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PROCUREMENT APPEALS

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FILE No. OPA-PA 09-009

Counsel for Appellant Guam Cleaning Masters

PROCUREMENT APPEAL

In the Appeal of

Docket No. OPA-PA09-009

GUAM CLEANING MASTERS,
APPELLANT.

Opposition to Motion to Dismiss

Appellee Department of Chamorro Affairs (“DCA”) seeks dismissal of Appellant’s appeal. Appellee DCA is not entitled to a procedural dismissal of the appeal.

The motion, although *seemingly* consistent with Appellant Guam Cleaning Master’s (“GCM’s”) appeal, actually falls short of providing the complete relief requested. Further, it lacks sufficient guarantees that DCA will actually cancel the award, thereby improperly depriving the Office of the Public Auditor of jurisdiction and Appellant GCM of its lawful relief under Guam law.

Dismissal Deprives OPA of Enforcement Jurisdiction.

In filing its motion to dismiss and essentially agreeing to GCM’s appeal, DCA admits it violated the law when they awarded the “RFP” to Lucky Kids Lawn Care &

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1 Janitorial Service ("Lucky Kids"). To cancel the existing contract with Lucky Kids
2 requires such a legal determination. An appeal was timely filed, and GCM is entitled to
3 an order from the OPA ruling upon DCA's procurement actions on the merits. 2 G.A.R.
4 § 12110. DCA provides no legal authority to support defeating GCM's entitlement to a
5 hearing on the merits and decision thereafter.

6 Just because DCA "says" it will cancel the contract, which is a serious decision
7 with legal ramifications, does not deprive the OPA of its jurisdiction that GCM lawfully
8 invoked. 5 G.C.A. § 5425(e) & 2 G.A.R. § 12103(a). In fact, it threatens GCM actually
9 ensuring the contract is cancelled without the OPA maintaining jurisdiction so that
10 GCM may apply for enforcement relief if DCA "changes its mind." The fact that DCA
11 previously violated the law when they failed to stop the Lucky Kids contract pending
12 GCM's September 30, 2009 procurement protest, and the November 7, 2008 decision,
13 *infra*, against DCA further reinforces why "trusting" them is not a legitimate basis in
14 which to grant their motion.
15

16 More importantly, Appellant GCM has been and continues to be prejudiced by
17 Appellee DCA's actions. Not only did DCA refuse to stop the contract pending the
18 protest, as required by 5 G.C.A. § 5425(g), and as requested by Appellant GCM, but
19 they have caused Appellant GCM to incur costs in submitting a proposal for an illegal
20 procurement, and have to incur additional legal costs and financial hardships in
21 protesting and appealing this matter to the OPA. Appellant GCM is entitled to a
22 decision that memorializes the gross negligence or intentional fraud caused by Appellee
23 DCA. They cannot simply say, we will cancel the contract and "*walk away.*"
24
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1 Jurisdiction has been properly invoked, and Appellant GCM, a Guam taxpayer, is
2 entitled to a decision as to the propriety of their actions.

3 Moreover, dismissal will divest the OPA of jurisdiction and prevent the OPA
4 from enforcing the cancellation and rebid of the procurement, as Appellee DCA's
5 counsel represents they will do. If the OPA dismisses this appeal as Appellee DCA
6 seeks, the OPA will lose jurisdiction in order to ensure that the contract is voided, and
7 the full relief is awarded to Appellant GCM, albeit falling short of the actual damages it
8 has incurred to date (i.e. its attorneys fees). Noteworthy, this is not the first time that
9 Appellee DCA has conducted an illegal procurement. In *In the Appeal of Ocean*
10 *Collection Services*, OPA-PA-08-006, the OPA issued a decision on November 7, 2008
11 memorializing the illegal procurement of bad debt collection services and the use of a
12 request for proposal when only a bid should have been used. This situation is quite
13 similar, though there is evidence of fraud in the manner in which this procurement was
14 handled, in addition to gross negligence in the manner in which bid and RFP
15 procedures were fatally commingled. DCA must be monitored for lawful compliances.
16

17 Like in other judicial proceedings, the proper form of Appellee DCA's counsel's
18 motion should be as a "Motion for Consent Judgment" or similar type instrument
19 creating a final decision that the OPA can enforce. Dismissing the appeal creates
20 jurisdiction problems that Appellee's counsel either does not realize, or which is being
21 intentionally withheld from this tribunal, to the detriment of GCM & the Guam
22 taxpayers.

23 Appellee DCA's motion should be denied since jurisdiction has properly been
24 invoked and Appellant GCM is entitled to a decision on the merits. Appellee's
25

1 "suggested" actions fall short of the full relief that Appellant GCM contends it is entitled
2 to receive under Guam law.

3 **Proposed Relief Falls Short of GCA's Entitlements.**

4 Without an order from the OPA, no relief can be guaranteed. Appellee DCA
5 represents that it will cancel the award. It does not provide that Appellant GCM's costs
6 in participating in the procurement be reimbursed.

7 GCM is entitled to reimbursement of its costs in participating in Appellee DCA's
8 procurement, albeit illegally conducted. Title 5 Guam Code Annotated § 5425(h)
9 entitles Appellant GCM to reimbursement of its costs. Those costs have been calculated
10 at \$3,050.00, and evidence will be presented at the hearing in this matter. Appellee
11 DCA has not addressed this important issue in its motion to dismiss, and they
12 misrepresent to the OPA that they are providing the full relief requested by Appellant
13 GCM.
14

15 **Conclusion.**

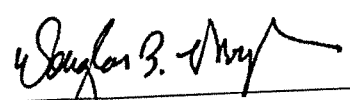
16 In order to effectuate the relief requested by Appellant GCM, and as seemingly
17 suggested by Appellee DCA, a decision that can be enforced should be issued. Dismissing
18 the case will divest the OPA of any enforcement powers to ensure that the RFP is actually
19 cancelled, that Appellant GCM's procurement costs are paid and that Appellee DCA rebids
20 the procurement as they represent in their December 21, 2009 motion.
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For the foregoing reasons, Appellant respectfully requests that the Office of the Public Auditor deny their Motion to Dismiss.

Respectfully submitted this 28th day of December, 2009.

Douglas B. Moylan
Attorney at Law



Douglas B. Moylan