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Electronic Filing - GPA's Proposed Findings of Fact and Conclusions of Law (OPA-PA-21-012)

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Hafa Adai Jerrick,

Please find attached submitted through electronic filing is the following:

1. GPA's Findings of Fact and Conclusions of Law (total of 8 pages)

Please respond with a confirmed stamped receipt so that service can be made to the Appellant.

Respectfully,

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**OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS**

IN THE APPEAL OF)	APPEAL NO. OPA-PA-21-012
)	
Graphic Center, Inc.,)	
)	GPA’S PROPOSED FINDINGS OF FACT
Appellant.)	AND CONCLUSIONS OF LAW
_____)	

I. Introduction

This matter came before the Public Auditor on June 6, 2025, for an evidentiary hearing following remand from the Superior Court of Guam in *Graphic Center v. GPA*, Case No. CV0207-22. Attorney Joshua Walsh appeared at the hearing on behalf of appellant Graphic Center, Inc., whose owner Chris Biolchino, was also present. GPA legal counsel Marianne Woloschuk appeared on behalf of appellee Guam Power Authority with GPA’s Chief Financial Officer John Kim. After considering the testimony at the hearing, the record in this matter, and the applicable law, the Public Auditor hereby issues its ruling.

II. Findings of Fact

Based on the testimony adduced at the hearing on June 6, 2025, as well as the record before this tribunal, the Public Auditor finds the following facts:

1. Graphic Center appealed to the OPA the denial of its protest of GPA's decision to proceed with InfoSend in Solicitation GPA-RFP-21-002 for the procurement of professional printing, mailing and processing of customer bills, arguing for the first time that GPA had improperly accepted InfoSend's bid proposal which was allegedly incomplete for missing Exhibit A.

2. Exhibit A is an inclusion of Amendment 1 to the RFP that tracks the scope of work in the RFP and is listed as a required form in section 2.12 of the RFP; it contains questions with boxes for yes/no answers and very small boxes for comments.

3. The OPA held an evidentiary hearing on February 4, 2022, following which the Public Auditor issued a decision denying Graphic Center's appeal because its claim was untimely and the OPA therefore lacked jurisdiction.

4. Graphic Center sought judicial review of the OPA's decision in the Superior Court, alleging in its complaint, without the support of a transcript, that GPA employee Dawn Fejeran had testified before the OPA that GPA had granted InfoSend an exemption from submitting Exhibit A, thereby preventing InfoSend's disqualification for failure to submit a required document.

5. Graphic Center also argued that GPA, by disqualifying bidder Moonlight BPO for failing to submit a required document (shareholder affidavit), treated similarly situated bidders differently.

6. The Superior Court affirmed the OPA's conclusion that Graphic Center was untimely in its claim that InfoSend submitted an incomplete proposal:

In this case, the OPA correctly asserted that because Graphic Center had not brought up the issue of the missing documentation on Infosend's part in a formal

written protest to GPA, OPA could not hear the appeal on this issue. Graphic Center’s original protest to GPA did not identify any missing documentation, and instead focused its protest mainly on the fact that Infosend is based [i]n California and not on Guam. Even if Graphic Center was not aware of the information missing from Infosend’s application at the time of its original protest, it should have filed an additional written protest with GPA within 14 days of becoming aware, rather than including the issue only in its appeal to OPA. Because the OPA's determination on this legal issue was not contrary to law, this decision is affirmed.

Graphic Center v. GPA, Case No. CV0207-22, Decision & Order at 4 (Oct. 29, 2024).

7. The Superior Court however denied as arbitrary, capricious or clearly erroneous the Public Auditor’s conclusion that there was no issue of an incomplete procurement record:

[I]t is clear that Infosend did not include all of the required information in their initial response to the RFP. Graphic Center has argued that there is evidence from a GPA employee that Infosend was granted an exemption by GPA which prevented its disqualification. . . . [T]he procurement record contains no explanation as to why Infosend’s offer was allowed to continue while missing key documents, but Moonlight’s offer was rejected for that reason. . . . [I]t remains to be seen whether Graphic Center sufficiently showed to OPA that missing elements of the procurement record were “material” or thwarted judicial review Because the OPA did not fully engage with the procurement record issues in its decision, . . . the Court remands this matter to the OPA for further agency investigation and record development to determine the materiality of the information missing from the procurement record.

Graphic Center, Case No. CV0207-22 at 6-7.

8. On remand, the OPA set a hearing for June 6, 2025, for which Graphic Center subpoenaed four witnesses from GPA: (1) James Borja, (2) John Kim, (3) Dawn Fejeran, and (4) Jamie Pangelinan.

9. Before the hearing, GPA obtained and submitted to the OPA and served on opposing counsel transcripts of the testimony of all witnesses at the original hearing on February 4, 2022, which showed that no witness testified that InfoSend was granted an exemption from submitting Exhibit A.

10. GPA moved to quash the subpoena to Jamie Pangelinan because she had been made available to testify at the original hearing on February 4, 2022, yet Graphic Center did not call her then.

11. The Public Auditor issued the subpoena to Ms. Pangelinan, thereby denying GPA's motion to quash, and later stated that he was doing so in order to give Graphic Center every opportunity to make a record as required by the Superior Court.

12. At the hearing, Graphic Center called only two GPA witnesses, Dawn Fejeran and John Kim, and did not call the two other GPA witnesses it had subpoenaed, James Borja and Jamie Pangelinan.

13. Dawn Fejeran, a Buyer in GPA's Procurement Division, testified that InfoSend was not given an exemption from submitting Exhibit A.

14. Ms. Fejeran also testified that Moonlight was disqualified because it did not submit a completed shareholder affidavit, which was a required form listed in section 2.12 of the RFP.

15. John Kim, GPA's CFO, testified that he was the one who drafted the scope of work and Exhibit A for the RFP for the purpose of obtaining information about the capabilities and functions of the bid proponents.

16. According to Mr. Kim, who was also a member of the evaluation committee for the RFP in this case, InfoSend answered the questions asked in Exhibit A when it addressed the scope of work.

17. Mr. Kim testified that the narrative in the scope of work was more helpful, like the comments to the yes/no questions in Exhibit A.

18. According to Mr. Kim, the space for comments (after answering yes/no) in Exhibit A was very small.

19. He said it was more important to provide the content asked for in the form than the form itself.

20. He said InfoSend's answers in the scope of work were about the same as Exhibit A and were not missing; in fact, InfoSend's submittal included its complete disaster recovery plan.

21. He said Graphic Center, on the other hand, did not submit information about its disaster recovery plan or answer yes/no in Exhibit A, which made it difficult to evaluate this important criterion.

21. John Kim also testified that InfoSend was not given an exemption from submitting Exhibit A.

III. Conclusions of Law

A. By failing to raise it in a timely manner before the proper forum, Graphic Center has waived its claim about Exhibit A.

When Graphic Center appealed the denial of its bid protest to the OPA, it raised the issue of InfoSend's allegedly incomplete proposal missing allegedly Exhibit A there for the first time. Issues raised for the first time on appeal are deemed waived. *Duenas v. Kallingal*, 2012 Guam 4 ¶ 35 ("As a matter of general practice, this court will not address an argument raised for the first time on appeal.") (internal citation and quotation marks omitted). The OPA properly found that it lacked jurisdiction over Graphic Center's untimely claim and the Superior Court properly affirmed the OPA's ruling.

Graphic Center then argued on judicial review to the Superior Court that GPA had granted InfoSend an exemption from submitting Exhibit A. This issue had no basis in the evidence and

was also raised for the first time in an appellate proceeding. The non-existent exemption duped the Superior Court into believing that GPA had somehow treated InfoSend and Moonlight differently. The court believed that GPA permitted InfoSend to continue its bid without a key document whilst rejecting Moonlight for the same reason. The court would not have remanded this matter had it known that the alleged exemption does not exist and is therefore not missing from the procurement record.

Having already found that the OPA properly declined to decide the matter of allegedly missing Exhibit A for lack of jurisdiction, the Superior Court should have dismissed the issue of the “missing” record of the exemption. Instead, the Superior Court chose to entertain the exemption issue and remanded the matter to the OPA for further fact finding. When transcripts of the February 2022 hearing before the OPA showed no evidence to support allegations of an exemption, Graphic Center once again shifted its argument, this time claiming that the procurement record did not contain anything to show that a narrative would be accepted in lieu of the yes/no questions in Exhibit A.

A litigant is not permitted to invent issues or to serially alter its position and argument depending on the forum. This is because “his opponent is entitled to rely upon the position he takes, and should be able to prepare for trial with the assurance that this position will not be suddenly changed without notice.” *Berry v. Klinger*, 300 S.E.2d 792, 795 (Va. 1983) (holding that “a litigant will not be permitted to assume, successively, inconsistent and mutually contradictory positions”). In this case, Graphic Center has done just that. For that reason alone, its appeal of this issue should be denied.

B. Graphic Center must not be permitted to elevate substance over form.

The hallmarks of government procurement are to ensure fair treatment and competition. *See* 5 GCA § 5001(b)(4) & (6). Material deviations are generally not permitted. However, the Guam procurement regulations will allow for a minor irregularity that does not affect material elements such as price, quantity, quality, or delivery. *See, e.g.,* 2 GAR, Div. 4 § 3109(m)(4)(B).

In contrast to its earlier arguments, Graphic Center now claims that the procurement record is missing a permission slip for InfoSend to answer the questions in Exhibit A in narrative form, rather than on the form itself. This argument seeks to elevate substance over form. As long as the bidders can meet the material elements of a solicitation, their proposals should be reviewed and evaluated and judged on their merits.

Here, the testimony of John Kim shows that the members of the evaluation committee considered narrative answers to be the same as yes/no answers on Exhibit A. The evaluators were looking for information which they could use to judge the capabilities of the proponents, so the form in which that information was presented did not matter as much as the information itself. As long as the bidder answered the questions, the members of the evaluation committee had the means to evaluate a bidder's proposal. When a bidder omitted an answer, whether on Exhibit A or in a narrative, that's when the evaluators could not make a judgment.

Under the procurement law, the test is whether accepting narrative answers in lieu of yes/no answers on Exhibit A would give a bidder an unfair advantage. In this case, InfoSend did not enjoy an unfair advantage. The information provided in InfoSend's narrative tracked the questions asked in Exhibit A. Both InfoSend and Graphic Center answered the questions, albeit in different forms.

Graphic Center lost points by failing to answer questions about its disaster recovery plan, an important consideration in a Guam procurement.

Because this solicitation adhered to the principles and policies underlying the Guam Procurement Law, Graphic Center's appeal should be denied.

IV. Conclusion and Order

In light of the foregoing, appellant Graphic Center's request for relief is DENIED.

SO ORDERED: _____.

BENJAMIN J.F. CRUZ
Public Auditor of Guam

Submitted by:

/s/_____
Marianne Woloschuk
GPA Legal Counsel