



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

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3
4 IN THE APPEAL OF,
5 GUAM PUBLICATIONS, INC.,
6 Appellant

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APPEAL NO: OPA-PA-08-007
FINDINGS AND RECOMMENDATIONS
OF HEARING OFFICER

I. INTRODUCTION

This is the Finding of the Hearing Officer, ANTHONY R. CAMACHO, ESQ., on an appeal filed on May 14, 2008, by Guam Publications, Inc., (Hereafter "PDN") regarding the General Service Agency's (Hereafter "GSA") denial of PDN's April 7, 2008, protest of GSA's award of GSA's Bid No. GSA-012-08 (Advertisement Notices Pursuant to Title 3 G.C.A. and Publication of Board Meetings Pursuant to the Open Government Law) (Hereafter "IFB") to the Marianas Variety-Guam (Hereafter "Marianas Variety") and GSA's Rejection of PDN's Bid.

The Hearing Officer recommends that the Public Auditor hold that Marianas Variety was not a responsive bidder because it failed to submit a Statement of Qualifications as required by the IFB. Accordingly, the Hearing Officer recommends that PDN's May 14, 2008, appeal be sustained in part and denied in part.

II. FINDING OF FACT

These findings are based on the Procurement Record, all documents submitted by the parties in the appeal, as well as all testimony and arguments presented at the August 22, 2008, Hearing in this matter.

1. On February 5, 2008, GSA issued the IFB via publication of the Bid Invitation in the Marianas Variety.¹

¹ Bid Announcement, Tab 13, Procurement Record.

2. The IFB sought bids for the following election notices:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>
1.1	2 x 4 Notice of Board Meetings & Other Election Information	28
2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25
3.1	3 x 6 Election Notices regarding polling sites	10
4.1	4 x 5 Election Notices regarding Candidates	11
5.1	4 x 13 Sample Ballots	10
6.1	5 x 7 Precinct Official Seminar Schedules	8
7.1	5 x 15 List of Precinct Officials	6 ²

3. The IFB was amended four (4) times as follows:

a. Amendment #1 amended the bid opening date from February 19, 2008 to February 29, 2008.³

b. Amendment #2 amended the bid opening date from February 29, 2008 to March 4, 2008, and amended the IFB by adding Item 8.1 for a 5 x 14 ad size for a List of Precinct Officials.⁴

c. Amendment #3 amended the bid opening date from March 4, 2008 to March 7, 2008.⁵

d. Amendment #4 amended the bid opening date from March 7, 2008 to March 12, 2008.⁶

² IFB Specifications, Tab 12, Procurement Record.

³ IFB Amendment No. 1, Tab 9d, Procurement Record.

⁴ IFB Amendment No. 2, Tab 9c, Procurement Record.

⁵ IFB Amendment No. 3, Tab 9b, Procurement Record.

⁶ IFB Amendment No. 4, Tab 9a, Procurement Record.

1 4. PDN submitted two (2) written inquiries to GSA which GSA and said inquiries and
2 answers are as follows:

3 a. On February 28, 2008, PDN inquired what distribution/circulation (number of
4 newspapers the notices would be published in) amount was the IFB requesting, and PDN
5 inquired whether IFB Item No. 7.1 was a full page ad, whether the ad size of 5 x 15 was
6 mandatory, and whether GSA would accept a 5 x 14 ad size.⁷ That same day, GSA responded to
7 PDN's inquiries by stating that the distribution/circulation amount was general circulation, and
8 that IFB Item No. 7.1's 5 x 15 ad size was not required by law and that it would amend the IFB
9 to include a 5 x 14 ad size as Item No. 8.1.⁸
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11 b. On March 3, 2008, PDN inquired as to what the distribution requirement was
12 for the notices and PDN inquired what the justifications were for the advertising notice
13 specification sizes.⁹ On March 5, 2008, GSA answered PDN's second inquiry by stating that the
14 distribution requirement for the notices was general circulation and that the size of the
15 advertisement is the specification that is required.¹⁰
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17 5. On March 12, 2008, GSA received bids for the IFB and PDN and the Marianas
18 Variety were the only bidders for the IFB.¹¹
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20 6. PDN submitted two alternative bids on IFB Items Nos. 1.1 to 8.1 for a distribution of
21 26,000 and a distribution of 10,000 which were as follows:
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25 ⁷ Letter from Jae F. Medina to Claudia Acfalle dated February 28, 2008, Tab 10b, Procurement Record.

26 ⁸ Letter from Claudia S. Acfalle to Jae Medina dated February 28, 2008, Id.

27 ⁹ Letter from Jae F. Medina to Claudia Acfalle dated March 3, 2008, Tab 10a, Procurement Record.

28 ¹⁰ Letter from Claudia S. Acfalle to Jae F. Medina dated March 5, 2008, Id.

¹¹ Abstract of Bids dated March 12, 2008, Tab 7, Procurement Record.

1 a. PDN's bid for a distribution of 10,000 was as follows:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
2 1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$91.20	\$2,553.60
3 2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$114.00	\$2,850.00
4 3.1	3 x 6 Election Notices regarding polling sites	10	\$205.20	\$2,052.00
5 4.1	4 x 5 Election Notices regarding Candidates	11	\$228.00	\$2,508.00
6 5.1	4 x 13 Sample Ballots	10	\$592.80	\$5,928.00
7 6.1	5 x 7 Precinct Official Seminar Schedules	8	\$399.00	\$3,192.00
8 7.1	5 x 15 List of Precinct Officials	6	\$855.00	\$5,130.00
9 8.1	5 x 14 List of Precinct Officials	6	\$798.00	\$4,788.00 ¹²

10 b. PDN's bid for a distribution of 26,000 pieces was as follows:

<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
11 1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$236.80	\$6,630.40
12 2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$296.00	\$7,400.00
13 3.1	3 x 6 Election Notices regarding polling sites	10	\$532.80	\$5,328.00
14 4.1	4 x 5 Election Notices regarding Candidates	11	\$592.00	\$6,512.00
15 5.1	4 x 13 Sample Ballots	10	\$1,539.20	\$15,392.00
16 6.1	5 x 7 Precinct Official Seminar Schedules	8	\$1,036.00	\$8,288.00
17 7.1	5 x 15 List of Precinct Officials	6	\$2,220.00	\$13,320.00
18 8.1	5 x 14 List of Precinct Officials	6	\$2,072.00	\$12,432.00 ¹³

19 7. Marianas Variety submitted one (1) bid for IFB Items Nos. 1.1 thru 7.1 which was as
20 follows:
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<u>Item</u>	<u>Specification</u>	<u>UOM</u>	<u>Unit Cost</u>	<u>Total Cost</u>
22 1.1	2 x 4 Notice of Board Meetings & Other Election Information	28	\$86.40	\$2,419.20

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28 ¹² Bid Submittals, Tab 8a, Procurement Record

¹³ Id.

1	2.1	2 x 5 Election Notices regarding Early Voting/Absentee & other election information	25	\$108.00	\$2,700.00
2	3.1	3 x 6 Election Notices regarding polling sites	10	\$194.40	\$1,944.00
3	4.1	4 x 5 Election Notices regarding Candidates	11	\$216.00	\$2,376.00
4	5.1	4 x 13 Sample Ballots	10	\$561.60	\$5,616.00
5	6.1	5 x 7 Precinct Official Seminar Schedules	8	\$378.00	\$3,024.00
6	7.1	5 x 15 List of Precinct Officials	6	\$810.00	\$4,860.00 ¹⁴

7 8. Marianas Variety did not submit a bid for item 8.1 of the IFB.¹⁵

8 9. Marianas Variety did not submit a Statement of Qualifications as required by the
9 IFB.¹⁶

10 10. GSA waived Marianas Variety's failure to submit a Statement of Qualifications as a
11 minor informality.¹⁷

12 11. GSA determined that Marianas Variety was the lowest responsible and responsive
13 bidder for IFB Items Nos. 1.1 thru 7.1.¹⁸

14 12. GSA rejected PDN's bid for IFB Item Nos. 1.1 thru 7.1 due to high price.¹⁹

15 13. On April 7, 2008, twelve (12) days after GSA issued its March 26, 2008 bid status,
16 PDN protested GSA's Award of the Bid to Marianas Variety and GSA's rejection of PDN's
17 bid.²⁰

18 14. On May 1, 2008, GSA denied PDN's April 7, 2008 protest.²¹

22 ¹⁴ Bid Submittals, Tab 8b, Procurement Record

23 ¹⁵ Marianas Variety's Bid, Tab 8b, Procurement Record.

24 ¹⁶ Id.

25 ¹⁷ Bid Status addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

26 ¹⁸ Analysis and Recommendation for Bid No. GSA-012-08 dated March 26, 2008, Tab 6, Procurement Record.

27 ¹⁹ Bid Status addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

28 ²⁰ PDN's April 7, 2008 Protest Letter, GSA Exhibit S.

1 15. On May 9, 2008, GSA issued Purchase Order No. PO086A04396 to Marianas
2 Variety for the amount of \$17,568.00.²²

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4 16. On May 14, 2008, thirteen (13) days after their April 7, 2008 protest was denied,
5 PDN filed its appeal in this matter.

6 17. Marianas Variety published notices pursuant to the specifications set forth in the IFB
7 on August 13, 15, and 18, 2008.²³

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10 **III. ANALYSIS**

11 As will be discussed in detail below, the Public Auditor must analyze a procurement
12 process that was flawed due to mistakes caused by GSA. GSA's most significant error was
13 requiring a Statement of Qualifications as a material part of the bids. This initial error was
14 compounded by GSA's failure to correctly apply Guam Procurement Law and Regulations when
15 evaluating whether the bids were responsive. These errors now result in the necessity of finding
16 that the bid award to Marianas Variety violates Guam Procurement Laws and Regulations. As a
17 preliminary matter, the Public Auditor must first address, for a second time, whether PDN's
18 appeal is properly before her.

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20 **A. None of the issues presented in PDN's Appeal were time barred by GSA's denial of
21 PDN's March 7, 2008 protest.**

22 As a preliminary matter GSA argues that the Public Auditor does not have the
23 jurisdiction to hear the three (3) issues raised by PDN's appeal because they are untimely. GSA
24 argues that two (2) of the issues, specifically the issue of whether the bid award is defective due
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27 ²¹ GSA's May 1, 2008 Denial of PDN's April 7, 2008 Protest, GSA Exhibit T.

28 ²² Purchase Order No. PO86A04396, Tab 4a, Procurement Record.

²³ PDN Exhibit Nos. 13, 14, 15, and 16.

1 to a distribution not being specified or due to the bids not being assessed on a distribution
2 specification and the issue of whether the bid award was defective due to specifications favoring
3 Marianas Variety, were untimely because they were a part of PDN's March 7, 2008 protest
4 which was denied by GSA and not appealed by PDN. Additionally, GSA argues that the
5 remaining issue of whether the bid award was defective because Marianas Variety's bid was
6 non-responsive was untimely because PDN did not file its protest fourteen (14) days after the bid
7 opening on March 12, 2008 when PDN first became aware of the fact the Marianas Variety did
8 not submit a Statement of Qualifications with its bid. The Hearing Officer recommends that the
9 Public Auditor find that GSA's jurisdictional arguments were previously raised in GSA's Motion
10 to Dismiss PDN's Appeal which was denied by the Hearing Officer's August 8, 2008 Decision
11 and Order. As stated in that decision, all three (3) issues are properly before the Public Auditor
12 because they were part of PDN's April 7, 2008, protest and they were part of GSA's May 1,
13 2008, Decision denying the aforementioned protest and PDN filed this appeal on May 14, 2008,
14 which is within the fifteen (15) day time period a protestor can appeal a protest decision. 5
15 G.C.A. §5425(e). The Hearing Officer recommends that the Public Auditor find, pursuant to the
16 Hearing Officer's August 8, 2008 Decision and Order, that the Public Auditor has the
17 jurisdiction to hear these matters because they are properly before her.

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22 Additionally, the Hearing Officer recommends that the Public Auditor find that there is
23 no merit to GSA's arguments that the issues concerning the distribution and specifications are
24 the same issues raised in PDN's March 7, 2008 protest or that PDN waived these issues by
25 submitting a bid. PDN's March 7, 2008 protest was limited to the terms of the IFB, specifically
26 the IFB's lack of specifications for distribution and the IFB's notice formats favoring formats
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1 used by Marianas Variety.²⁴ In contrast, PDN's April 7, 2008, protest concerned GSA's award
2 of the IFB to Marianas Variety and the Rejection of PDN's bid. Although the issues are similar,
3 the key difference is that in its second protest, PDN is arguing that the alleged lack of a
4 distribution specification and the allegedly biased 5 x 15 notice specification resulted in or
5 substantially contributed to GSA's award of the IFB to Marianas Variety and GSA's rejection of
6 PDN's bid for IFB Item Nos. 1.1 through 7.1. Thus, the issues in PDN's March 7, 2008 protest
7 are not the same as the issues in PDN's April 7, 2008 protest.
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10 Further, the Hearing Officer recommends that the Public Auditor find that there is no
11 merit to Marianas Variety's argument that PDN waived its right to raise these two (2) issues on
12 appeal because the PDN submitted a bid in response to IFB. Marianas Variety's argument relies
13 on the ruling in *Kohl Partners, LLC, v. City of Manchester*, 2003 WL 22474626 (D.N.H.). In
14 that unpublished case, the U.S. District Court of New Hampshire ruled that the Plaintiff waived
15 any complaints about the format of the RFP by submitting a proposal. *Id.* at page 6. However,
16 that case is distinguishable from this matter because the terms of the RFP in *Kohl Partners* had a
17 pre-proposal protest procedure specifically for challenging the terms of the RFP which was the
18 Plaintiff's exclusive remedy and the Plaintiff's claims were waived because the Plaintiff failed to
19 protest the terms of the RFP prior to submitting a proposal in violation of said exclusive remedy.
20 *Id.* page 5. Guam Procurement Law and Regulations have no such pre-proposal protest
21 procedure. Instead, Guam Procurement Law and Regulations merely require a protest to be filed
22 within fourteen (14) days after an aggrieved bidder or potential bidder knew or should have
23 known of the facts giving rise to the protest. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9,
24 §9101(c)(1). As set forth above, on April 7, 2008, PDN filed a timely protest concerning GSA's
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²⁴ Page 2, PDN's Protest dated March 7, 2008, GSA Exhibit Q.

1 bid award to Marianas Variety and GSA's rejection of PDN's bid for IFB Item nos. 1.1 thru 7.1,
2 twelve (12) days after PDN became aware of the facts giving rise to its protest.

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4 The Hearing Officer also recommends that the Public Auditor find that there is no merit
5 to GSA's argument that the issue concerning whether Marianas Variety was a responsive bidder
6 is untimely. This issue was also raised by GSA's Motion to Dismiss and decided by the Hearing
7 Officer's August 8, 2008 Decision and Order. The Hearing Officer recommends that the Public
8 Auditor find, pursuant to said Decision and Order, that this issue is properly before her.

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10 Additionally, there is no merit to GSA's argument that PDN should have filed its protest
11 concerning Marianas Variety's failure to submit a statement of qualifications with its bid
12 fourteen (14) days after the bid opening on March 12, 2008. Although the issue of Marianas
13 Variety's missing Statement of Qualifications was an element of PDN's protest, as stated above,
14 PDN's underlying protest concerns GSA's award of IFB Item Nos. 1.1 thru 1.7 to Marianas
15 Variety and GSA's rejection of PDN's bid for the same items. PDN was not aware of the award
16 or the rejection of its bid until it received GSA's Bid Status on March 26, 2008.²⁵ PDN filed a
17 timely protest, to include its allegations concerning Marianas Variety's missing Statement of
18 Qualifications, twelve (12) days later on April 7, 2008.

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20 Finally, the Public Auditor notes that GSA did not raise the issue of PDN's timeliness in
21 GSA's May 1, 2008 decision denying PDN's April 7, 2008 protest. Instead, GSA evaluated and
22 denied PDN's protest on its merits. Here, as the Public Auditor has found that the three (3) main
23 issues, described above, raised in the PDN's appeal are properly before the Public Auditor, the
24 Public Auditor will review *De Novo* GSA's May 1, 2008 decision denying each of these issues.
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²⁵ GSA Bid Status Addressed to PDN dated March 26, 2008, Tab 5a, Procurement Record.

1 **B. The bid award is not defective due to a distribution not being specified or due to the**
2 **bids not being assessed pursuant to a distribution specification.**

3 GSA correctly found no merit in PDN's allegation that the bid award to Marianas Variety
4 was defective because a distribution, defined by PDN as the number of newspapers the ads were
5 to be published in, was not specified or because the bids were not assessed pursuant to
6 distribution specification. The terms of the IFB do not support this argument. The IFB states that
7 it is an indefinite quantity bid and that the quantities stated in the IFB are annual estimated
8 requirements projected within a twelve (12) month period.²⁶ Generally, an indefinite quantity
9 contract is a contract for an indefinite amount of supplies or services that establishes unit prices
10 of a fixed-price type. 2 G.A.R., Div. 4, Chap. 3, §3119(i)(2). Here, the IFB states the number of
11 ads that it is seeking for each ad size described in IFB Item Nos. 1.1 thru 8.1 and seeks bids
12 based on unit costs for each size of ad.²⁷ Thus, the Hearing Officer recommends that the Public
13 Auditor find that the IFB specifications conformed with Guam Procurement Regulations
14 governing indefinite quantity contracts because the IFB sought bids for unit costs for each ad
15 size for the number of times such ad sizes were to be published.

16 Further, Guam law does not require that the IFB's ads be printed in a specific number of
17 newspapers. The IFB states that the election notices are to be published pursuant to Title 3
18 Guam Code Annotated and that the board meeting notices were to be published pursuant to the
19 Open Government Law.²⁸ Title 3, Guam Code Annotated states for every notice that must be
20 published, that such publication be in a newspaper of general circulation or a newspaper
21 published on Guam.²⁹ Likewise, Guam's Open Government Law only requires that notices be
22 published by a newspaper of general circulation which said statute defines as a newspaper which
23 is printed and distributed not less than once a week, at regular intervals, throughout Guam, which
24 has a paid circulation and holds a valid second class mailing permit from the United States Post

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26 ²⁶ Special Provisions, IFB, Tab12, Procurement Record

27 ²⁷ Specifications, IFB, Tab 12, Procurement Record.

28 ²⁸ Id.

²⁹ 3 GCA §4108, §5105, §6112, §6114, §7104, and §16202.

1 Office, and which contains news, articles of opinion, features, and other matters of current
2 interest published for public dissemination. 5 G.C.A. §8104(a)(5) and §8108. The term “general
3 circulation” as used in the aforementioned statutes does not, in and of itself, require publication
4 in a specific number of newspapers. General circulation of a newspaper is not determined by the
5 number of subscribers but by diversity of subscribers. *Eisenberg v. Wabash*, 189 N.E. 301, 302
6 (Ill. 1934) and *Board of Commissioners of Decatur County v. Greensburg Times*, 19 N.E.2d 459,
7 476 (Ind. 1939). Thus, the Hearing Officer recommends that the Public Auditor find that neither
8 of the statutes cited in the IFB specifications requires publication in a specific number of
9 newspapers.

10 The Hearing Officer recommends that the Public Auditor find that there is no merit in
11 PDN’s arguments that without a specification concerning a distribution number, GSA could not
12 properly assess that the award to Marianas Variety maximized the purchasing value of the public
13 funds used for the ads. As stated above, the IFB complied with Guam Procurement Regulations
14 by requiring the bids specifying unit cost per ad. Clearly, GSA could determine who the lowest
15 bidder was by comparing the unit costs submitted by each bidder and GSA in fact determined
16 that Marianas Variety was the lowest bidder based on the unit costs in this bid.³⁰

17 Finally, Hearing Officer recommends that the Public Auditor find no merit to PDN’s
18 argument that without a specified distribution, GSA has no assurance that its award to Marianas
19 Variety results in GSA obtaining the highest value for its dollar. Generally, Guam Procurement
20 Regulations governing competitive sealed bidding prohibit an award to a bidder submitting a
21 higher quality item than that designated in the invitation for bid if such bidder is not also the
22 lowest bidder. 2 G.A.R., Div. 4, Chap. 3, §3109(n)(5). Thus, even assuming that PDN’s bid
23 offered a higher quality item than what was specified in the bid because PDN specified the
24 number of newspapers the ads would be published in, GSA could not award PDN IFB Item Nos.
25 1.1 thru 7.1 unless PDN was also the lowest bidder for said IFB Items and it is undisputed that
26 Marianas Variety’s bid was lower than both of PDN’s bids for IFB Item Nos. 1.1 thru 7.1.

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28 ³⁰ Testimony of Claudia S. Acfalle.

1 Despite the foregoing, the Hearing Officer recommends that the Public Auditor find some
2 merit in PDN's argument that the purchasing power of government funds would be improved by
3 specifying the number of newspapers the ads will be printed in. Generally, one of the primary
4 purposes of the procurement code is to maximize to the fullest extent practicable the purchasing
5 value of public funds. 5 G.C.A. §5001(b)(5). Here, GSA could improve the purchasing value
6 for these ads by specifying at least a minimum number of papers of the ads would run in.
7 Without such a specification, in future bids for these ads, as here, GSA risks an unscrupulous
8 bidder making a very low bid complying with the unit of cost and unit of measure specifications,
9 but only publishing the ad in one (1) newspaper. Further, future procurements for these ads will
10 benefit by not using an indefinite quantify contract because the laws requiring these ads,
11 described above, clearly state the types of ads required for the elections and the number times
12 such ads must be published. GSA should review the specifications provided by the purchasing
13 agencies to ensure they will result in a procurement that maximizes the purchasing value of
14 public funds and amend such specifications to ensure that purpose is achieved.

15
16 **C. The bid award is not defective due to specifications favoring Marianas Variety.**

17 GSA correctly found no merit in PDN's allegation that the bid award was defective
18 because the 5 x 15 ad size required by IFB Item No. 7.1 is a format primarily used by Marianas
19 Variety. Generally, all specifications shall seek to promote overall economy for the purposes
20 intended and encourage competition in satisfying the Government's needs, and shall not be
21 unduly restrictive. 5 G.C. A. §5265. Further, specifications shall not include requirements, such
22 as but not limited to restrictive dimensions, weights, or materials, which unnecessarily restrict
23 competition nor shall they specify a product having features peculiar to the products of one
24 manufacturer, producer, or distributor unless it has been determined in writing by the Director of
25 the using agency that those particular features are essential to its requirements and specifying the
26 reason that similar products lacking those features would not meet minimum requirements for
27 the item. 5 G.C.A. §5268(a) and (b). Initially, the IFB Item No. 7.1's requirement for and ad
28 size of 5 x 15 was an unduly restrictive specification. The specification is for a full page ad and

1 PDN's full page ad size is approximately one (1) inch shorter than Marianas Variety's full page
2 ad size. PDN's full page ad size is 5 x 14 which is approximately one inch shorter than the
3 specification.³¹ The specification clearly favored Marianas Variety because its full page ad size
4 is 5 x 15.³² However, the Public Auditor finds that GSA cured this issue by amending the IFB to
5 include Item No. 8.1 which specified an ad size of 5 x 14.

6 Despite GSA's cure, the Public Auditor should be troubled by the testimony of GSA's
7 Chief Procurement Officer, Claudia S. Acfalle, who testified that she merely used the
8 specifications requested by the Guam Election Commission to solicit for the 5 x 15 ad size. As
9 stated above, said specification was unduly restrictive and better screening of the specifications
10 given by the Guam Election Commission to ensure they complied by Guam Procurement laws
11 governing specifications could have prevented this issue. In fact, had the original specification
12 been modified to require a "full-page ad," it is unlikely this issue would have resulted in two (2)
13 inquiries, two (2) protests, and this issue being made a part of this appeal. As, full page ad sizes
14 will most likely be required for future elections, the Chief Procurement Officer should ensure
15 that restrictive ad specifications that favor one bidder over another are not used, and that any
16 specifications provided by the Guam Election Commission are properly screened and amended
17 when necessary to prevent such restrictive specifications from appearing in future IFBs.

18
19 **D. The bid award is defective because Marianas Variety was not a responsive bidder.**

20 GSA erroneously determined that PDN's allegation that the Marianas Variety was a non-
21 responsive bidder had no merit. In competitive sealed bidding, contracts shall be awarded to the
22 lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth
23 in the invitation for bids. 5 G.C.A. §5211(g) and 2 G.A.R. Div. 4, Chap. 3, §3109(n)(1). The
24 term "responsive bidder" is defined as a bidder who has submitted a bid which conforms in all
25 material respects to the invitation for bids. 5 G.C.A. §5201(g) and 2 G.A.R. Div. 4, Chap. 3,
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28 ³¹ Testimony of Rindraty Limtiaco and Jae Medina.

³² Id.

1 §3109(n)(2). Here, the plain language of the IFB specifically required all bidders to submit a
2 Statement of Qualifications and that the failure to do so will mean disqualification and rejection
3 of the bid.³³ Pursuant to this language, the Statement of Qualifications was a material
4 requirement because its omission would automatically disqualify a bidder and reject the bid.
5 Therefore, based on the IFB's plain language, the Hearing Officer recommends that the Public
6 Auditor find that the Statement of Qualifications was a material requirement of the IFB and
7 Marianas Variety was non-responsive because it failed to comply with this material requirement.
8 The Hearing Officer recommends that the Public Auditor find that Marianas Variety is
9 disqualified as a bidder and its bid is rejected because it failed to submit a Statement of
10 Qualifications with its bid.

11 The Hearing Officer recommends that the Public Auditor find that there is no merit to
12 GSA's and Marianas Variety's arguments that the Statement of Qualifications was not material
13 to this bid. GSA's Chief Procurement Officer, Claudia S. Acfalle, testified that the Statement of
14 Qualifications was not necessary in the IFB and that it is usually used for Request for Proposals.
15 The general rule is that an invitation for bids must set forth the requirements and criteria which
16 will be used to determine the lowest responsible and responsive bidder and bids shall be
17 evaluated based on the requirements set forth in the invitation for bids. 5 G.C.A. §5211(e) and 2
18 G.A.R., Div. 4, Chap. 3, §3109(n)(1). As stated above, the Statement of Qualifications was one
19 of the material requirements set forth in the IFB. Thus, the Hearing Officer recommends that the
20 Public Auditor find that, pursuant to IFB's plain language, the Statement of Qualifications was a
21 material requirement and its presence or lack thereof in a bid must be evaluated to determine
22 whether a bidder was responsive.

23 The Hearing Officer recommends that the Public Auditor find that there is no merit to
24 GSA's and Marianas Variety's arguments that GSA properly waived Marianas Variety's failure
25 to submit the Statement of Qualifications as a minor informality. A minor informality is a matter
26 of form, rather than substance evident from the bid document, or insignificant mistakes that can
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28 ³³ Specification Reminder to Prospective Bidders, IFB, Tab 12, Procurement Record.

1 be waived or corrected without prejudice to other bidders; that is, the effect on price, quantity,
2 quality, delivery, or contractual conditions is negligible. 2 G.A.R., Div. 4, Chap. 3,
3 §3109(m)(4)(B). The Hearing Officer recommends that the Public Auditor find that the
4 Marianas Variety's failure to submit a Statement of Qualifications was not an insignificant
5 mistake because the IFB mandates that disqualification of bidders and rejection of bids submitted
6 without a Statement of Qualifications. Further, as the PDN submitted its Statement of
7 Qualifications, the Hearing Officer recommends that the Public Auditor find that the PDN was
8 prejudiced by GSA's waiver of Statement of Qualifications for Marianas Variety because,
9 pursuant to the express terms of the IFB, Marianas Variety should have been disqualified as a
10 bidder and its Bid been should have been rejected for failing to submit a Statement of
11 Qualifications, leaving PDN as the sole responsive bidder to the IFB.

12 In addition to the foregoing, the Hearing Officer recommends that the Public Auditor find
13 that GSA should have stated what the bidders should have included in the Statement of
14 Qualifications. Here, the IFB only mandated that bidders submit a Statement of Qualifications
15 with their bid and it did not specify what a bidder should include in such statement. Thus, with
16 such open-ended and non-specific requirements an unscrupulous bidder could include a
17 document entitled "Statement of Qualifications" and regardless of what was in such statement, it
18 would comply with the terms of the IFB. To prevent such issues in future IFBs, GSA should
19 improve its review and editing of draft IFBs to ensure that Statement of Qualifications are
20 necessary for the solicitation and that the IFB states specifically what bidders must include in a
21 Statement of Qualifications.

22
23 **E. PDN was the IFB's only responsive bidder.**

24 The Hearing Officer recommends that the Public Auditor find that PDN was the sole
25 responsive bidder to the IFB and that GSA's argument that PDN was not a responsive bidder
26 has no merit. GSA argues that PDN's bid was not responsive because PDN failed to submit a
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1 signed bid cover sheet. However, the record in this matter does not support this argument.³⁴
2 GSA's official evaluation of PDN's bid does not indicate GSA made a determination that PDN's
3 bid was non-responsive.³⁵ GSA rejected PDN's bid for IFB Item Nos. 1.1 thru 7.1 solely on the
4 grounds of PDN's higher price for those items.³⁶ In fact, GSA's Chief Procurement Officer
5 Claudia Acfalle testified that she waived PDN's omission of the signed cover sheet of the bid.
6 Unlike the Statement of Qualifications, the IFB did not require the automatic disqualification of
7 bidders and rejection of bids for the omission of signed bid cover sheets. Further, Guam
8 Procurement Regulations specifically allow this situation to be waived as minor informality
9 when an unsigned bid is accompanied by other material indicating the bidder's intent to be
10 bound. 2 G.A.R., Div. 4, Chap. 3, §3109(m)(4)(B)(2). Here, PDN submitted its Statement of
11 Qualifications with its bid which was signed by its President and Publisher, Rindraty Limtiaco.
12 PDN's Statement of Qualifications states that PDN has met all requirements for the services
13 needed and outlined in the IFB and PDN was ready to accept this job.³⁷ The Hearing Officer
14 recommends that the Public Auditor find that PDN's Statement of Qualifications indicates its
15 intent to be bound and that PDN's failure to submit a signed bid cover page could be properly
16 waived as a minor informality by GSA.

17
18 **F. The Award of IFB Item Nos. 1.1 thru 7.1 to Marianas Variety is void and said**
19 **award shall be made to PDN**

20 The Hearing Officer recommends that the Public Auditor find that the award of IFB Item
21 Nos. 1.1 thru 7.1 to Marianas Variety is void. If after an award it is determined that a solicitation
22 or award of a contract is in violation of law, and the person awarded the contract has not acted
23 fraudulently or in bad faith, the contract may be: (1) ratified or affirmed if doing so is in the best

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25 ³⁴ GSA did submit the Declarations of GSA Employees Anita Cruz, Angel Cruz-Wusstig, and Alma Fama-Alcantara
26 who stated that they raised this issue with PDN at the March 12, 2008 bid opening, however, their declarations are
27 not official GSA determinations concerning this issue.

28 ³⁵ Analysis and Recommendation for IFB, dated March 26, 2008, Tab 6, Procurement Record.

³⁶ Bid Status Addressed to PDN and dated March 26, 2008, Tab 5a, Procurement Record.

³⁷ PDN's Bid Submittal, Tab 8a, Procurement Record.

1 interests of Guam; or (2) the contract may be terminated and the person awarded the contract
2 shall be compensated for the actual expenses reasonably incurred under the contract plus a
3 reasonable profit, prior to the termination. 5 G.C.A. §5452(a)(1). Here, as set forth above, the
4 Hearing Officer recommends that the Public Auditor find that the award of IFB Item Nos. 1.1
5 thru 7.1 violates 5 G.C.A. §5211(g) and 2 G.A.R. Div. 4, Chap. 3, §3109(n)(1) because Marianas
6 Variety was not a responsive bidder. Further, the Hearing Officer recommends that the Public
7 Auditor find that there is nothing in the record indicating Marianas Variety acted fraudulently or
8 in bad faith in procuring the contract. The Hearing Officer recommends that the Public Auditor
9 find that ratifying or affirming GSA's contract with Marianas Variety is not in the best interests
10 of the Government because GSA's failure to evaluate the bids in accordance with the express
11 terms of the IFB, which is the root cause of the unlawful award to Marianas Variety, is a serious
12 threat to the integrity of the procurement process and must not be condoned by ratification of this
13 contract. The Hearing Officer recommends that the Public Auditor find that the contract
14 awarded to Marianas Variety shall be terminated as of the date of this Decision, and Marianas
15 Variety shall be compensated for the actual expenses it reasonably incurred under the contract
16 plus a reasonable profit, prior to the termination. (i.e. using unit prices for ad sizes specified in its
17 Bid)

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19 **G. No grounds exist justifying the award of attorney fees or interest.**

20 The Hearing Officer recommends that the Public Auditor find that there is no merit to
21 GSA's argument that it should be awarded its attorneys fees in this matter because PDN's protest
22 was frivolous and not made in good faith. Generally, the Public Auditor has the power to assess
23 reasonable attorney's fees incurred by the Government against a procurement protestor upon its
24 finding that the protest was made fraudulently, frivolously, or solely to disrupt the procurement
25 process. 5 G.C.A. §5425(h)(2). As set forth above, the Public Auditor has sustained PDN's
26 protest by finding that GSA's award of IFB Item Nos. 1.1 thru 7.1 was improper because
27 Marianas Variety was not a responsive bidder. Thus, the Hearing Officer recommends that the
28 Public Auditor find that PDN's April 7, 2008 protest and its subsequent appeal of the GSA's

1 May 1, 2008 denial of the protest was not fraudulent or frivolous. Further, the record in this
2 matter and Guam's Procurement Laws and Regulations do not support GSA's arguments that
3 PDN attempted to disrupt the procurement process by making inquiries or by filing its April 7,
4 2008 protest. The IFB expressly states that any explanation desired by a bidder regarding the
5 meaning or interpretation of solicitation or specifications must be submitted in writing with
6 sufficient time allowed for written reply to reach all bidders before the submission of their bids.³⁸
7 Bidder or potential bidders have the right to file protests in connection with the method of source
8 selection, solicitation, or award of a contract. 5 G.C.A. §5425(a) and 2 G.A.R., Div. 4, Chap. 9,
9 §9101(c)(1). Thus, the Hearing Officer recommends that the Public Auditor find that PDN's
10 compliance with the IFB's inquiry provisions and PDN's exercise of its right to protest are not
11 disruptions to the procurement process justifying an award of attorney's fees to GSA.

12 The Hearing Officer recommends that the Public Auditor find that there is no merit to
13 PDN's request for attorney's fees from GSA or Marianas Variety for Marianas Variety's
14 publication of the notices after PDN filed its appeal in this matter. At issue here is whether the
15 automatic stay provisions were triggered by PDN's appeal. Generally, in the event of a timely
16 protest, the Government shall not proceed further with the solicitation or award of the contract
17 prior to the final resolution of such protest. 5 G.C.A. §5425(g) and 2 G.A.R., Div. 4, Chap. 9,
18 §9101(e). These automatic stay provisions are triggered when a protest is timely and the protest
19 is filed before the award was made. *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15,
20 ¶24 (Supreme Court of Guam, August 12, 2004). As set forth above, the Hearing Officer
21 recommends that the Public Auditor find that PDN's April 7, 2008 protest and that this appeal
22 was timely filed. However, the record in this matter clearly shows that PDN filed this appeal
23 after the award of IFB Item Nos. 1.1 thru 7.1 was made to Marianas Variety. As set forth above,
24 GSA denied PDN's April 7, 2008 protest on May 1, 2008. Further, GSA completed the award of
25 IFB Item Nos. 1.1 thru 7.1 to Marianas Variety by issuing Purchase Order No. PO86A04396 on
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28 ³⁸ Paragraph 3, Sealed Bid Solicitation Instructions, IFB, Tab 12, Procurement Record.

1 May 9, 2008.³⁹ As set forth above, PDN filed this appeal on May 14, 2008. Thus, the Hearing
2 Officer recommends that the Public Auditor find that the automatic stay provisions were not
3 triggered as a result of this appeal because GSA completed its award to Marianas Variety
4 between GSA's denial of PDN's April 7, 2008 protest and PDN's appeal. Further, there is no
5 statutory authority authorizing an award of attorney fees to PDN regarding this matter.

6 The Hearing Officer recommends that the Public Auditor find that there is no merit to
7 PDN's request for interest. Generally, interest on amounts ultimately determined to be due to a
8 contractor shall be payable at the statutory rate from the date the claim arose through the date of
9 decision or judgment, whichever is later. 5 G.C.A. §5475. Here, PDN's appeal is based on the
10 unlawful award of the contract under the IFB to Marianas Variety and not sums owed by GSA to
11 PDN pursuant to an existing contract. Thus, the Hearing Officer recommends that the Public
12 Auditor find that PDN is not entitled to interest in this matter.

13 14 **IV. CONCLUSION**

15 Based on the foregoing, the Hearing Officer recommends that the Public Auditor
16 determine the following:

- 17 1. PDN's April 7, 2008 Protest and PDN's Appeal in this matter were timely.
- 18 2. GSA's award of Item Nos. 1.1 thru 7.1 to Marinas Variety violates Guam
19 Procurement Laws and Regulations because Marinas Variety was not a responsive bidder.
- 20 3. PDN's Appeal is denied as to the issue of whether the award of the bid was defective
21 because a distribution was not specified or because the bids were not assessed pursuant to a
22 distribution specification and as to the issue of whether the bid award was defective because the
23 5 x 15 ad size required by IFB Item No. 7.1 is a format primarily used by Marianas Variety.
- 24 4. PDN's Appeal is sustained as to the issue of whether Marianas Variety was a
25 responsive bidder.
- 26 5. GSA's contract with Marianas Variety for IFB Item Nos. 1.1 thru 7.1 is hereby

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³⁹ Purchase Order No. PO86A04396, Tab 4a, Procurement Record.

1 terminated as of the date of this decision and Marianas Variety shall be compensated for the
2 actual expenses it reasonably incurred under the contract plus a reasonable profit, prior to the
3 termination. (i.e. using unit prices for ad sizes specified in its Bid).

4 6. PDN shall be awarded the remainder of the contract for IFB Item Nos. 1.1 thru 7.1 as
5 of the date of this Decision and PDN shall be allowed to print the remaining notices and
6 accordingly be compensated per its Bid. GSA shall decide which of PDN's alternate bids it shall
7 use as the basis for the contract. Although the majority if not all of the ads required for the
8 primary election have already been duly published, clearly PDN will at least have the
9 opportunity to publish the ads required for the general election.

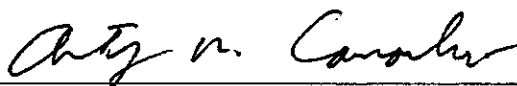
10 7. PDN is hereby awarded, pursuant to 5 G.C.A. §5425(h), PDN's reasonable costs
11 incurred in connection with the solicitation and its April 7, 2008 protest, including PDN's
12 reasonable bid preparation costs, excluding PDN's attorney's fees, because PDN should have
13 been awarded the contract under the IFB but was not. GSA may object to the PDN's cost
14 demand by filing the appropriate motion with the Public Auditor no later than fifteen (15) days
15 after PDN submits such cost demand to GSA.

16 8. GSA's request for Attorney Fees is hereby denied.

17 9. PDN's request for Attorney Fees and interest is hereby denied.

18 A copy of these Findings and Recommendations shall be provided to the parties and their
19 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review
20 on the OPA Website www.guamopa.org.

21
22 **DATED** this 5th day of September, 2008.

23
24 

25 ANTHONY R. CAMACHO, ESQ.
26 Hearing Officer
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