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PROCUREMENT APPEALS

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FILE No. OPA-PA 08-011

BEFORE THE OFFICE OF THE PUBLIC AUDITOR

In the Appeal of)	APPELLANT'S OPPOSITION
)	TO APPELLEE'S OBJECTION
TOWN HOUSE DEPARTMENT STORES,)	
INC., dba)	
ISLAND BUSINESS SYSTEMS)	DOCKET NO. OPA-PA 08-011
& SUPPLIES,)	
APPELLANT)	
_____)	

Coincident with entering its Notice of Filing Procurement Record in the instant Appeal on August 1, 2008, Appellee GPSS entered an Objection "to the Public Auditor hearing this Appeal". The gravamen of this objection is the claim of prejudice: that the Public Auditor "would not be ... a fair and unbiased decision maker".

Appellant opposes this claim. It is legally unfounded, factually unsubstantiated, before the wrong reviewing body, and untimely, all as discussed following.

Appellant IBSS finds the claim bitterly ironic because it arises as a direct consequence of a jurisdictional issue that GPSS itself failed to raise or argue in the original Appeal, yet now it jumps on the Public Auditor's Decision ruling on that issue to cry foul in this second Appeal.

In fact, it was Appellant IBSS that raised the issue that GPSS' refusal to render a decision on its Protest presented a jurisdictional hurdle, but, IBSS argued, GPSS' actions denying IBSS procedural due process by refusing to decide should obviate the jurisdictional requirement for an

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antecedent administrative decision.¹

The Public Auditor concluded that the antecedent administrative decision was a legal requirement but, noting the equitable unfairness this presented when an agency manifestly ignored the duty to render the decision, resorted to her broad equitable powers to assure the integrity of the procurement process by compelling GPSS to render the decision it otherwise refused to make, which was a violation of its legal and regulatory duty.

The facts on which GPSS' claim of prejudice is based are that, in the original Appeal (OPA-PA 08-003) giving rise to this instant Appeal (OPA-PA 08-003), the Public Auditor found that the refusal² of GPSS to issue a decision on IBSS' protest was *an act of bad faith* that threatened the integrity of the procurement process, and that the purchase of copiers by GPSS was by contract that was "*most likely*" illegal.

These statements do not constitute prejudice. Not even the appearance of it.

The sort of prejudice which could disqualify an officer from hearing a matter is the kind that comes extra-judiciously, from something beyond the immediate matter at hand. GPSS does not claim that the "prejudice" alleged arises from any influence, relationship or interest outside the context of this matter. It is derived entirely from and in the context of the record in this case and the Public Auditor's due consideration of it.³

Indeed, GPSS makes the curious statement that these facts would not constitute any such

¹ See Appellant's Notice of Appeal in the original Appeal, OPA-PA-08-003, from page 10.

² Appellant disingenuously extracts from the context of the Public Auditor's Decision the description that there was a mere "*delay* in issuing the decision" after 65 days, but the record submitted revealed, not delay, but a pattern of ignoring any attempt to open any dialogue about the complaint. The record revealed that there had been numerous efforts to discuss the complaint prior to formal protest that had been ignored by GPSS and that GPSS continued to refuse to respond to the Protest, in clear violation of its legal duty to promptly and expeditiously respond to the Protest, notwithstanding IBSS' filing of a Request for Decision on the Protest. The full context reveals that the Public Auditor, "based on the record submitted in this matter" found "there is no reason justifying" GPSS' recalcitrance. Thus, the Public Auditor found "that by not exercising her power to compel the production of documents in this matter, **GPSS would simply continue to ignore** IBSS' protest" (Decision, page 6, from line 23; bold emphasis added.)

³ GPSS formally concurred that the matter be decided *on the record* in the original Appeal. See notice of No Objection filed in OPA-PA 08-003 March 7, 2008.

prejudice in the context of the original Appeal but only in the context of the instant second Appeal.⁴ The original Appeal, however, is not substantively separate from the instant Appeal; this one is a continuation of the original. In its Decision ordering GPSS to render a decision on IBSS' Protest, the Public Auditor specifically reserved jurisdiction to oversee GPSS' production of the Protest Decision, and give to IBSS the right to appeal that decision back to the Public Auditor.⁵

GPSS makes too much of the Public Auditor's finding that she did not have jurisdiction in the original Appeal, with the aim of making the instant Appeal entirely distinct from the original Appeal, to then bootleg that into an argument that any finding from the original Appeal, other than the one finding regarding the jurisdictional hurdle posed by GPSS' obstinance in rendering a Protest decision, was unjustified.⁶

The jurisdictional finding regarding the requirement of an antecedent administrative decision, however, was not a broad statement, but, rather, a circumscribed one, limited to the issue of process, not substance. In effect, the Public Auditor found that there was a momentary procedural jurisdictional defect which was wrongfully caused by GPSS, but the defect was curable. She did not rule that the jurisdictional defect was so basic and essential that any statement she might have offered bearing on the merits might be construed as reflecting an expression of opinion on the merits.

In making the statements regarding bad faith and likelihood of illegality, the Public Auditor was not speaking to the substance of the complaint raised in the original Appeal, but, rather, to the remedy she imposed to overcome the jurisdictional hurdle that GPSS itself erected which was preventing her from reaching a decision on the merits of the claim.

The specific Conclusion of the Public Auditor was that she "does not have the jurisdiction to hear IBSS' appeal *at this time....*" (Italics added.) She did not relinquish all jurisdiction over the case but retained such jurisdiction as was necessary to compel GPSS to render its decision on the Protest, and to deliver a copy of its decision to her, reserving IBSS' right to appeal its cause back to her.

⁴ See GPSS Objection, page 1, line 21: "If the matter of OPA-PA-08-003 ended without further findings or conclusions GPSS would raise no objections to the Hearing Officer or Public Auditor hearing this case."

⁵ Decision, Conclusion 4, page 7, from line 16.

⁶ As mentioned at footnote 4, GPSS does not allege prejudice in the original Appeal, but GPSS does do so "in this case". See, GPSS Objection, page 2, line 14.

She carefully retained jurisdiction to assure compliance with her equitable power to compel the production of documents and promote the integrity of the procurement process.⁷ Thus, the statement of GPSS that the comments would not constitute prejudice in the context of the original Appeal are an admission that they do not count as prejudice in the retained jurisdiction of this matter.

More importantly, the so-called prejudicial statements were not made gratuitously nor in comment on the merits but in the context of rendering a remedy based in equity and would be familiar to most legal practitioners in that context.

The statements relating to bad faith and “likely” illegality of contract were not casual observations or expressions of prejudice but necessary *findings* specifically *required* for her to make in order to exercise her broad equitable powers to assure the integrity of the procurement process, and are likened to the routine findings necessarily made to provide equitable relief in other judicial contexts, such as rulings on requests for injunction and mandamus.

An administrative review tribunal must not interfere in the ordinary work of agencies absent findings of wrongdoing and a colorable meritorious claim. The Public Auditor would have been in error in the exercise of her equitable powers to compel GPSS to exercise its administrative duty if she had simply ordered GPSS to render a decision without such findings.

The finding of bad faith was pertinent to a showing that GPSS had a duty to act and that its failure to act was a breach of such duty. The finding that the contract was “likely illegal” was merely the required finding that IBSS had a meritorious claim, and is no different from all the other instances when a court must be assured that there is some *likelihood of success on the merits*.

GPSS’ claim that the Public Auditor is incapable of being fair and unbiased based on its exercise of judicial consideration of evidence submitted and reaching a reasoned and necessary conclusion based on such record fails to understand the equitable process and impugns the judicial character.

If GPSS’ logic were followed, no body would ever be capable of re-considering a decision it had made, because, having made one decision in the matter, it would be incapable of being a fair and unbiased decision maker on any reconsideration. Such logic totally misconceives the review process and reviewer objectivity and integrity.

Quite apart from the requirements of rendering an equitable remedy, the statements of bad faith and likely illegality were entirely objectively substantiated by the record, and not wrong-minded nor conjured up by some feeling of ill will, lack of fairness or bias; on the record before the

⁷ Decision, page 5, from line 15.

Public Auditor, the statements were not unreasonable nor objectively prejudicial.

On the record submitted, GPSS did not once evidence any attempt to deal openly, honestly or in good faith⁸ with IBSS. The record was uncontradicted that GPSS was at all times and in all circumstances unwilling to have any examination of its procurement of the copiers by IBSS. The Public Auditor's finding regarding bad faith was not an assault on the character of GPSS, and did not say that all its dealings with IBSS were in bad faith, but, rather *specifically limited the scope of the finding* of bad faith to the manner in which GPSS dealt with, or refused to deal with, IBSS on the Protest.

The Public Auditor's decision was strictly limited to a holding that, there being no mitigating showing, a failure of an agency to promptly and expeditiously render a decision on a protest in violation of relevant law and regulation is an act of bad faith⁹, which empowers the Public Auditor to compel the production of the protest decision. GPSS could have avoided the sting of this finding by having dealt in good faith.

On the record submitted, it is likewise objectively obvious that the copier purchase contract(s) are "suspect" and "likely" illegal. GPSS made the bare statement that it had done nothing improper, but did not produce a skerrick of evidence that it ever did anything at all proper to attempt a legal procurement of the copiers. It never has, to this moment, specified, let alone substantiated, what method of source selection it chose to procure the copier supply, and without any such showing, there can be no proper procurement. GPSS could have avoided the sting of this finding by presenting evidence, any evidence, to substantiate its bare statement that it did nothing improper in its procurement of the supplies, but all it produced was bare contract.

GPSS' attempt to oust the Public Auditor of its authority to continue to hear and resolve the complaint which is at the heart of the original Appeal, and which has not been denied substantively in the Decision on Protest, simply continues the efforts of GPSS to deny IBSS any substantive review of its claim. It is simply more of the same game to deny IBSS its procedural and substantive due process, to undermine the procurement process.

There is no substance to GPSS' claim that the findings which were necessary to render the Decision and results in the original Appeal now render the Public Auditor incapable of retaining the jurisdiction for this instant Appeal that she specifically reserved to assure the integrity of the procurement process in this matter.

⁸ 2 GAR §1105 requires all parties subject to the procurement regulations to act in good faith.

⁹ Decision, Conclusion 2, from line 7.

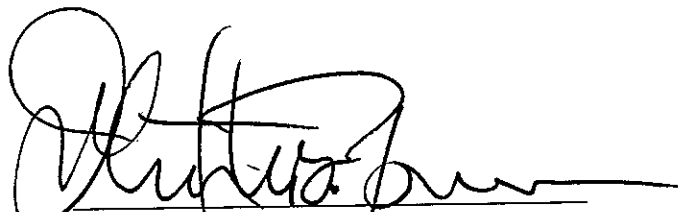
Finally, Appellant IBSS opposes GPSS' objection to the Public Auditor's hearing of this matter because it comes too late and to the wrong body.

The Public Auditor's Decision to retain jurisdiction to assure procedural integrity, including the reservation of the right of Appellant to again appeal any decision on the Protest back to her, was a specific and integral part of her Decision.

If GPSS wished to oust the Public Auditor of her carefully reserved jurisdiction to continue to hear this Appeal, it should have appealed her Decision to retain such jurisdiction to the Superior Court, as she advised in her Decision.¹⁰ It is too late to raise the objection here, now.

IBSS therefore requests the Public Auditor to reject GPSS' objection.

Dated: August 4, 2008



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¹⁰ See Decision, page 7, from line 20: "This is a Final Administrative Decision. The Parties are hereby informed of their right to appeal"