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Attorneys for the Purchasing Agency

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

In the Appeal of:

) Docket No.: OPA-PA-08-007
)
)
)

Guam Publication, Inc.,

) **REPLY TO PDN'S OPPOSITION
 TO GSA'S MOTION TO DISMISS**
)
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Appellant.
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INTRODUCTION

In its initial Agency report, filed and served on June 26, 2008, and its rebuttal report, GSA requested that PDN's appeal be dismissed for lack of jurisdiction.¹ This motion was filed promptly once GSA received a response from PDN regarding the proposed cancellation.

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¹ See Agency Report, dated June 25, 2008 (filed June 26, 2008), p. 2, footnotes 1-2, p. 8; see also Rebuttal Agency Report, pps. 4-8.



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INTRODUCTION

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¹ See Agency Report, dated June 25, 2008 (filed June 26, 2008) . p. 2. footnotes 1-2, p. 8 : see also Rebuttal Agency Report, pps. 4-8.

1 PDN appealed to the OPA on May 14, 2008, on four grounds.² GSA contends that the
2 OPA has no jurisdiction to hear the appeal on any of the four issues, because the appeal was
3 not timely filed based on a valid and timely protest.

4 Two issues on the current appeal were made the basis of a March 7, 2008, protest,
5 (which was denied on March 10, 2008 by GSA), which was not timely appealed by PDN on or
6 before March 25, 2008, as required under the applicable procurement statutes and regulations.

7 A third issue on appeal relates to GSA's determination at the bid opening, on March 12,
8 2008, that Marianas Variety's failed to submit a Statement of Qualifications with its bid. This
9 issue is untimely raised, since PDN was aware of this issue on March 12, 2008, and failed to
10 make a timely protest thereafter. *This issue to be have been timely protested would have to*
11 *have been protested on or before March 26, 2008, and not April 7, 2008.*

13 The fourth issue on appeal is whether or not Marianas Variety is a daily newspaper of
14 general circulation. PDN admits this issue was not raised in any of its prior protests.³ This
15 issue must be excluded from consideration on appeal since there was not a valid and timely
16 protest relating to this issue. Additionally, this issue should have been known to PDN on or
17 before its initial protest on March 7, 2008, and certainly on or before its April 7, 2008, protest.

18 ///

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22 _____

23 ² See Notice of Appeal, pps. 3-5.

24 ³ PDN's opposition to Motion to Dismiss, p. 4 of 6.

1 **THE OPA SHOULD DISMISS PDN'S APPEAL FOR LACK OF JURISDICTION**

2 **A. Subject Matter Jurisdiction Can Be Raised at Any Time; 2 G.A.R.**
3 **§ 12104 (c)(9); GSA Promptly Filed its Motion to Dismiss**

4 PDN's opposition indicates that GSA waived the jurisdictional issue because it failed to
5 address it earlier. ⁴ PDN also asserts that the motion should be denied, because the motion
6 must have been made within seven (7) days of the filing of the Notice of Appeal, and because
7 GSA allegedly did not *promptly* file the Motion to Dismiss.

8 It is a fundamental rule of law that the issue of subject matter jurisdiction can be
9 brought at any time, even on appeal, without any time limitation. The reason is that no
10 administrative body or court can make a valid order if there is no jurisdiction or it exceeds its
11 jurisdiction to make a valid order. Any orders made without appropriate jurisdiction are void.

12 As for the seven day provision, that provision does not apply to this motion, but it is believed
13 to be relevant to disqualification motions.

14 PDN later in its opposition refers to the fact that the motion should be filed *promptly*.
15 The same regulation cited by PDN also states that the OPA can raise the issue of lack of
16 jurisdiction at any time. See 2 G.A.R., Div. 4 § 12104(c)(9). See PDN's opposition to motion
17 to dismiss, p. 2 of 6. Additionally, per 5 G.C.A. § 5703, the jurisdiction of the Public Auditor
18 to review and decide matters is limited to the matters properly submitted.
19

20 In the present case, PDN did not submit a timely or proper appeal based on a valid
21 protest, and thus GSA requests that the OPA dismiss the appeal as not complying with 5
22 G.C.A. § 5703, and the applicable procurement laws relating to the deadlines in which to file
23

24 _____
25 ⁴ See PDN's Opposition to Motion to Dismiss, p. 1-2.

1 protests and appeals.⁵ Moreover, this appeal should also be denied because it does not serve
2 the purposes of the Procurement Law as previously referenced in the Agency Report and as
3 continuously referred to by PDN. As a result, GSA's counsel is now seeking attorney's fees
4 against PDN in a reasonable amount as set forth herein.

5 *GSA promptly made a motion to dismiss the appeal for lack of jurisdiction in its Agency*
6 *Report, filed June 26, 2008, just three weeks after PDN's motion was filed. GSA re-confirmed*
7 *this motion again in its rebuttal report, filed on July 14, 2008. However, the OPA can*
8 *consider this issue on its own motion at any time, including the date set for hearing in this case*
9 *on August 8, 2008, at 11:00 a.m., to determine whether or not it has jurisdiction to proceed.*
10 *GSA respectfully requests that the OPA assert this issue on its own motion as well.*

12 Between May 14, 2008 (when PDN filed its appeal) and June 5, 2008, (when PDN filed
13 its initial motion), GSA was awaiting a response from PDN regarding whether or not it would
14 accept a proposed cancellation. Once PDN filed the Motion for Default Judgment (which has
15 now been denied), GSA tendered the matter to its counsel, who immediately requested a
16 continuance of time to prepare the Agency Report (the Agency's response) and the
17 Procurement Record. GSA's motion for this continuance was granted on August 4, 2008, and
18 these documents are now part of the official record.

19 _____
20
21 ⁵ 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
22 (14) days after it knew or should have known of the facts giving rise to the protest. PDN's initial protest (involving two
23 issues that are the subject of this appeal) was denied on March 10, 2008. This appeal arises from the second protest, dated
24 April 7, 2008, which was untimely. PDN relied on issues previously asserted in its denied prior protest, that was not appealed.
25 PDN is estopped from basing this appeal on those two issues, because there was no timely appeal of a valid protest. 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 never appealed this initial protest, and thus there is no
jurisdiction to hear either of the two issues initially raised in that protest. After the protest was denied on March 10, 2008, PDN
bid on March 12, 2008. PDN's subsequent protest dated April 7, 2008, relating to at least these two issues are untimely, and thus
the appeal is untimely. The facts relating to the two initial issues were already known by PDN's admission at least by March 7,
2008. GSA also contends that the March 7, 2008, protest was itself untimely in that these issues were known by PDN shortly
after the IFB announcement on February 5, 2008, and before the protest of March 7, 2008.

1 **B. GSA Raised the Motion to Dismiss in Its Agency Report and Rebuttal**

2 When GSA filed its Agency Report, it responded by requesting that PDN's appeal be
3 dismissed for lack of jurisdiction. Per the procurement regulations, an Agency report is an
4 agency's response to the all allegations of the appeal and all information and documents
5 relating to the validity of the appeal. 2 G.A.R., Div. 4, § 12105(g).

6 In the initial agency report filed and served on June 26, 2008, on page two, GSA states
7 as follows:

8 GSA seeks a determination by the Office of the Public Auditor that PDN made
9 an untimely and/or improper appeal [fn1] and thus moves the Public Auditor to
10 dismiss PDN's appeal for lack of jurisdiction under 5 G.C.A § 5425, after reviewing
11 all the supporting documents. . It is believed that the mere fact that PDN bid
12 on the IFB No. GSA-012-08, on March 12, 2008, after they issued a written protest
on March 7, 2008, forecloses its right to appeal this protest and assert that the IFB
was unlawful in any manner . . .

13 Footnotes 1-2 of the initial Agency Report also refer to the facts and law
14 underlying the basis for the motion to dismiss and are incorporated herein by reference.
15 Additionally, GSA's Motion to Dismiss was also reconfirmed in the Agency Rebuttal
16 Report dated July 14, 2008, on pages 4-8. Those pages are incorporated by reference.

17 **C. The OPA Must Dismiss Two of the Current Issues in this Appeal That**
18 **Were Previously Raised By PDN in its March 7, 2008, Protest**

19 In its first protest on March 7, 2008, PDN raised two issues⁶:

- 20 1) GSA has not properly disclosed the specifications for distribution of the
21 procured notices (i.e. other than to state "general circulation,") and
22 2) The formats of the notices have appeared to be geared toward formats utilized
23 by the Marianas Variety, inferring that the Invitation for Bids is unfairly skewed
in favor of the Marianas Variety.

24 ⁶ See Agency report, Tab 5, and Procurement Record, Tab 3.
25

1 GSA denied PDN's March 7, 2008, protest, on March 10, 2008. PDN never timely
2 appealed the denial of this protest. To be timely, PDN would have had to appeal by March 25,
3 2008. Rather than appeal the protest denial or seek judicial relief, PDN bid on the IFB on
4 March 12, 2008.

5 *The current appeal was filed on May 14, 2008, based on PDN's second protest on April*
6 *7, 2008. In its second protest, PDN raises the same two issues it raised in the March 7, 2008,*
7 *protest, with almost exactly the same language.⁷ PDN is estopped from now raising these*
8 *same two issues on appeal. Moreover, the OPA does not have jurisdiction to hear these issues*
9 *since they were admittedly known to PDN at least by March 7, 2008, and not timely appealed.*
10 *The second protest does not cure the jurisdictional defect.* These two issues were not affected
11 in any manner by the actual recommendation of the award to Marianas Variety on March 26,
12 2008. To allow consideration of this issue now would be unfair and would certainly
13 undermine the purposes of the procurement regulations.

14 Creatively, PDN has attempted to get a third bite at the apple, after having first
15 protested the issues, then bidding on the IFB, and now protesting the same two issues again
16 with no additional facts, simply because it failed to make a timely appeal.⁸

17 *The jurisdictional defect is not cured by filing an allegedly timely appeal from a*
18 *untimely and improper second protest of the same issues.*
19
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21

22 ⁷ See Procurement Record, Ex. 3, and Supplemental Procurement Record (for April 7, 2008 protest).

23 ⁸ It can be reasonably inferred that PDN assumed that it would be awarded the contract, since it submitted two bids
24 on all items. When it was not awarded the contract, it must have realized it was too late to file an appeal, and thus
25 decided to make a second protest with a new issue relating to the Statement of Qualifications, although the second
protest was untimely raised as to that allegedly new issue, as set forth more fully herein.

1 PDN states in its opposition that “[a]t the earliest, the relevant protestable event *on all*
2 *issues* raised in this protest is the *award* of the contract . . .”⁹ [emphasis added]. This statement
3 is simply irrelevant as to the two specific issues previously raised. PDN then goes on to state
4 why March 26, 2008, is the earliest protestable event, and that any earlier protest would have
5 been premature and unripe, if not impossible.¹⁰

6 Despite PDN’s assertions as to the timeliness of its appeal on *all* issues, it has not
7 responded directly to the fact that these exact two issues were previously raised before in a
8 prior protest. PDN’s opposition to this point is *non-responsive and evasive*. PDN has simply
9 failed to be candid with the OPA and acknowledging there is no jurisdiction to at least hear
10 these two issues. The argument that these two issues were premature and unripe must
11 necessarily fail, since they were already previously raised.
12

13 **D. PDN’S Second Protest Raises a Third Issue Relating to the Statement of**
14 **Qualifications Which Was Not Timely Raised After the Bid Opening**

15 PDN’s second protest, dated April 7, 2008, raises an untimely third issue *not raised* in
16 its first protest dated March 7, 2008. At the bid opening on March 12, 2008, PDN was aware that
17 Marianas Variety had not submitted a Statement of Qualifications. PDN’s representatives,
18 including Jae Medina, were actually present at the bid opening on March 12, 2008, when it was
19 discovered that Marianas Variety failed to submit a Statement of Qualifications.¹¹ Ms. Medina
20 specifically states in Paragraph 6 of her Declaration that “Marianas Variety’s bid was opened
21

22
23 ⁹ PDN’s Opposition to Motion to Dismiss, p. 3 of 6

24 ¹⁰ Id. at pg. 4.

25 ¹¹ See PDN’s Comments to GSA’s Agency Report, pps. 6-7 of 12, *and* the Declaration of Jae Medina, p. 11 of 12.

1 first. GSA personnel went through the checklist . . . and stated that the Variety's bid was non-
2 compliant because it failed to submit a Statement of Qualifications."

3 Despite knowledge of this fact on March 12, 2008, PDN did not timely protest this
4 issue by filing a protest within fourteen (14) days of that date or no later than March 26, 2008.
5 PDN attempts now to argue that the relevant date is March 26, 2008, but that is simply not the
6 state of the law. To argue this date is to be less than candid with the OPA, especially since
7 PDN's own pleadings show knowledge prior to March 26, 2008. No protest was filed on this
8 issue until April 7, 2008, thus the second protest is untimely and the issue cannot be now raised
9 on appeal.

10
11 PDN has not directly admitted that its second protest is late, but that inference can
12 reasonably be drawn from the record and PDN's evasiveness on this issue. *Moreover, PDN*
13 *has asserted that any untimeliness of its protest was waived by GSA, because GSA considered*
14 *the protest dated April 7, 2008, on the merits.*¹² *GSA did not waive the right to assert the lack*
15 *of jurisdiction for this issue to be heard on appeal, because it can be raised at any time, and*
16 *even by the OPA on its own motion.*

17 Furthermore, on the tangential but actual issue of Marianas Variety's qualifications, no
18 such challenge was made by PDN prior to the IFB. Any such issue relating to the Marianas
19 Variety's qualifications should have been known to PDN prior to its initial protest dated March
20 7, 2008. PDN knew on or about February 5, 2008, that the IFB involved the publication of
21 election notices. Had PDN believed that Marianas Variety was not qualified, it could have
22 made an inquiry to GSA or protested this issue.
23

24
25 ¹² See PDN's comments to Agency Report, p. 7 of 12. and Opposition to Motion to Dismiss, p. 3 of 6.

1 PDN did not contest the qualifications of Marianas Variety at any time until after it lost
2 the award. PDN did not seek any type of declaratory relief or other injunctive relief relating to
3 the IFB prior to bidding on the IFB on March 12, 2008. PDN was on notice that Marianas
4 Variety was a proposed bidder, because it received notice of amendments to the IFB, which
5 also had to be served on Marianas Variety. Marianas Variety is well qualified to publish legal
6 and election notices. This is commonly known in the industry. Additionally, at least two AG
7 opinions have issued stating Marianas Variety was deemed a newspaper of general circulation
8 at least since 2003.
9

10 **E. The OPA Has No Jurisdiction to Consider Newly Raised Issues on Appeal Not
11 Raised in Any Timely Prior Protests**

12 The issue of whether or not Marianas Variety is a daily newspaper of general
13 circulation is not properly before the OPA and must be dismissed for lack of jurisdiction. An
14 appeal on an issue must be based on a valid and timely protest. *This issue has admittedly not*
15 *been raised in any protest as stated above.* It was raised for the first time on appeal.
16 Moreover, this issue, if to be argued at all, should have been raised on or before March 7,
17 2008.

18 PDN requests that the OPA consider this new issue, because the OPA has the general
19 obligation to “promote the integrity of the procurement process” and Guam’s procurement
20 laws. PDN then states that “to effectuate this aim, the OPA is not bound by any prior decisions
21 or determinations. . . .” Finally, PDN states that the OPA may also consider newly raised
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1 arguments not involved in the procurement protest stage, as is evident by section 12103(a)'s
2 provision allowing the OPA to consider testimony and evidence submitted by other bidders.¹³
3 These arguments fail since the jurisdictional defect cannot be cured. Moreover, these
4 arguments are simply inapplicable, meritless, and not persuasive under the facts presented in
5 the record.

6 **F. GSA Has Not Waived the Issue of Untimeliness**

7 PDN states that since GSA responded to the merits of its April 7, 2008, protest, that
8 GSA somehow waived the right to assert that the protest was untimely. This is not the state of
9 the law, and PDN cannot point to any legal authority to substantiate this point. *To the*
10 *contrary, GSA asserts and the OPA rules even acknowledge, that the issue of standing can be*
11 *addressed on the OPA's own motion at any time. Additionally, subject matter jurisdiction can*
12 *be raised at any time.* The only requirement noticed in the procurement regulations is that
13 such a motion, if brought by a party, be brought promptly. GSA has promptly brought this
14 motion relating to the lack of jurisdiction to hear the four issues on appeal.

15
16 *PDN, on the other hand, as set forth above, has now asserted on appeal for the first*
17 *time (and not in any of its two protests) that Marianas Variety is not a daily newspaper of*
18 *general circulation. PDN acknowledges this issue was not previously raised in any protest, yet*
19 *claims it has not waived this issue for appeal. PDN cannot have it both ways. Certainly, the*
20 *OPA will recognize this position is unfair and inequitable and contrary to the purposes of the*
21 *Procurement Law.*

22
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24
25 ¹³ See PDN's Comments to GSA's Agency Report, p. 5 of 12, and PDN's Opposition to the Motion to Dismiss, P. 4 of 6.

1 **G. GSA's Counsel Requests Attorney's Fees and Costs Against PDN Pursuant to**
2 **5 G.C.A. § 5425(h)**

3 5 G.C.A. § 5425 (h)states in pertinent part as follows:

4 (2) . . . [T]he Public Auditor *shall* have the power to assess *reasonable attorney's*
5 *fees incurred by the government, including its autonomous agencies and public*
6 *corporations, against a protestant upon its finding that the protest was made*
7 *fraudulently, frivolously or solely to disrupt the procurement process.* [emphasis added]

8 GSA requests a finding from the OPA that PDN, the protestant, made a frivolous
9 protest and then filed the present appeal based on that frivolous protest, in addition to filing
10 new issues on appeal not previously raised in any protest. Moreover, PDN's actions in filing
11 this frivolous appeal, and including new issues not previously protested, show PDN's sole
12 intent to disrupt the procurement process. PDN's actions in this case, and its omissions were
13 either willful or reckless in nature, although such a finding is unnecessary to make an order for
14 attorney's fees.

15 GSA requests that the OPA award its counsel reasonable attorney's fees and costs
16 considering the fact that at least twenty hours have been expended in the research of this
17 matter, in the preparation of the necessary documents (after PDN refused to respond to the
18 proposed cancellation), in preparing and responding to the various motions, and in appearing
19 before the OPA on two occasions (as of the next date for hearing).

20 PDN has continually stated in its pleadings that Guam's procurement laws have been
21 undermined throughout the procurement process and bid award in this case. PDN even
22 references the fact that these laws ensure the fair and equitable treatment of all persons who
23 deal with the procurement system. If anyone has undermined the procurement laws in this case
24 and has requested unequal and unfair treatment, it has been PDN, starting with its initial
25 continued inquiries to GSA (which caused a delay in the bid opening process), proceeded by its

1 initial protest on the same issues stated in the inquiries (even after the issues were addressed),
2 which further delayed the bid opening. PDN then proceeded to make alternate bids and
3 actually bid on the IFB. It was only when it did not receive recommendation of the award on
4 items 1.1 -7.1, that PDN made the untimely protest, and then appeal based on that protest. On
5 appeal, PDN even raised a new issue not previously protested.

6 *After the appeal was filed, PDN refused to respond to GSA's requests to discuss a*
7 *proposed cancellation, and then later opposed GSA's request for a continuance of time to file*
8 *the necessary documents. Furthermore, the fact that PDN has now evaded direct discussion of*
9 *the important jurisdictional issues in this case, because PDN is aware that its appeal is*
10 *jurisdictionally defective. PDN has abandoned its duty of candor to the OPA.*

11
12 Finally, PDN has continuously referred to GSA's dilatory conduct throughout this
13 appeal. *The simple fact of the matter is that PDN's appeal was untimely and not based on any*
14 *valid protest.* PDN arguably went on the offensive most likely to avoid the detection of its
15 untimeliness. Because this appeal and the protest on which it was based was frivolous and
16 solely designed to delay the procurement process, such attorney's fees are necessary to ensure
17 compliance with the Procurement Law by all future interested parties and to help defray the
18 resources expended in defending the current action.

19 CONCLUSION

20
21 Based on the foregoing and the record in this case, including PDN's own pleadings, it
22 is requested that the appeal be dismissed in its entirety as lacking the necessary jurisdiction and
23 standing to proceed, and that the OPA order PDN to pay to GSA's counsel a reasonable
24 attorney's fees as a sanction. The appeal should not have been brought, since the issues were
25 untimely raised or not raised at all in the April 7, 2008, protest. After PDN discovered it was

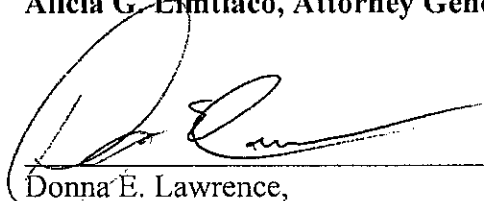
1 not awarded the bid, it filed the current appeal without any legitimate appealable issues. As a
2 result of this filing, the award of the contract to Marianas Variety has been delayed, the notices
3 have yet to be published, and unnecessary time and resources have been spent, as a result of
4 PDN's misconduct.

5
6 Submitted this 6 th day of August 2008.

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9 OFFICE OF THE ATTORNEY GENERAL

10 **Alicia G. Lintiaco, Attorney General**

11
12
13 By:



Donna E. Lawrence,
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