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PROCUREMENT APPEALS

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5 Attorneys for Appellant:
EONS ENTERPRISES CORPORATION

6 IN THE OFFICE OF THE PUBLIC AUDITOR

7 In the Matter of Appeal of)
8 EONS ENTERPRISES CORPORATION,)
9 Appellant.)

Docket Number: OPA-PA-10-003

OPPOSITION TO MOTION TO
DISMISS

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14 Appellee argues that Eons has not met the requirements of 2 GAR § 9101(c)(3),
15 regarding bid protests, and that the OPA therefore lacks jurisdiction to hear an appeal
16 from the decision of GCC. Appellant does not agree with this interpretation of events,
17 and submits it has complied, or substantially complied, with the requirements of a bid
18 protest.

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20 Eons's protest was in fact timely lodged in writing. While appellee notes that a
21 protest must be in writing and "should" declare it is a protest, strict compliance with
22 this "should" provision does not appear to be mandatory from the face of the statute.
23 Eons has complied with the mandatory provisions of 2 GAR § 9101(c)(3) as follows:

24 1. Identification of Protestor

25 The first requirement of 2 GAR § 9101(c)(3) is that a protest must include the
26 name and address of the protestor. The address of Eons Enterprises, Corp. is listed at
27
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COPY

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2 the top of the written protest, along with all relevant contact information. This
3 requirement is clearly met by the Eons protest.

4 2. Identification of Procurement

5 The next requirement is for appropriate identification of the procurement, and, if
6 a contract has been awarded, its number. This requirement was also met. The
7 procurement is identified in the subject as GCC-FB-10-009, and labeled "Install
8 Typhoon shutters at the Student Services Administration. A contract number was not
9 available to appellant at the time of the protest.

10 Notwithstanding, Eons did incorporate into their protest a "notice of non-award"
11 letter which they received from GCC. Because this letter references the award to The
12 Infiniti Group, Inc., and because it appears clear that a contract number had not been
13 awarded at the time of the protest, this attached letter should be viewed as reasonable
14 satisfaction of the requirement that a contract number or reference be included in the
15 protest. The purpose of including such a number is for identification of the contract,
16 and the contract has been clearly identified by this protest, to the extent possible at the
17 time of the protest.

18 3. Reasons Stated

19 The requirement of a "statement of reasons for the protest" was met by Eons's
20 protest as well. From Eon's protest, "We respectfully request for consideration for re
21 evaluation of the bids of the above referenced project due to the fact that we submitted the
22 lowest bid to the project which should have been considered as it is most favorable to the
23 government." (emphasis added) This is the reason for the protest. No dispute exists
24 that Eons submitted the lowest bid, most favorable to the government. Eons is aware
25 that they are a responsible and responsive bidder. This requirement has been met, as
26 the reasons for the protest were in the letter.

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2 4. Exhibits

3 The next requirement is for “supporting exhibits, evidence, or documents to
4 substantiate any claims unless not available within the filing time in which case the
5 expected availability date shall be indicated”. The attachment to Eons’s protest letter
6 was the Notice of Non-Award from GCC. At the time of the protest, no further
7 documentation to substantiate the claim of Eons was available, apart from the bid
8 packages and documents already in the possession of GCC. No further information
9 was included, and no availability was indicated, because no further documentation
10 appeared wanting or necessary from that limited information given by GCC to Eons.
11 Appellant submits that it complied with the requirement of this section because it
12 included and referenced the known documentation supporting its claim, and it did not
13 know at the time of protest what further information would be necessary. To re-include
14 the bid package of Eons would have been duplicative, and should not have been
15 expected by GCC.

16 Having laid out the requirements for a protest, and having shown that all have
17 been met or substantially met by the Eons protest, appellant turns now to the equitable
18 considerations at hand. In none of the correspondence from GCC was the right to
19 protest, a deadline, or a form for protest provided or referenced. Appellant does not
20 submit that mention of the process was legally required or necessary, but merely notes
21 that a simple notice of rights or procedures and inclusion of related language would
22 have triggered a more optimal protest format.

23 In Appellee’s Memorandum of Points and Authorities in Support of Motion to
24 Dismiss (“Memorandum”), appellant notes that “GCC’s Procurement Officer, Joleen
25 Evangelista, did not consider Eon’s three sentence letter to amount to a legal protest”. It
26 should be noted that there is no direction in statute that the protest letter be longer than
27 3 sentences. Beyond that, and as mentioned above, the protest requirements were met

1 or substantially met by the protest. Furthermore, from a plain reading of the letter,
2 Eons directly requested a change in outcome and gave its notice to protest the decision.
3

4 Appellee's Memorandum states that "Eon's could have corrected [their previous
5 protest] by filing a formal protest by May 11, 2010." If Joleen Evangelista actually
6 believed that the Eons letter did not meet the requirements of the protest, she did not
7 represent this to Eons in any way during the relevant time for filing a protest. Eons did
8 not receive any correspondence regarding their protest until a GCC letter
9 inappropriately dated May 10, 2010 was received by Eons on May 24, 2010. The
10 postmark date of this letter was May 21, 2010, so Eons could not possibly have amended
11 or resubmitted their protest in time for the May 11, 2010 deadline for protesting after
12 receiving it.
13

14 Eons submits that they have substantially complied with the requirements of a
15 protest, and that GCC had notice of Eons's desire to protest the award of contract in this
16 procurement. It has been variously stated that "An elementary and fundamental
17 requirement of due process in any proceeding which is to be accorded finality is notice
18 reasonably calculated, under all the circumstances, to apprise interested parties of the
19 pendency of the action and afford them an opportunity to present their objections."
20 Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 314 (1950). Notice is an
21 important issue in this case because a protest is essentially an administrative equivalent
22 to a complaint; it begins a case which will eventually be adjudicated by the agency who
23 made the adverse decision. By disputing whether Eons has filed a proper protest in this
24 case, GCC is really disputing whether they were on notice of Eons's protest. Eons
25 submits that they were in fact on notice. GCC had an opportunity to object to the form
26 of Eons's protest, and GCC was made aware of Eons's reasoning within the notice of
27 protest letter.
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2 Even if it is determined that the protest was not in proper form, Eons submits
3 that this Opposition should be read as a permissible amendment to the notice of protest.
4 "It is usually held that any deficiencies in the pleadings can be corrected during
5 discovery, amendment, or at the prehearing conference." Koch Jr, Charles H.,
6 Administrative Law and Practice, Volume 2, Chapter 5 § 5.33[1] (West Publishing Co.,
7 2d ed. 1997) In cases within Guam's judicial branch, amendments to pleadings are
8 permissible under G.R.C.P. § 15(a). In the present case, an amendment to the protest
9 will not cause prejudice to any party. Here, GCC has no statement of any actual
10 prejudice or real confusion as to parties or issues. Furthermore, by analogy, GCC has
11 not yet served a formal response to the protest. In the event that the OPA should
12 determine that the protest was insufficient, Eons requests that they be allowed to
13 amend their protest with any necessary information or documents. While the Guam
14 Rules of Civil Procedure are not binding on Guam's administrative agencies, Appellant
15 submits that the interests of justice are met by freely allowing leave to amend so as to
16 allow reasonable modifications to the form notice of protest – where no actual prejudice
17 exists. See Foman v. Davis, 371 U.S. 178, 181-182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

18 Appellant alternatively submits that their protest be considered to have
19 substantially complied with all requirements. The purpose of the doctrine of
20 substantial compliance, is to avoid the harsh consequences that flow from technically
21 inadequate actions that nonetheless meet a statute's underlying purpose. See Anske v.
22 Borough of Palisades Park, 139 N.J.Super. 342, 347, 354 A.2d 87 (App.Div. 1976). If the
23 Motion to Dismiss is granted in this case, Eons's claim will be dismissed without being
24 heard on the merits, and their recourse to challenge the decision of GCC will be forfeit.
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Conclusion

It is clear from a reading of Eons's protest notice and letter of May 3, 2010 that it intended to protest the contract award in GCC-FB-10-009. Eons complied or substantially complied with all requirements of a bid protest under Guam law. For these reasons, this matter has been properly submitted to the OPA, and OPA has the jurisdiction to hear the merits of this appeal. The motion to dismiss should be denied.

Dated this 7th day of July, 2010

Respectfully submitted,

BERMAN O'CONNOR & MANN
Attorneys for Appellant
Eons Enterprises Corporation

Dated: July 7, 2010

By: 
DANIEL J. BERMAN