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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM

IN RE AN APPEAL FILED) OPA-PA-11-016
19 AUGUST 2011)
OPA-PA-11-016)
) **MOTION TO DISMISS**
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***** Motion *****

COMES NOW interested party Guam Medical Referral Service (GMRS), by and through counsel the law firm of Fisher & Associates, by attorney Thomas J. Fisher, Esq., and Moves the Office of Public Accountability dismiss an appeal of a protest.

***** Memorandum of Points and Authority *****

On August 3rd, 2011, APM exercised its right under Guam law to protest to a purchasing agency the process of a solicitation of award of a contract. "Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." See 5 Guam Code Ann. §4525(a). APM specifically

1 states it is “hereby protesting the process and the tampering of my documents.” *AR at tab 2,*
2 *p. 2.* APM protested no particular irregularity in the “process” but voiced a generalized
3 dissatisfaction.

4 Pursuant to 5 Guam Code Ann. §4525(c), GSA responded to the protest on August 4th,
5 2011. In that response, GSA explained to APM the process but, because no protest of any
6 particular action was made, could not address one. *Agency Report (AR) at tab 3, pp. 1-2.*

7 GSA also addressed the accusation of “tampering of my documents”. APM stated in
8 its protest that on August 2nd, 2011, its representative visited GSA to retrieve its bid price
9 envelope and noticed it had been opened. *AR at tab 2, pp. 1-2.* GSA explained that APM’s
10 bid price envelope had been opened by mistake on July 22nd, 2011, post selection and award.
11 *AR at tab 3, pp. 1-2¹.* There is neither evidence nor suggestion that this was not the case.

12 APM has appealed this agency decision to the Office of the Public Auditor. “A
13 decision under Subsection (c) of this Section including a decision there under regarding
14 entitlement to costs as provided by Subsection (h) of this Section, may be appealed by the
15 protestant, to the Public Auditor within fifteen (15) days after receipt by the protestant of the
16 notice of decision.” *5 Guam Code Ann. §4525(e).* Thus it is the GSA’s *decision* (and not
17 innuendo contained in a comment to an agency report) that is before the Public Auditor. *See*
18 *In the Appeal of IBSS, OPA-PA-06-004.*

19 While it is true that the Public Auditor’s standard on review is *de novo*, there must be
20 some allegation of irregularity or wrongdoing for it to assess. In other words, APM has a
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23 ¹ It should be noted that whether APM’s envelope was opened advertently or inadvertently is
24 fundamentally irrelevant; APM’s technical bid was rated unacceptable in phase 1. Its bid
25 price would only be of consequence if it had advanced to phase 2. It did not.

1 burden of putting forth some grievance beyond the fact that it was unsuccessful. Here APM
2 complains of the “process”. But that is a question addressed to the legislature. After all, the
3 procurement law *is*, and APM nowhere states that it wasn’t followed. To the extent any
4 allegation contains color, it is only that its bid price envelope was opened. But there is no
5 grievance here either. APM protests this procurement under 2 Guam Admin. R. & Reg.
6 §12201.² Under this section “[t]he Public Auditor shall determine whether a decision on the
7 protest of method of selection, solicitation or award of a contract, or entitlement to costs is in
8 accordance with the statutes, regulations, and the terms and conditions of the solicitation.” *Id.*
9 We have seen that APM does not (and did not) protest the award; neither does APM protest
10 the solicitation method. Such a protest would be untimely in any case. The bid solicitation
11 issued on 17 June 2011 and the time to protest its form ran on 01 July 2011. What is left is a
12 protest of the selection. But APM makes no allegation of impropriety in the selection, only
13 that its bid price was opened. The uncontroverted evidence is that this happened after
14 selection. Thus there is neither evidence of, nor an allegation of wrongdoing in the selection.
15 In any case, opening of APM’s bid price could not have been of consequence. Its technical
16 bid was unacceptable so its price was irrelevant. Assume the envelope was never opened;
17 APM would be in no different position then it is today.

18 While the Office of the Public Auditor will review the matter *de novo*, it will still
19 presume regularity in the GSA actions. *See Wade v. Taitano, 2002 Guam 16, ¶ 12 (Guam*
20 *2002)* “On review, the burden of proof is on the party challenging the regulation, because the
21 administrative agency's action comes before the court with a presumption of correctness and
22 regularity.” *Id.*, citing *Tomlinson v. Qualcomm, Inc., 118 Cal.Rptr.2d 822 (Cal.App. 4 Dist.,*

24 ² §12301 (Contract and Breach of Contract) and §12401 (Debarment or
25 Suspension) are neither raised nor applicable.

1 2002.). See also *Capital Safety Inc. v. State Div. of Bldgs. and Construction*, 848 A.2d 863,
2 866 (N.J. Super., 2004).

3 The federal courts have also held that the contractors' burden to prove the Government
4 acted in bad faith ... is very weighty. Government officials are presumed to act in good
5 faith, and it requires well-nigh irrefragable proof to induce the court to abandon the
6 presumption of good faith dealing. The requirement of 'well-nigh irrefragable' proof
7 ... sets a high hurdle for a challenger seeking to prove that a government official acted
8 in bad faith. This standard has been equated with evidence of some specific intent to
injure the plaintiff. Consequently, an ordinary business decision made for the purpose
of saving the government money does not provide a basis for a finding of bad faith.
Due to this heavy burden of proof, contractors have rarely succeeded in demonstrating
the Government's bad faith.

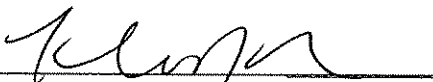
9 *Id.*, internal citations, quotations omitted.

10 The effect of this presumption is to put to APM the burden of alleging some
11 consequential irregularity. Disappointment is not enough. APM protested the process but did
12 not tell the agency what aspect it did not like. APM protested the "tampering of my
13 documents" but did not describe any "tampering" nor articulate how it was aggrieved by an
14 inadvertent opening. In the meantime, a procurement for an important service is disrupted.
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16 **WHEREFORE** Interested Party Guam Medical Referral Service asks that the Office
17 of Public Accountability dismiss an appeal in this matter.

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FISHER & ASSOCIATES



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For Guam Medical Referral Service