



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

PROCUREMENT APPEALS

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7 IN THE MATTER OF,)
8)
9 KIM BROTHERS CONSTRUCITON)
10 CORPORATION)
11 Appellant.)
_____)

APPEAL NO: OPA-PA-11-017

**DECISION AND ORDER RE
PURCHASING AGENCY'S
MOTION TO DISMISS**

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13 To: **Purchasing Agency:**
14 Department of Education, Government of Guam
15 C/O Rebecca Perez, Esq.
16 GGDOE Office of the Superintendent
17 312 Aspinall Ave.
18 Hagåtña, Guam, 96932
19 Facsimile: (671) 472-5003

20 **Appellant:**
21 Kim Brothers Construction, Corp.
22 C/O Thomas Tarply, Jr., Esq.
23 GCIC Bldg, Suite 904
24 414 W. Soledad
25 Hagåtña, Guam, 96910
26 Facsimile: (671) 472-4526

27 **THIS MATTER** came before the Office of Public Accountability (Hereafter referred to
28 as "OPA") on February 6, 2012 pursuant to the Purchasing Agency's Motion to Dismiss. Wok
Sik Kim, President, Kim Bros., Construction Corp., was present and represented by his counsel
of record, Thomas M. Tarpley, Jr., Esq. Marcus Y. Pido, Guam Department of Education
(Hereafter referred to as "GDOE"), Supply Management Administrator, was present and
represented by GDOE's Legal Counsel, Rebecca M. Perez, Esq.

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BACKGROUND

Appellant submitted a bid in response to GDOE's Multi-Step IFB No. 024-2011 (Renovation of Southern High School Gymnasium) (Hereafter referred to as "IFB").¹ On or about September 13, 2011, GDOE cancelled the IFB.² Fourteen (14) days later, on September 27, 2011, Appellant submitted a letter to Marcus Y. Pido, GDOE's Supply Management Administrator, complaining of the manner in which GDOE responded to the Appellant's inquiries to GDOE, and alleging that GDOE did not give Appellant notice of GDOE's cancellation of the IFB.³ In the letter, Appellant also stated that if GDOE ignored the letter, the Appellant would seek legal assistance and claim its expenses including, but not limited to, Appellant's estimating costs, bid bond fee, attorney's fee, and other costs.⁴ On October 27, 2011, GDOE responded to Appellant's letter stating that GDOE sent notice of the IFB's cancellation to Appellant via Appellant's e-mail address and GDOE offered to re-send the notice to the Appellant. Appellant received GDOE's letter on October 30, 2011.⁵ On November 14, 2011, fifteen (15) days later, Appellant filed this procurement appeal with the OPA alleging that after Appellant's bid price was opened, GDOE canceled the solicitation and failed to give notice of the cancellation to Appellant. On January 10, 2012, GDOE filed a Motion to Dismiss in this matter because this matter is not properly before the OPA due to Appellant's failure to file a protest.

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27 ¹ Page 1, Letter from Won Sik Kim, President, Kim Bros. Construction Corp., to Marcus Y. Pido, GDOE Supply Management Administrator, dated September 26, 2011, Attached to Notice of Appeal, filed on November 14, 2011.

28 ² Line 1, Page 2, Affidavit of Marcus Y. Pido, Exhibit 8, Agency Report filed on December 5, 2011.

³ Letter from Won Sik Kim, President, Kim Bros. Construction Corp., to Marcus Y. Pido, GDOE Supply Management Administrator, dated September 26, 2011, Attached to Notice of Appeal, filed on November 14, 2011.

⁴ Page 2, Id.

⁵ Letter from Marcus Y. Pido, GDOE Supply Management Administrator, to Appellant, dated October 27, 2011, attached to Notice of Appeal, filed on November 14, 2011.

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DISCUSSION

The OPA must determine the jurisdictional issue of whether Appellant’s Appeal is properly before the Public Auditor. Generally, the Public Auditor has the power to review and determine *de novo*, any matter properly submitted to her. 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 12, §12103. This statutory and regulatory language has been interpreted to mean that the jurisdiction of the Public Auditor is limited to matters properly submitted to her. *TRC Environmental Corporation v. Office of the Public Auditor*, SP160-07, Line 6, Page 5, Decision and Order on Petition for Writ of Mandate dated November 24, 2008 (Superior Court of Guam). Thus, if the Appellant’s procurement appeal was not properly submitted to the Public Auditor, then the OPA lacks jurisdiction to hear it.

GDOE argues that this matter is not properly before the Public Auditor because there is no decision from which an appeal may be made as Appellant’s September 27, 2011 letter to GDOE is not a protest. GDOE is correct in asserting that a purchasing agency’s decision on a protest is a pre-requisite for acquiring the Public Auditor’s jurisdiction in a procurement protest appeal. A purchasing agency’s procurement protest decision relative to the protest of a method of selection, solicitation, or award of a contract, may be appealed by the protestant to the Public Auditor within fifteen (15) days after receipt of the protestant of the notice of decision. 5 G.C.A. §5425(e) and 2 G.A.R., Div. 4, Chap. 12, §12201(a). Thus, a protest and the purchasing agency’s protest decision, are required for the Public Auditor to have jurisdiction over a procurement protest decision appeal. The OPA must decide whether the Appellant’s September 27, 2011 letter to GDOE was a protest and whether GDOE’s October 27, 2011 response to said letter was a protest decision.

Appellant’s September 27, 2011 letter to GDOE is a complaint and not a protest. Generally, complainants should seek resolution of their complaints initially with the Superintendent of Education and such complaints may be made verbally or in writing. Chapter IX, Section 9.2.2, GDOE Procurement Regulations. Here, the very first sentence of Appellant’s letter states: “This letter is to inform you that we are **complaining** on the way your office

1 responded to the inquiries of our company in regards to the above subject project (the IFB) (Bold
2 Emphasis Added)".⁶ Thus, the Public Auditor finds that the purpose of the letter was to submit a
3 written complaint and not a protest to GDOE. Further, the fact that the letter is not addressed to
4 GDOE's Superintendent has no effect on the letter's compliance with the GDOE regulation
5 governing complaints. A plain reading of the aforementioned GDOE procurement regulation
6 reveals that complaints should be made to the GDOE Superintendent. Chapter IX, Section 9.2.2,
7 GDOE Procurement Regulations. Further, under GDOE's Procurement Regulations, only the
8 term "shall" denotes the imperative. Chapter I, Section 1.9.46, GDOE Procurement Regulations.
9 Here, it is not imperative that a complaint be addressed to GDOE's Superintendent as the plain
10 language of the regulation states that it only should be addressed to GDOE's Superintendent.
11 Also, there is no evidence, by way of testimony, affidavit, or declaration, was presented to
12 indicate that Appellant's September 27, 2011 letter was intended to be a protest and not a
13 complaint, or that Appellant's use of the phrase "we are complaining" was a typographical error.
14 Therefore, Appellant's September 27, 2011 letter to GDOE was, by a plain reading of its
15 language, a written complaint to GDOE submitted in compliance with Chapter IX, Section 9.2.2,
16 of GDOE's Procurement Regulations. The Public Auditor must now determine whether
17 GDOE's October 27, 2011 letter was a protest decision.

18 GDOE's October 27, 2011 letter was GDOE's response to Appellant's written complaint
19 and not a protest decision. Generally, if GDOE's Superintendent is unable to resolve a protest by
20 mutual agreement, the Superintendent shall promptly issue a decision in writing stating the
21 reasons for the actions taken and informing the protestant of its right to administrative and
22 judicial review. Chapter IX, Section 9.2.7, GDOE Procurement Regulations. Here, GDOE's
23 October 27, 2011 letter is from GDOE's Supply Management Administrator and not GDOE's
24 Superintendent. Further, said letter expressly states that it received Appellant's letter of
25 complaint, and the letter does not include the mandatory language for procurement protest
26 decisions advising the protestor of its right to administrative and judicial review. Thus, the

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28 ⁶ Page 1, Letter from Won Sik Kim, President, Kim Bros. Construction Corp., to
Marcus Y. Pido, GDOE Supply Management Administrator, dated September 26,
2011, Attached to Notice of Appeal, filed on November 14, 2011.

1 Public Auditor finds that GDOE's October 27, 2011 letter is not a protest decision and is in fact a
2 letter responding to Appellant's written complaint.

3 There is no merit to Appellant's argument that the phrase "we are complaining" as used
4 in the Appellant's September 27, 2011 does not exclude the letter from being a protest.⁷

5 Appellant relies on the finding in OPA's July 20, 2010 Decision and Order Re Purchasing
6 Agency's Motion to Dismiss from *In the Appeal of EONS Enterprises Corp.*, OPA-PA-10-003
7 (Office of Public Accountability) that a protest letter did not have to have the word "protest" in it
8 provided that it contained the minimum information required for protests set forth in 2 G.A.R.,
9 Div. 4, Chap. 9, §9101(a)(3). However, the decision in *EONS* is distinguishable from this case.
10 Here, unlike the appellant in *EONS*, the Appellant actually used the phrase "we are complaining"
11 which resulted in GDOE handling the Appellant's letter as a complaint and not a protest.
12 Further, as previously stated, said letter met the requirements, set forth in GDOE's procurement
13 regulations, of a written complaint. Thus, had the Appellant not used that phrase which triggered
14 GDOE's complaint procedure, the decision and order in *EONS* may have been applicable.

15 There is no merit to Appellant's argument that GDOE acted in bad faith by treating
16 Appellant's September 27, 2011 letter as a complaint and not a protest. Complainants should
17 seek resolution of their complaint initially with the Superintendent of Education. Chapter IX,
18 Section 9.2.2, GDOE Procurement Regulations. As previously stated, Appellant stated in their
19 September 27, 2011 letter that they were complaining. Further, GDOE responded on October
20 27, 2011, thirty (30) days later, stating that they received Appellant's complaint and GDOE
21 responded to it by stating that GDOE sent notice of the IFB's cancellation to Appellant via
22 Appellant's e-mail address and GDOE offered to re-send the notice to the Appellant. Thus,
23 GDOE acted in good faith by responding to Appellant's Complaint in a timely manner.

24 Further, the Public Auditor finds that treating Appellant's September 27, 2011 written
25 complaint and GDOE's October 27, 2011 response to the complaint as a protest and a protest
26 decision respectively, would greatly prejudice the procurement process and GDOE. The Public
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⁷ Line 2, Page 5, Appellant's Comments on the Agency Report filed on December 15, 2011.

1 Auditor's jurisdiction shall be utilized to promote the integrity of the procurement process and
2 the purposes of Guam's Procurement Law. 5 G.C.A. §5703. Here, as previously stated,
3 GDOE's procurement process does include a procedure for submitting written complaints
4 concerning procurement, which the facts of this case indicate, the parties followed. Further, one
5 of the purposes and policies of Guam's procurement law is to provide safeguards for a
6 procurement system of quality and integrity. 5 G.C.A. §5001(b)(7). Here, treating Appellant's
7 September 27, 2011 complaint and GDOE's October 27, 2011 response to it as a protest and
8 protest decision, respectively, for the purposes of sustaining Appellant's procurement appeal,
9 threatens the integrity of the procurement process. GDOE's complaint process would be
10 nullified if complaints could be treated as protests. Further, in this matter, GDOE would be
11 denied its right to decide a protest and to state all the reasons it would use to make such decision.
12 Thus, the Public Auditor finds that the integrity of the procurement process is preserved and
13 prejudice to GDOE is prevented by treating Appellant's September 27, 2011 letter as a written
14 complaint, and GDOE's October 27, 2011 letter as a response to a written complaint, as is
15 expressly stated in both letters.

16 Nevertheless, GDOE should have advised the Appellant of its right to protest shortly after
17 receiving Appellant's complaint. One of the underlying policies of Guam's Procurement laws is
18 to ensure fair and equitable treatment of all persons who deal with the Government of Guam's
19 Procurement System. 5 G.C.A. §5001(a)(4). GDOE was or should have been cognizant of the
20 fact that the deadline for Appellant to submit a protest concerning GDOE's September 13, 2011
21 cancellation of the IFB expired on September 27, 2011, the day it received Appellant's
22 complaint. GDOE should have been more pro-active in advising the Appellant, who was not
23 represented by legal counsel at that time, of the deadline and of Appellant's right to file a protest.
24 Had GDOE so advised the Appellant, the lingering suspicion that GDOE speciously waited for
25 the protest deadline to expire before responding to Appellant's complaint would not exist, and
26 there would be no question concerning whether GDOE treated the Appellant in a fair and
27 equitable manner.

1 **CONCLUSION**

2 For the foregoing reasons, the Public Auditor finds that she lacks the jurisdiction to hear
3 this matter because it is not properly before due to Appellant not filing a protest with GDOE, and
4 due to there being no protest decision from GDOE for her to review. GDOE's Motion to
5 Dismiss is hereby GRANTED and this matter is dismissed in its entirety.

6 This is a Final Administrative Decision. The Parties are hereby informed of their right to
7 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
8 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative
9 Decision. 5 G.C.A. §5481(a).

10 A copy of this Decision shall be provided to the parties and their respective attorneys, in
11 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
12 www.guamopa.org.

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14 **SO ORDERED** this 22nd day of February, 2012.

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19 DORIS FLORES BROOKS, CPA, CGFM
20 PUBLIC AUDITOR