PDN received notice on March 26, 2008. On that date, GSA acknowledged that it accepted Marianas Variety's bid even though it failed to submit a Statement of Qualifications, and therefore failed to be a qualified bidder. This is one of the grounds of PDN's protest.

Any earlier date for protesting Marianas Variety's status as a responsive and qualified bidder would have been premature and unripe. As section 5425(a) states, a protest may only be made as to the "method of source selection, solicitation or award." The only applicable category for a protest on the grounds of a bidder's lack of qualifications is the award of a bid. Therefore, PDN's protest after GSA recommended award to Marianas Variety is timely.

⁴ "Methods of source selection" relate to whether a contract will be awarded by competitive sealed bidding, sole source procurement, emergency procurement, etc. *See* 5 G.C.A. Art. 3, Part B.

Also on March 26, 2008, GSA announced that PDN's bid was rejected due to "high price," even though PDN's bid could actually be lower had a distribution number been specified. PDN's protest with respect to GSA's evaluation of the bidders' prices could only have been raised, at the earliest, when GSA announced its award.⁵ Any earlier protest would have been premature and unripe, if not impossible. PDN's appeal on this ground of GSA's failure to award the contract after an adequate assessment of the price quotations is therefore timely.

Also by March 26, 2008, PDN learned that the bid would be awarded to Marianas Variety even though it did not meet the definition of a daily newspaper of general circulation, as that term is used in several provisions of the election law. While this is an issue that was not initially raised during the protest, the OPA has the general obligation to "promote the integrity of the procurement process" and Guam's procurement laws. 2 GAR Div. 4 § 12103(a). To effectuate this aim, the OPA is not bound by any prior decisions or determinations. 5 G.C.A. § 5703; 2 GAR Div. 4 § 12103. The OPA may also consider newly raised arguments not involved in the procurement protest stage, as is evident by section 12103(a)'s provision allowing the OPA to consider testimony and evidence submitted by other bidders. The OPA, therefore, has the authority to consider this issue and to ensure that the procurement process does not overstep statutory requirements for notices as important as those directly informing the public about its

⁵ Specifically, PDN's claim is that GSA could not adequately assess and compare the bids submitted by PDN versus the bid submitted by Marianas Variety. Take for example the 2 x 4 notice. Marianas Variety submitted a bid price of \$86.40. PDN submitted a bid for \$91.20 for a distribution of 10,000 pieces, and a bid of \$268.80 for a distribution of 26,000 pieces. Under PDN's respective bids, that means that it costs \$0.00912 per notice for a distribution of 10,000, and \$0.01033 per notice for a distribution of 26,000. Because GSA knows the price per piece under both of PDN's bids, it knows what exactly it is paying for. On the other hand, GSA and GEC have no idea what price per piece it is receiving for placing the notices with Marianas Variety. Marianas Variety can choose to distribute the notices in ten of its papers, and still receive \$86.40 under the contract. At that rate, which amounts to \$8.64 per notice, PDN obviously represents the better value. Even if Marianas Variety distributed the notice to 5,000 of its papers, resulting in a price of \$0.01728 per notice, PDN still represents the better value under both the 10,000 and 26,000 distribution levels. If the award is allowed, the Government has no assurance that it has maximized the purchasing value of the public funds of the Territory. 5 G.C.A. § 5001(b)(5). Without a clear distribution amount specified, GSA could not adequately compare the two bidders' figures, or even evaluate Marianas Variety's bid. GSA has no assurance that it has made an award to the lowest bidder.

elections.

In addition, PDN protests the award of the bid, and GSA's favoritism, to Marianas Variety. GSA exhibited partiality towards the Marianas Variety by utilizing a publishing format used only by the Marianas Variety. Favoritism and partiality towards one bidder over another violates the goal of the procurement laws to "foster effective broad-based competition within the free enterprise system." 5 G.C.A. § 5001. Again, the relevant protestable event here is the "award."

Finally, the relevant protestable date is *not* February 5, 2008, as GSA claims. On that date, PDN's competitor, Marianas Variety, first published the Bid Invitation advertisement, yet such publication did not provide any notice of the various issues on appeal. It did not provide any notice that the notices were to be printed in a newspaper of general circulation, and in fact makes no mention of the term "daily newspaper of general circulation." It also did not provide any of the formats that would be utilized under the IFB. It certainly did not give any notice that the award of the bid would be granted to a bidder who did not meet the requirements of the election laws. It did not give notice that the Statement of Qualifications would be waived. It did not state that an award would be allowed in spite of any bidder's failure to specify a distribution number. It did not state that GSA would make an award without adequately assessing if it has maximized the purchasing value of public funds.

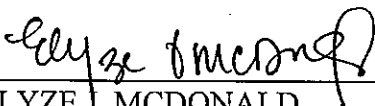
Here, PDN's protest has been based on the award of the contract to Marianas Variety. PDN has fully complied with the time limitations set forth in 5 G.C.A. § 5425.

V. Conclusion

GSA has failed to raise a timely motion to dismiss and has also waived claims of untimeliness. In any event, PDN's protest was timely, and the Motion to Dismiss should be denied.

DATED: Hagåtña, Guam, August 1, 2008.

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