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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO. OPA-PA: 11-002

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT PETITION

In the Petition of)	
)	APPELLANT'S OPPOSITION TO
TOWN HOUSE DEPARTMENT STORES,)	APPELLEE DOE's
INC., dba)	MOTION TO DECLINE APPEAL
ISLAND BUSINESS SYSTEMS)	
& SUPPLIES,)	DOCKET NO. OPA-PA-11-002
APPELLANT)	
_____)	

On April 29, 2011 DOE brought motion that OPA "dismiss and decline" the within Appeal. This motion is untimely and without legal basis.

The gist of the allegation of the motion is that there is another pending civil action which, by virtue of 2 GAR § 12013(b), makes this "matter not properly before the OPA".

Appellant does not deny the existence of the civil action. It was filed September 8, 2010. The within IFB 022 was not even then issued; it was issued September 10, 2010.

The bids were opened October 28, 2010 and Protest on the award was made December 16, 2010. This Appeal was brought January 27, 2011.

On February 8, 2011, DOE filed the Procurement Record (subsequently amended). If the complaint in the civil action did in fact concern this procurement, it was not made part of the procurement record.

It is noteworthy that DOE IFB 006-2010 was issued prior to the filing of the civil action, and the facts of that procurement are also germane to the underlying cause in the civil action. Appellant

had also protested that IFB and, on October 18, 2010, Appellant brought an appeal to compel DOE to render a decision on the protest. DOE was not heard in that matter, OPA-PA-10-006, to object to the hearing of the matter due to the then pending civil action.

After DOE finally rendered its protest decision, denying the protest, Appellant appealed that decision to OPA, by appeal filed November 26, 2010, OPA-PA-10-010.

In its filing of the statement “indicating whether the matter is subject to a pending court proceeding” as part of its Agency Report in OPA-PA-10-010, **DOE did not consider the pending civil action mentionable.** That was filed December 10, 2010.

However, when DOE filed its Agency Report in the within matter on February 11, 2011, DOE reported that “this matter” was the subject of the pending civil action. No amendments or changes were filed in respect to the civil action between the time of DOE’s determination on December 10, 2010 that the civil action did not concern the IFB 006 procurement matter, a procurement that did actually exist when the civil action was filed, and the time its February 11, 2011 determination that IFB 022 was subject to the civil action, a procurement which did not even exist when the civil action was filed.

Appellant, in its Comments on the Agency Report, filed February 14, 2011, noted DOE’s mention of the pending civil action and went to great length to argue why it did not “concern” the procurement Appeal, and emailed a copy of the complaint in the action to OPA the same day. (See, Appellant’s Comments, pp 7-9.)

On March 31, 2011, not content with the filing of the statement regarding the civil action with its Agency Report, and without addressing Appellant’s arguments, DOE again filed a Notice of Pending Court Action, this time appending thereto a copy of the complaint in the action, but it did not object to the OPA’s continued hearing of the matter.

Appellant responded to that Notice the same day, March 31, 2011, reiterating its objections to any implication of the civil action.

And now, for the third time, DOE raises this matter, suggesting it is sufficient to cause OPA to decline to hear this Appeal. DOE has not, however, sought any order from the Superior Court in that civil action to require OPA to desist from hearing this matter.

This Motion is brought too late. 2 GAR § 12104(c)(9) requires, “ Any objection or motion addressed to the jurisdiction of the Public Auditor shall be promptly filed.” This late motion is anything but “promptly filed”, especially considering its prior attempts to make hay of it.

While Appellant has already made adequate argument, in its Comments on the Agency Report, which are hereby reiterated and incorporated by reference, Appellant also notes that this is not “jurisdictional” in the sense that it can be raised at any time as a complete bar to any continued hearing of the matter. Since it is not thusly jurisdictional, it is subject to timeliness rules.

The regulation instructing the Public Auditor not to act on an Appeal except to notify the parties and decline further hearing due to Judicial involvement, is a rule of comity, not jurisdiction. That is, even a court case *directly* dealing with the underlying legal clause (not just some overlapping facts as is the case here), does not automatically divest the Public Auditor of jurisdiction over the procurement Appeal.

In *Harbor Centre Guam Co, LTD. vs Doris Flores Brooks*, Guam Superior Court, SP 0226-10 (Hon. Arthur R. Barcinas, Decision and Order, April 20, 2011, at p. 6), the Superior Court ruled that 2 GAR § 12103(b) is only meant “to require the Public Auditor to refrain from any further action in a procurement appeal upon the filing of judicial proceedings, and that the issuance of dismissal with prejudice” would be “in derogation of the rule”.

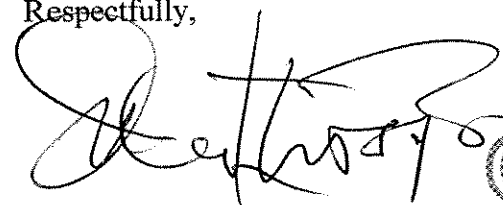
DOE’s request “to dismiss ... the within Appeal” is contrary to Judge Barcinas’ decision even if the civil action did concern this matter, a supposition strongly denied.

In addition to the legal arguments already made, Appellant would also note, if the civil action did actually concern this procurement, the whole IFB should have been stayed by the prior filing of that action. The fact the civil action does not stay the procurement is further differentiation of the legal basis of that action from the action herein, and evidence that complaint does not concern this procurement action.

Similarly, at the Pre-Hearing Conference herein, on April 27, 2011, Xerox made the point that it did not raise the civil action as grounds for dismissing the Appeal because it is not a party to that case and has no position concerning it. (Hear Audio Record, approximately 96 minutes into recording.) If a party is “interested” in this Appeal, but not in the civil action, the actions do not “concern” each other, in the legal sense that word must be construed. Mere factual overlapping does not amount to the kind of “concern” that is necessarily contemplated by 2 GAR § 12104(c)(9).

DOE’s motion is unfounded now, and was unfounded the first two attempts to raise it. Strike three.

Respectfully,



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For Appellant
May 2, 2011