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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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Attorney for Appellee, Guam Community College

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

In the Matter of Appeal of)	Docket Number: OPA-PA-10-003
EONS ENTERPRISES CORP.,)	
)	
Appellant)	
)	AGENCY REPLY TO APPELLANT'S
)	OPPOSITION TO MOTION TO
)	DISMISS
_____)	

INTRODUCTION

Appellee Guam Community College, (hereinafter "GCC"), by and through its attorney, Sarah A. Strock, of Cabot Mantanona LLP, respectfully submits this Reply to Appellant's Opposition to Motion to Dismiss filed on July 7, 2010 and received by Cabot Mantanona LLP on the same date. This Reply is based on the supporting Memorandum of Points and Authorities, the pleadings in the file and any other evidence that may be presented at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

Appellee GCC's Motion to Dismiss should be granted because the Public Auditor lacks jurisdiction to hear this appeal. Eons did not file a protest by May 11, 2010 and GCC did not issue a formal decision regarding any such protest. The requirements of 2 G.A.R. § 9101(c)(3) of a protest were previously explained in GCC's Motion to Dismiss.

In response to Eons' Opposition to the Motion to Dismiss, GCC maintains that Eons' May 3, 2010 letter was not sufficient to be considered a legal protest.

1. EONS DID NOT IDENTIFY ITSELF AS A PROTESTOR.

Eons' May 3, 2010 did not identify Eons as a *protestor* because the letter did not contain any protest language (such as "protest," "protestor," "protesting," "protestant," etc.), which would alert GCC to recognize that the letter was intended as a formal protest, as required by 2 G.A.R. § 9101(c)(3). The letter only identified Eons as the party requesting a "reevaluation," as opposed to the required "protestor." Eons did not use the requisite word "protest" anywhere in its correspondence to GCC. Therefore, this requirement was not met and Eons' May 3, 2010 letter did not comply with the statutory requirements of a protest.

2. EONS DID IDENTIFY THE PROCUREMENT, BUT IDENTIFICATION ALONE IS INSUFFICIENT.

Eons' May 3, 2010 letter did identify the relevant bid as required by the statute. However, most business letters identify the subject matter of a letter, and the mere reference to the bid in the May 3, 2010 letter did not put GCC on notice that Eons intended the letter to be considered a formal protest and thereby trigger the relevant timelines and procurement rules. The letter did not contain the contract award number as required by the statute either. Eons' states in their Opposition that the contract award number was not available at the time of their letter, but there is no indication that Eons attempted to ask GCC for the contract award number at any time before the May 11, 2010 deadline to file their protest. Therefore, identifying the relevant procurement alone is not sufficient to transform Eons' May 3, 2010 letter into a protest.

3. EONS' REASON WAS INSUFFICIENT.

Eons' May 3, 2010 letter requesting a "reevaluation" is not a sufficient formal protest. The letter did not contain a statement of reasons or request reasons why Eons' bid was rejected. It only mentioned that Eons was the lowest bidder. While there is no minimum length of the letter, the statutory requirements are specific and formal. Eons' letter was three sentences long and merely requested a reevaluation since Eons was the lowest bidder, which does not comply with the minimum legal requirements established by 2 G.A.R. § 9101(c). Additionally, the letter was not filed in duplicate within 14 days as required by the statute either. Therefore, these requirements were not met and Eons' May 3, 2010 letter did not comply with the statutory requirements of a protest.

4. EONS' SUPPORTING EXHIBITS WERE INSUFFICIENT.

The May 3, 2010 letter attached a copy of the Notice of Non-Award. The statute requires "supporting exhibits, evidence, or documents to substantiate any claims unless not available within the filing time, in which case the expected availability date shall be indicated." Eons only attached the letter that GCC sent to Eons. Eons did not attach any evidence or documents to substantiate their claim that they were the lowest most responsible, responsive bidder. If Eons did not have the supporting exhibits or evidence (for example, copies of their business license or contractor's license for installing typhoon shutters), then Eons was required to state the expected availability dates of those documents. If Eons did not know what supporting exhibits to attach yet, then Eons was minimally required to state that they would be able to provide the documents at a later date. GCC agrees with Eons on their point that resubmitting the

entire bid package would be unnecessary and duplicative. However, Eons should have either supplied documentation that they were the lowest, most responsible, responsive bidder, or at the very least stated dates or approximate dates on when they would be able to provide this information to GCC. The May 3, 2010 letter did neither. Therefore, this requirement was not met and Eons' May 3, 2010 letter did not comply with the statutory requirements of a protest.

5. EONS DID NOT FILE A PROTEST AND GCC DID NOT ISSUE A FORMAL DECISION.

Eons' May 3, 2010 letter is more analogous to a "complaint" as defined in 2 G.A.R. § 9101(b):

Complaint to Procurement Officer. Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation. Such complaints may be made verbally or in writing.

Complaints are less formal than protests. Since Eons' May 3, 2010 letter did not meet all of the formal requirements of a protest (for the reasons stated above) it cannot be anything more than a complaint, as defined by 2 G.A.R. § 9101(b). The law requires an agency to respond and issue a formal "notice of decision" to protests, (2 G.A.R. § 9101(g)) but there is no such requirement for complaints.

Since Eons' May 3, 2010 letter was a complaint, as opposed to a formal protest, GCC was not required to issue a notice of decision. Eons' Opposition insists that "plain reading" of the letter would suggest it is a protest. GCC maintains that "plain reading" of the letter suggests it is a complaint, rather than a protest, specifically because the law has set out specific requirements for a protest and formal decision to trigger the

appeals process, and more general language (“verbal or in writing”) for complaints, which do not trigger the appeals process.

Eon’s Opposition also states that “[i]f Joleen Evangelista actually believed that the Eons letter did not meet the requirements of the protest, she did not represent this to Eons in any way during the relevant time for filing a protest.” A government agency is under no legal obligation to notify a complaining party that the agency does not consider their complaint to be a formal protest. Similarly, a government agency is under no legal obligation to object to the form of a complaint or protest, as Eons asserts in its Opposition. Eons cites no such legal authority in their Opposition to support such obligations. Eons could have corrected any potential ambiguity by filing a formal protest by May 11, 2010 (14 days after April 27, 2010).

GCC does not agree with Eons’ argument that their Opposition should be read as a permissible amendment because the deadlines mandated by the statute are very strict and clear. Eons had until May 11, 2010 to protest GCC’s decision. By allowing a party to amend a letter, months later via an Opposition to a Motion to Dismiss, the Public Auditor would be awarding parties who do not observe the statutory requirements and deadlines. Since Eons’ did not properly protest GCC’s bid award to Alliance Metal Specialties by May 11, 2010, Eons waived any right to file a protest.

GCC does not agree with Eons’ argument that substantial statutory compliance is sufficient for a protest. GCC maintains that strict compliance is required based on the fact that Guam has two separate statutes: one with specific requirements for a formal protest, and one with general requirements for a complaint that does not trigger the appeal process. See *infra*. If the Guam Legislature intended to allow substantial

compliance instead of strict compliance, then there would be no need for the separate statute regarding complaints that do not require the specific formalities of protests. Additionally, even if the Public Auditor determines that only substantial compliance with the statute is required, GCC argues that Eons did not substantially comply based on the analysis above. GCC maintains that Eons' compliance with 2 G.A.R. § 9101(c) was minimal at best.

GCC does not agree with Eons' argument that Eons should be allowed to amend their May 3, 2010 letter with any necessary information or documentation, because it would prejudice GCC. GCC awarded the typhoon shutters contract to Alliance Metal on April 27, 2010. Alliance Metal has prepared to begin work on the contract. GCC wants to begin work on the contract as soon as possible so the typhoon shutters can be installed before the school year begins and preferably before a typhoon hits Guam. By allowing Eons to file a formal protest now, and start this process over again, would frustrate GCC's efforts to have the typhoon shutters installed in a timely manner and would prejudice both GCC and Alliance Metal.

Since Eons' May 3, 2010 letter was not a protest, and Eons never filed a protest by May 11, 2010, GCC never issued a formal decision in response to such protest. In their Comments to Agency Report, Eons admits that "technically" GCC did not issue a formal decision. The letter dated May 10, 2010 and received by Eons on May 24, 2010 was not a formal decision. Instead, it was a polite response to Eons' May 3, 2010 complaint. Therefore, the May 10, 2010 letter should not be viewed as a decision on Eons' protest. A protest and notice of decision are prerequisites for the Public Auditor's

jurisdiction over an appeal. 5 G.C.A. § 5425. Since Eons did not protest on time, the Public Auditor lacks jurisdiction for this appeal.

CONCLUSION

This Appeal should be dismissed because OPA lacks jurisdiction to hear this appeal since Eons never filed a formal protest by May 11, 2010 and GCC never issued a final determination in response to such protest. Eons' alternative legal arguments lack merit and GCC respectfully requests that the Public Auditor dismiss this Appeal and award all of the legal and equitable remedies that GCC may be entitled to as a result.

Respectfully submitted this 14th day of July, 2010.

By:

CABOT MANTANONA LLP
Attorney for Guam Community College


SARAH A. STROCK