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OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

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FILE NO OPA-PA: 13-004

Attorneys for: Appellant

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGATNA, GUAM**

IN THE APPEAL OF K CLEANING )	OPA-PA-13-004
SERVICES, )	
)	
)	<b>APPELLANT'S BRIEF RE: OPA</b>
APPELLANT. )	<b>JURISDICTION</b>
)	
)	

In its Order of July 23, 2013, the OPA directed the parties to submit briefs on the issue of whether the Public Auditor has jurisdiction over Appellant K Cleaning Services ("Appellant") appeal in light of Agency Guam International Airport Authority's ("Agency") apparent non-compliance with 5 GCA §5425(c)(2). Appellant therefore files this brief.

The question raised by the OPA in its Order is whether or not the Agency's failure to advise the Appellant of its right to administrative review as required by 5 GCA §5425(c)(2) deprives the OPA of jurisdiction to hear the appeal. The answer to this question is no.

Similar facts were before the OPA *In The Appeal of Eons Enterprises Corp*, Appeal No. OPA-PA-10-003. In that case in its Decision and Order Re: Purchasing Agency's Motion to Dismiss dated July 20, 2010, the Hearing Officer stated "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 Appellant was seeking and

GCC stated that the reasons for its denial of said relief. Further, GCC issued its decision promptly. Thus the Hearing Officer finds that GCC's May 10, 2010 letter was GCC's decision to deny Appellant's May 3, 2010 protest." Thus in the *Eons* case the OPA had before it the issue of a violation of 5 GCA §5425(c)(2) and did not find that it affected the OPA's jurisdiction.

*In the Appeal of Latte Treatment Cent, Inc.*, Procurement Appeal No. OPA-AP-06-003, the Agency, DMHSA alleged in its Agency Report that the OPA lacked jurisdiction. In this case it was noted in the pleadings that DMHSA failed to follow the procurement law in its response and did not inform Appellant of its right to administrative review as required by 5 GCA §5425(c)(2). Thus even though this issue was raised in this appeal the OPA did not make a determination that it lacked jurisdiction to hear the appeal.

As Appellant has already pointed out in both its appeal and in its Opposition to Agency's Motion to Dismiss Appeal, Superior Court Judge Michal J. Bordallo ruled in *Sumitomo Construction vs. Government of Guam Department of Public Works*, SP0274-98 that where the Agency fails to inform the Protestant of its right to administrative and judicial review the Protestant Petitioner should be allowed a reasonable amount of time to file an appeal. Clearly there was no issue or concern regarding Appellate jurisdiction based on the Agency's failure to properly inform the Protestant of its review rights.

Appellant has reviewed the OPA decisions and been unable to find any case where the OPA determined it did not have jurisdiction where the Agency violated §5425(c)(2). This result makes both legal and common sense. If failing to advise a

Protestant of its rights would deprive the Protestant of having its matter heard by the OPA based on jurisdictional grounds, all Agencies would have to do to negate a Protestants right of review is fail to include the language required by §5425(c)(2). The Appellant has no control over what the Agency puts in its rejection letter of a protest. To permit the Agency's negligent or intentional failure to include the language required by §5425(c)(2) to deprive the OPA of jurisdiction would clearly deprive the Appellant of its rights under the Procurement law and violate the intent of the Guam Legislature.

*In the Appeal of Town House Department Stores, Inc.*, Appeal No. OPA-PA-08-003, in its Decision of July 11, 2008, the OPA made a finding that it did not have jurisdiction to hear an appeal because the Agency had not produced a decision in response to the Appellant's protest. Clearly the facts in that case were different because the issue was the Agency's failure to produce a decision in response to the protest properly filed by the Appellant. That is very different from the facts of the case at bar where the Agency did respond to the Protest and rejected it but failed to include the language regarding review rights. And in the *Townhouse* case, even though the OPA determined it did not have jurisdiction to hear the appeal of the protest because there was not a proper rejection, the OPA had jurisdiction to make an order requiring the Agency to properly respond to the protest as required by law. Because of these significant difference in facts, Appellant suggests that the *Townhouse* case is not determinative of the jurisdictional question of the failure of the Agency to include the right of review language set forth in 5 GCA §5425(c)(2).

In conclusion, Appellant suggests that the Agency has waived any jurisdictional defect or challenge by its failure to comply with the statute. To determine otherwise would undermine the integrity of the procurement process.

Respectfully submitted this 2<sup>nd</sup> day of August, 2013.

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By

  
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JEFFREY A. COOK, ESQ.