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RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 7/3/13
TIME: 4:30 ☐AM ☑PM BY: Ashley M.
FILE NO OPA-PA: 13-004

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGATNA, GUAM

IN THE APPEAL OF K CLEANING SERVICES APPELLANT	OPA-PA-13-004 **REPLY TO AGENCY OPPOSITION TO A MOTION TO STRIKE**

COMES NOW, Appellant K Cleaning Services, ("Appellant") through counsel, Jeffrey A. Cook, Esq., to reply to the Agency Opposition to a Motion to Strike filed June 26, 2013.

Appellant argued in its Motion to Strike that it is entitled to receive a complete copy of the Procurement Record in an appeal to the Office of Public Accountability ("OPA"). Agency responds citing 2 GAR §12104(c)(3) for the proposition that the Appellant is only to receive the Agency Report and not the Procurement Record. Appellant has reviewed numerous OPA cases and it appears that in all cases the Agency was required to serve the Procurement Record as well as the Agency Report. Thus notwithstanding the language of 2 GAR §12104, the OPA cases would support that the OPA has read this language to require an agency to serve the procurement record as well as the Agency Report.

The primary reason for Appellant filing the Motion to Strike is that the Agency appeared to sandbag its arguments in response to the appeal. The Agency knew, or should have known, that certain information was apparently given out at the pre-bid conference that was material and relevant to its defense of Appellant's appeal. Yet the Agency did not mention the pre-bid conference or any recording thereof in its Agency Report. After Appellant replied to the Agency Report, the Agency came up with a completely new argument for why Appellant's appeal should be denied.

In the law, reply briefs are normally intended to argue against facts and law raised in the opposition that the reply is directed at. Reply briefs should not bring in new law or facts other than as they respond to the law and facts in the opposition. There is no provision for sur-reply briefs in the OPA's rules.

Numerous courts have ruled that the inclusion of a new argument in a Reply Brief is improper as a matter of Motion practice. *See* Thurston v. Page, 931 F.Supp.765, 768 (D.Kan.1996); *Torgeson v. Unum Life Ins. Co. of Am., 466 F.Supp.2d 1096, 1121-22 (N.D. Iowa 2006)*. As one court has noted, "Barring extraordinary circumstances, both the opposing party and the court are entitled to rely on the movant's opening brief as a conclusive statement of its position on the claims targeted by the motion. Both efficiency, and fairness to one's adversary, militate in favor of requiring a movant's opening brief to identify with certainty all the arguments and evidence which the movant believes supports his position." *Int'l-Matex Tank Terminals – Illinois v. Chem. Bank*, 2009 WL 2423756 (W.D. Mich. 8/4/09). Appellant compares the Agency's Report to an opening brief, which should contain all the arguments and evidence the Agency believes supports its position. The Agency should not be allowed to raise new legal

arguments or bring in new facts that the Appellant did not have an opportunity to respond to in its comment on the Agency Report.

The Agency's initial report made no mention of any activity at the pre-bid conference. In opposition to the Agency Report, Appellant made its arguments as to why the bid was ambiguous and confronted the arguments and facts set forth by the Agency. Then in its reply the Agency pulls out an alleged fact it clearly had knowledge of and it should have included in its report. Then the Appellant could have responded to it. And just as importantly, Appellant would have somehow reviewed that part of the record so it could respond. Since Agency never mentioned the tape, it did not appear to be relevant. Thus, the Agency's actions simply are not fair.

Appellant would remind the OPA that the Agency's actions throughout this particular bid process have not been fair to the Appellant. First the agency failed to consider its bid. Then it failed to inform Appellant of its review rights although providing that information is required by statute. Now Agency in a reply brief, which technically Appellant has no opportunity to respond to, raises factual issues that it clearly knew at the time it filed its Agency Report. Such behavior should not be condoned by the OPA and the appropriate punishment for such behavior would be to strike the evidence that was not provided Appellant and was not properly raised by the Agency in its Agency Report.

Respectfully submitted this 3rd day of July, 2013.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant

By _____
JEFFREY A. COOK, ESQ.