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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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FILE NO OPA-PA: 13-004

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM

IN THE MATTER OF K CLEANING) OPA-PA-13-004
SERVICES)
)
APPELLANT) **REPLY TO AN**
) **OPPOSITION TO A**
) **MOTION TO DISMISS AN**
) **APPEAL**
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COMES NOW Guam International Airport Authority (GIAA) by and through Counsel Fisher & Associates, by attorney Thomas J. Fisher, and Replies to Appellant’s Opposition to a Motion to Dismiss an Appeal for Lack of Jurisdiction.

***** Reply *****

For a protest to an agency to be timely, it must be made “in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.” 5 *Guam Code Ann. §5425(a).*

For an appeal of an agency decision on the protest to be properly before the Public Auditor, it must be made within fifteen (15) days of appellant’s receipt of the agency decision. 5 *Guam Code Ann. §5425(e).*

1 Compliance with both of these limitation periods is a prerequisite to this Office's
2 jurisdiction. In other words, if a disappointed bidder does not protest a solicitation to the
3 agency within 14 days of the time it knew, or should have known of the issue, it is too late. If
4 a disappointed bidder does not appeal an agency decision to this Office within 15 days of the
5 receipt of the agency decision, it is too late.

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7 1. *Appellant cannot raise a new issue at this stage.*

8 In its Opposition, Appellant embraces then abandons its argument of ambiguity and
9 says it "was not mistaken when it was at the conference room to submit its bid and wait for
10 the bids to be opened and read as instructed by the Invitation for Bid. Therefore, Appellant
11 clearly disagrees that it misunderstood the directions in the Invitation for Bid and, in fact,
12 followed those directions." *Opposition at 2*, and "In reviewing the facts, GIAA should admit
13 it failed to follow its own Invitation for Bid requirements . . ." *Id at 3*. In other words,
14 Appellant stays it correctly followed the solicitation's instructions and the GIAA did not.

15 In its protest though, Appellant stated, "[w]e believe that the confusion regarding the
16 bid turn in location was caused by the conflicting statements making reference to time and
17 place . . ." *See Procurement Record at Tab I*. It is clear then that the Appellant initially
18 complained of perceived ambiguities which lead him to err; not an agency failure to follow
19 clear instructions. Appellant should have raised that issue in protest, did not, and there is no
20 GIAA decision on this theory for the OPA to review.
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1 2. *Appellant knew, or should have known, of an “ambiguity” when it obtained the*
2 *invitation.*

3 Assuming the solicitation obtained an ambiguity¹, Appellant knew (or should have
4 known) of it when it read the solicitation. Appellant has appealed the GIAA’s decision to the
5 OPA on a specific theory; that the solicitation was impermissibly ambiguous. *See Appeal at*
6 *passim and Attachment 1.* “Base (sic) on this confusing language in the Invitation for bid,
7 Appellant’s representative was at the GIAA Conference Room as noted in the Invitation for
8 Bid to have the Bids opened and read aloud” and “Upon reviewing the Invitation for Bid
9 sections cited in this appeal OPA will agree that the Invitation for Bid (sic) is ambiguous and
10 confusing.”

11
12 GIAA asserts that the agency protest was untimely because Appellant did not protest
13 within the 14 day window of when he knew, or should have known, of the issue. Appellant
14 characterizes this position as “ludicrous” and states “[a]ppellant did not become aware that
15 there was any question about where the bid was supposed to be delivered and opened until the
16 date of the bid opening when his representative was sitting in the GIAA conference room
17 waiting for the proceedings to take place.” But ignorance is not an excuse. Appellant chose
18 a protest theory of ambiguity in the solicitation. That choice has consequence. For a protest
19 to an agency to be timely, it must be made “within fourteen (14) days after such aggrieved
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22 ¹ It didn’t. K Cleaning simply made a mistake. The instructions are explicit, “Sealed bids . . .
23 will be received at the office of the GIAA Executive Manager” Appellant’s statement that
24 “there is no reference to the bids being submitted to the GIAA Executive Manager’s office”
25 (Opposition at p.1) is just wrong. Other provisions address the place of opening and refer to
 the place of receiving.

1 person knows or should know of the facts giving rise thereto.” 5 *Guam Code Ann.* §5425(a),
2 *emphasis added*. He now invites the OPA to discover an ambiguity in the solicitation. If the
3 OPA can do it at this stage, Appellant could have done so as well; months ago and in time to
4 either seek a clarification or protest.

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7 3. *The GIAA issued a decision on the protest.*

8 GIAA issued an agency decision. GIAA argues that the appeal should be dismissed
9 because the protest and appeal are untimely, not because there was no agency decision. In
10 other words, K Cleaning failed to appeal within 15 days of receiving the GIAA’s decision on
11 its protest. This Office is familiar with its decision in *In the Appeal of Eons Enterprises, Inc.*,
12 *OPA-PA-10-003*, “Here, although GCC failed to advise the Appellant of its right to
13 administrative and judicial review, GCC did deny Appellant the re-evaluation of the bids
14 Appellant was seeking and GCC stated the reasons for its denial of said relief. Further, GCC
15 issued its decisions promptly. Thus, the Hearing Officer finds that GCC’s May 10, 2010
16 Letter was GCC’s decision to deny Appellant’s May 3, 2010 protest.” *Id at pp 5-6*. Appellant
17 appears to accept the truth of this when it acknowledges, “[t]he OPA found that the letter was
18 a decision determining a protest, and the appeal was appropriate”. *Opposition at 5*.

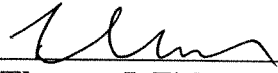
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20 Appellant offers two cases to support its theory that the failure to advise of
21 administrative and judicial review affords additional time for appeal (he offers nothing to
22 support his untimely protest). In *Pacific Security Alarm v. DPW, CV591-05*, the plaintiff was
23 noticed of his right to review and is therefore, simply off-point. In that case the judge felt this
24 was insufficient though since there was no constituted Procurement Appeals Board at the time
25 to hear an appeal and stated the plaintiff was entitled to further notice. *In Sumitomo*

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Construction vs. DPW, SP0274-98, the Plaintiff was not noticed of the right to review. But that case involved a time to appeal in the context of a writ proceeding and most significantly, where there was no procurement appeals agency available. Now, of course, the OPA exists to interpret a statutory requirement. This is exactly what it did in the *Eons* case and pursuant to the Office's precedent, an agency decision issued.

WHEREFORE Agency GIAA prays the Public Auditor dismiss the appeal as untimely.

FISHER & ASSOCIATES



Thomas J. Fisher, Esq.
For GIAA