



OFFICE OF THE PUBLIC AUDITOR

**PROCUREMENT APPEALS**

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6 IN THE APPEAL OF,

7 EONS ENTERPRISES CORP.,

8 Appellant

) APPEAL NO: OPA-PA-10-003

)  
) **DECISION AND ORDER RE**  
) **PURCHASING AGENCY'S MOTION TO**  
) **DISMISS**  
)

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10  
11 To: **Purchasing Agency:**  
12 Guam Community College  
13 C/O Sarah A. Strock, Esq.  
14 Cabot Mantanona LLP  
15 Edge Building, 2d Floor  
16 929 S. Marine Corps Drive  
17 Tamuning, Guam, 96913  
18 Facsimile: (671) 646-0777

19  
20 **Appellant:**  
21 Eons Enterprises Corp.  
22 C/O Daniel J. Berman, Esq.  
23 Berman O'Conner & Mann  
24 Ste 503, Bank of Guam Building  
25 111 Chalan Santo Papa  
26 Hagåtña, Guam, 96910  
27 Facsimile: (671) 477-4366

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29 **THIS MATTER** came before the Office of Public Accountability on July 19, 2010  
30 pursuant to the Purchasing Agency's Motion to Dismiss. Mr. Frank Wu was present on behalf of  
31 Appellant and was represented by Daniel J. Berman, Esq. The Ms. Joleen Evangelista, the  
32 Purchasing Agency's (Hereafter Referred to as "GCC") Procurement and Inventory  
33 Administrator, was present on behalf of GCC and was represented by Sarah A. Strock, Esq.  
34 After hearing the arguments of the parties, the Hearing Officer, pursuant to 2 G.A.R., Div. 4,

1 Chap. 12, §12109(1), hereby issues his Decision and Order on said Motion to Dismiss which is as  
2 follows:

### 3 4 **BACKGROUND**

5 Appellant submitted a bid in response to GCC-FB-10-009 (Install Typhoon Shutters at  
6 GCC Student Services and Administration Building) (Hereafter Referred to as "IFB"). On or  
7 about April 26, 2010, Appellant received a notice from GCC advising Appellant that the IFB had  
8 been awarded to The Infiniti Group dba Alliance Metal Specialties.<sup>1</sup> Seven (7) days later, on  
9 May 3, 2010, Appellant delivered a letter to GCC. Appellant's letter contained appellant's  
10 letterhead, was titled "Request for Reevaluation of the Bid Awards Re: Install Typhoon Shutters  
11 at the Student Services and Administration Building (Building 2000) GCC-FB-10-009,"  
12 requested for re-evaluation of the bids submitted in response to the IFB because Appellant had  
13 submitted the lowest bid, and the letter contained GCC's April 26, 2010 Notice, described above,  
14 as an attachment.<sup>2</sup> Seven (7) days later, on or about May 10, 2010, GCC responded to  
15 Appellant's May 3, 2010 letter by advising Appellant that GCC had evaluated the bids in detail  
16 and "remains firm in its decision on the award."<sup>3</sup> Appellant received GCC's May 10, 2010 letter  
17 on or about May 24, 2010.<sup>4</sup> Two (2) days later, on May 26, 2010, Appellant filed its appeal  
18 citing GCC's May 10, 2010 Letter as the Decision it was appealing.

### 19 20 **DISCUSSION**

21 The Hearing Officer must decide the jurisdictional issue of whether Appellant's Appeal is  
22 properly before the Public Auditor. Generally, the Public Auditor has the power to review and  
23 determine *de novo*, any matter properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div. 4,

24  
25 <sup>1</sup> Letter from Joleen M. Evangelista dated April 26, 2010, Exhibit A,  
26 Declaration of Joleen M. Evangelista filed on June 3, 2010.

27 <sup>2</sup> Letter from Frank F.C. Wu dated May 3, 2010, Exhibit B, Id.

28 <sup>3</sup> Letter from May A.Y. Okada dated May 10, 2010, Exhibit C, Id.

<sup>4</sup> Part III, C, Appellant's Notice of Appeal filed on May 26, 2010.

1 Chap. 12, §12103. This statutory and regulatory language has been interpreted to mean that the  
2 jurisdiction of the Public Auditor is limited to matters properly submitted to her. *TRC*  
3 *Environmental Corporation v. Office of the Public Auditor*, SP160-07, Decision and Order on  
4 Petition for Writ of Mandate dated November 24, 2008 (Superior Court of Guam). Thus, if the  
5 Appellant's procurement appeal was not properly submitted to the Public Auditor, then the OPA  
6 lacks jurisdiction to hear it.

7 GCC argues that this appeal is not properly before the Public Auditor because the  
8 Appellant did not file a protest. Generally, the head of purchasing agency's written decision  
9 denying a procurement protest may be appealed by the protestant to the Public Auditor within  
10 fifteen (15) days after receipt by the protestant of the notice of decision. 5 G.C.A. §5425(c) and  
11 (d), and 2 G.A.R., Div. 4, Chap. 9, §9101(g). Therefore, to prevail in this argument, GCC has to  
12 show that the Appellant's May 3, 2010 letter was not a protest and that GCC's May 10, 2010  
13 letter was not a protest decision. The Hearing Officer must first decide whether the Appellant's  
14 May 3, 2010 letter was a protest.

#### 15 16 **Appellant's May 3, 2010 Letter was a Procurement Protest**

17 The Appellant's May 3, 2010 Letter met all the form requirements of a protest except for  
18 the requirements that it should have been delivered to GCC in an envelope marked "protest," and  
19 the contract number. Any actual or prospective bidder, offeror, or contractor who may be  
20 aggrieved in connection with the method of source selection, solicitation or award of a contract  
21 may protest to the head of a purchasing agency. 5 G.C.A. §5425(a). Here, the Appellant had  
22 the right to protest because it was an actual bidder and because the Appellant was aggrieved by  
23 GCC's selection of another bidder for the IFB award. The protest shall be submitted in writing  
24 within fourteen (14) days after such aggrieved person knows or should know of the facts giving  
25 rise thereto. *Id.* Here, the Appellant complied with these requirements by delivering its May 3,  
26 2010 letter GCC only seven (7) days after the Appellant received GCC's April 26, 2010 notice  
27 that GCC awarded the contract to another bidder.

28 Further, the written protest should include as a minimum the following: (1) The name  
and address of the protestor; (2) Appropriate identification of the procurement, and, if a contract

1 has been awarded, its number; (3) A statement of reasons for the protest; and (d) Supporting  
2 exhibits, evidence, or documents to substantiate any claims unless not available within the filing  
3 time in which case the expected availability date shall be indicated. 2 G.A.R., Div. 4, Chap. 9,  
4 §9101(a)(3). Here, Appellant's May 3, 2010 letter complied with these requirements because it  
5 contained appellant's letterhead, was titled "Request for Reevaluation of the Bid Awards Re:  
6 Install Typhoon Shutters at the Student Services and Administration Building (Building 2000)  
7 GCC-FB-10-009," requested for re-evaluation of the bids submitted in response to the IFB  
8 because Appellant had submitted the lowest bid, and the letter contained GCC's April 26, 2010  
9 Notice, described above, as an attachment. Although the letter did not identify the Purchase  
10 Order number, the Hearing Officer finds that this is excusable because the Purchase Order was  
11 not issued until May 12, 2010, and that the Purchase Order was not signed by GCC's President  
12 until May 20, 2010, which is well after the Appellant drafted its May 3, 2010 Letter.<sup>5</sup> The  
13 Hearing Officer finds that Appellant's May 3, 2010 letter meets all the written form requirements  
14 of a procurement protest.

15 However, the Appellant failed submit its May 3, 2010 Letter in an envelope marked  
16 "Protest." To expedite handling of protests, the envelope should be labeled "Protest." 2 G.A.R.,  
17 Div. 4, Chap. 9, §9101(a)(3). Thus, a plain reading of the statute reveals that only the envelope  
18 should be marked "Protest," and there is no requirement that the Appellant's May 3, 2010 letter  
19 had to be titled "Protest." Further, under Guam's Procurement Regulations, only the term  
20 "shall" denotes the imperative. 2 G.A.R., Div. 4, Chap. 1, §1106(20). Here, it is not imperative  
21 that a procurement protest be filed in an envelope marked "Protest," as the plain language of the  
22 regulation states that it only should be marked "Protest." Here, there was no evidence presented  
23 by either party that the Appellant delivered its May 3, 2010 Letter in an envelope or that such  
24 envelop was or was not marked "Protest." Based on GCC's acceptance stamp on the Appellant's  
25 May 3, 2010 Letter, the Hearing Officer finds that the Appellant delivered its May 3, 2010 Letter

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27 <sup>5</sup> Purchase Order No. 1001294, Tab 13, Procurement Record filed on June 3,  
28 2010.

1 without an envelope. Despite this, the record indicates that GCC suffered no prejudice by there  
2 being no envelope marked "Protest," because GCC expeditiously responded to the Appellant's  
3 May 3, 2010 Letter only seven (7) days after GCC received it.

4 The Hearing Officer finds no merit in GCC's argument that the Appellant's failure to title  
5 its May 3, 2010 Letter "Protest," makes it a complaint. Generally, Complainants should seek  
6 resolution of their complaints initially with the Procurement Officer or the office that issued the  
7 solicitation, and such complaints may be made verbally or in writing. 2 G.A.R., Div. 4, Chap. 9,  
8 §9101. The Hearing Officer finds that it is unreasonable for GCC to interpret the Appellant's  
9 May 3, 2010 Letter as an informal complaint and not a protest. GCC knew or should have  
10 known that the Appellant had the right to protest GCC's award of the IFB to another bidder.  
11 Further, GCC knew or should have known that the Appellant's May 3, 2010 letter, albeit brief,  
12 complied with all the formal requirements of a protest. Finally, GCC knew or should have  
13 known that it had a duty to act in good faith. All parties involved with the negotiation,  
14 performance, or administration of Government of Guam contracts are required to act in good  
15 faith. 5 G.C.A. § and 2 G.A.R., Div., 1, Chap. 1, §1105. If GCC was confused as to whether  
16 the Appellant's May 3, 2010 letter was a protest or a complaint, it should have acted in good  
17 faith by seeking clarification from the Appellant instead of speciously treating the Appellant's  
18 May 3, 2010 Letter as a complaint.

19 Thus, based on the foregoing, the Hearing Officer finds that the Appellant's May 3, 2010  
20 Letter was a Procurement Protest.

### 21 22 **GCC's May 10, 2010 Letter was a Decision Denying Appellants Protest**

23 GCC's May 10, 2010 Letter was a Decision denying the Appellant's May 3, 2010  
24 procurement protest. If a protest is not resolved by mutual agreement, the Chief Procurement  
25 Officer, the Director of Public Works, or the head of a purchasing agency shall promptly issue a  
26 decision in writing and the decision shall state the reasons for the action taken; and inform the  
27 protestant of its right to administrative and judicial review. 5 G.C.A. §5425(c) and 2 G.A.R.,  
28 Div. 4, Chap. 9, §9101(g). Here, although GCC failed to advise the Appellant of its right to  
administrative and judicial review, GCC did deny Appellant the re-evaluation of the bids

1 Appellant was seeking and GCC stated that the reasons for its denial of said relief. Further,  
2 GCC issued its decision promptly. Thus, the Hearing Officer finds that GCC's May 10, 2010  
3 Letter was GCC's decision to deny Appellant's May 3, 2010 protest.  
4

5 **CONCLUSION**

6 For the foregoing reasons, the Hearing Officer finds that Appellant's Appeal is properly  
7 before the Public Auditor and hereby DENIES GCC's Motion to Dismiss. A scheduling order  
8 for the formal hearing in this matter shall be issued after this Decision.  
9

10 **SO ORDERED** this 20<sup>th</sup> day of July, 2010 by:

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14 ANTHONY R. CAMACHO, ESQ.  
15 Hearing Officer  
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# FAX

To: Daniel J. Berman, Esq.  
Legal Counsel for Appellant – Eons Corp.  
  
Sarah A. Strock, Esq.  
Legal Counsel for Appellee – GCC

From: Doris Flores Brooks, Public Auditor  
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Hagatna, Guam 96910

The Infinity Group, Inc. dba AMS  
Interested Party

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Agency: \_\_\_\_\_ Pages 7 (Including cover)

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CC: \_\_\_\_\_ Date: \_\_\_\_\_

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Fax: Eons - D. Berman/646-0777      Point of Contact Tel: 475-0390 x 219 (Anne Camacho)  
GCC - S. Strock/477-4366      Contact Fax: 472-7951  
AMS – S. Lai/649-0267      Nos.

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Re: Appeal No. OPA-PA-10-003 – Decision and Order Re Purchasing Agency’s Motion to Dismiss

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Anne Camacho – [acamacho@guamopa.org](mailto:acamacho@guamopa.org)

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