



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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**dooik eng co., opa-pa-23-004 reply to opp'n to motion to dismiss**

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**Marianne Woloschuk** <mwoloschuk@gpagwa.com>

Wed, Nov 22, 2023 at 1:29 PM

To: "jhernandez@guamopa.com" &lt;jhernandez@guamopa.com&gt;

Cc: "service@camachotaitano.law" &lt;service@camachotaitano.law&gt;, Beatrice Limtiaco &lt;tlimtiaco@gpagwa.com&gt;, "Rojas, Theresa Victoria Gumataotao" &lt;tgrojas@guamwaterworks.org&gt;

Dear Mr. Hernandez,

Attached for filing is GPA's reply to Dooik's opposition to the motion to dismiss (5 pages).

Thanks very much,

-Marianne

**Marianne Woloschuk****Guam Power Authority**

Gloria B Nelson Public Service Building



#688 Route 15 Fadian

Mangilao, GU 96913

TEL: 671.648.3203

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**23-11-22\_OPA PA-23-004 Dooik Reply re Motion to Dismiss.pdf**  
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1 **MARIANNE WOLOSCHUK**  
2 Legal Counsel  
3 Guam Power Authority  
4 Gloria B. Nelson Public Building  
5 688 Route 15, Mangilao, GU 96913  
6 Telephone: (671) 648-3203  
7 Fax No. (671) 648-3290  
8 Email: [mwołoschuk@gpagwa.com](mailto:mwołoschuk@gpagwa.com)

9 *Attorney for Guam Power Authority*

10 **BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY**  
11 **PROCUREMENT APPEAL**

12 **In the Appeal of:**

13 **Appeal Case No. OPA-PA-23-004**

14 **DOOIK ENG., LTD.,**

15 **REPLY TO OPPOSITION TO MOTION**  
16 **TO DISMISS**

17 Appellant.

18 **I. Introduction.**

19 On November 17, 2023, appellant Dooik Eng, Ltd. (Dooik) submitted its opposition to  
20 the motion to dismiss filed by the Guam Power Authority (GPA) on November 13, 2023. GPA  
21 hereby tenders its reply.

22 **II. Argument.**

23 **A. The OPA should dismiss for lack of jurisdiction over claims where Dooik failed to**  
24 **exhaust its administrative remedies.**

25 Guam law provides that “[t]he Public Auditor shall have the power to review and  
26 determine de novo any matter properly submitted to her or him.” 5 GCA § 5703(a) (emphasis  
27 added); see 2 GAR § 12103(a) (same). Dooik emphasizes the language “any matter” when it  
28 argues that the OPA has jurisdiction in this case, because the OPA can review all claims related  
29 to and arising from the procurement. Dooik thus tries to justify bringing many matters before the  
30 OPA not raised in its earlier protest. However, Dooik elides over the fact that the law demands  
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1 that the matters it brings to the OPA must be “properly submitted.” A properly submitted matter  
2 is one that comports with the principles of exhaustion of administrative remedies. *See DFS Guam*  
3 *L.P. v. A.B. Won Pat Int’l Airport Auth.*, 2020 Guam 20 ¶ 50 (finding that “all claims arising  
4 under the Procurement Code must be administratively exhausted”).  
5

6 To exhausts its administrative remedies, the protesting party must raise its objections at  
7 the earliest possible instance and at each level of review thereafter. Failure to do so waives the  
8 objection and the reviewing body lacks jurisdiction over the claim. In this case, Dooik failed to  
9 raise certain objections at the earliest stages and therefore waived those claims, namely, scoring  
10 and scoresheets, which Dooik could have obtained prior to the preparation and filing of the  
11 procurement record in this case. In addition, Dooik participated in the solicitation without  
12 comment the entire time, up until the moment it earned an unacceptable score. Dooik cannot  
13 now object to the method of solicitation. As a result, the OPA lacks jurisdiction to decide these  
14 claims.  
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19 Dooik contends that it should be allowed to raise new claims before the OPA that it did  
20 not raise in its protest because it was a pro se party, such that ignoring claims raised by Dooik’s  
21 attorneys would decrease public confidence in the procurement process and undermine the fair  
22 and equitable treatment of prospective bidders. Dooik knew or should have known of the  
23 allegations underlying its appeal. If, in fact, the OPA excuses Dooik from exhausting  
24 administrative remedies and considers Dooik’s new claims just because Dooik is now  
25 represented by counsel, the OPA will be giving Dooik preferential treatment in comparison to  
26 unrepresented parties. This does more to decrease public confidence and undermine fair  
27 treatment than any argument propounded by GPA.  
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1 **B. The OPA should dismiss Dooik’s claims for failing to state a cause of action.**

2 **1. Scoring category.**

3 Dooik argues that it is entitled to proceed to the next phase of the procurement because  
4 GPA did not include “potentially acceptable” as a scoring category. In this case Dooik obtained  
5 a score of unacceptable. Dooik’s bid was never potentially acceptable. Dooik therefore not only  
6 lacks standing to complain about—and the OPA jurisdiction to consider—the non-existence of  
7 this category, but, moreover, having this category would not have changed Dooik’s score or  
8 made it eligible for the next phase of the procurement. Dooik is not entitled to relief on this basis.

9 **2. Scoresheets.**

10 Dooik’s objection to the blanks in one evaluator’s scoresheet similarly does not withstand  
11 scrutiny. That evaluator’s expertise lies in financial matters. She therefore scored all bidders only  
12 as to financial matters. If she had been compelled to fill in the blanks in the rest of the evaluation  
13 form, she would have had to give every bidder the exact same zero score due to lack of expertise  
14 in the other technical areas at issue in those parts of the scoresheet. The result would have been  
15 the same: Dooik would have obtained an unacceptable score. Dooik is not entitled to relief on  
16 this basis.

17 **3. Multi-Step IFB v. RFP.**

18 Dooik complains that GPA’s arguments undermine the Procurement Law’s goal of  
19 fostering competition in the government procurement process. Dooik then complains that GPA  
20 used a multi-step IFB instead of RFP. Dooik cannot sustain both positions, given their  
21 incompatibility with one another.

22 An RFP is used for the procurement of professional services. Bidders are evaluated to  
23 determine the most responsive and most responsible. The other bidders are then eliminated while  
24 that bidder moves on to negotiate the price. In a multi-step IFB, on the other hand, all of the  
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1 bidders are reviewed and rated in the first phase. Those bidders who achieve an acceptable score  
2 move on to the next phase, where the contract will be awarded to the lowest price bidder.

3  
4 Section 5001 of the Procurement Law lists the underlying purposes and policies to  
5 include “foster[ing] effective broad-based competition within the free enterprise system”. 5 GCA  
6 § 5001(b)(6). The RFP process eliminates competitors early, while the multi-step IFB  
7 encourages continued competition. Thus, not only is an RFP not appropriate in this type of  
8 procurement, but, contrary to Dooik’s assertions, it also does not serve the purposes of the  
9 Procurement Law. Dooik is not entitled to relief on this basis.

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12 **4. Section 5150.**

13 Dooik argues that GPA’s alleged non-compliance with 5 GCA § 5150 is “fatal” to the  
14 procurement. Section 5150 provides that the Attorney General or a special assistant attorney  
15 general “shall act as legal advisor during all phases of the solicitation or procurement process.”  
16 5 GCA § 5150. GPA complied with this statute. The bid in this case was advertised on  
17 January 12, 2023. *See* R. at 5117 of 6970 (Binder 9 of 11, Pdf p. 5130).

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20 GPA asks the OPA to take judicial notice of its own records showing that, at the time the  
21 bid was issued in January 2023, GPA had legal counsel<sup>1</sup> with a SAAG appointment representing  
22 the agency before the OPA. *See* Guam R. Evid. 201(b) & (d) (“A judicially noticed fact must be  
23 one not subject to reasonable dispute in that it is either (1) generally known within the territorial  
24 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to  
25 sources whose accuracy cannot reasonably be questioned. . . . A court shall take judicial notice  
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32 <sup>1</sup> GPA’s legal counsel remained with GPA until leaving for the OAG in late March 2023. *See* Steve Limtiaco, “CCU  
fires GPA attorney, citing ‘disloyalty,’” Pacific Daily News (Mar. 30, 2023) <[https://www.guampdn.com/news/ccu-fires-gpa-attorney-citing-disloyalty/article\\_d8d791a2-cedf-11ed-8e67-cbdd0408b700.html#:~:text=Botha%20was%20fired%20after%20CCU,for%20the%20AG%20next%20week.>](https://www.guampdn.com/news/ccu-fires-gpa-attorney-citing-disloyalty/article_d8d791a2-cedf-11ed-8e67-cbdd0408b700.html#:~:text=Botha%20was%20fired%20after%20CCU,for%20the%20AG%20next%20week.>) (last visited Nov. 22, 2023).

