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Attorneys for: Appellant

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
 HAGATNA, GUAM**

IN THE APPEAL OF K CLEANING) SERVICES,))) APPELLANT.)) _____)	OPA-PA-13-004 OPPOSITION TO MOTION TO DISMISS APPEAL
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Appellant K Cleaning Services (K Cleaning) opposes Guam International Airport Authority's (GIAA) Motion to Dismiss an Appeal; Lack of Jurisdiction filed with the Office of Public Accountability May 15, 2013 for the reasons set forth herein.

In the Statement of Fact submitted by GIAA in support of its Motion, it claims that Appellant misunderstood the bid instructions resulting in Appellant's bringing its bid to the GIAA conference room instead of the Executive Manager's office. Appellant agrees that the instruction to bidders states "sealed bids in triplicate will be received at the office of the GIAA Executive Manager as indicated in the INVITATION FOR BID at which time and place all bids will be publicly opened and read aloud." (Emphasis in original) As Appellant has already argued in its appeal the problem with these instructions are that they referenced (and emphasized) the Invitation for Bid as to where the bids will be submitted, opened, and read aloud. A review of the Invitation for Bid makes it clear that there is no reference to the bids being submitted to the GIAA Executive Manager's office. The Invitation for Bid states, "Deadline for submission is 2:00 p.m. Friday, February 15, 2013 at which time and place all bids will be publicly

opened and read aloud at the GIAA Conference Room. All bids received after the deadline of submission specified above, will not be considered." Appellant was not mistaken when it was at the conference room to submit its bids and wait for the bids to be opened and read as instructed by the Invitation for Bid. Therefore, Appellant clearly disagrees that it misunderstood the directions in the Invitation for Bid and, in fact, followed those directions.

Another fact that supports Appellant's position is that the attendance sheets for the bid opening on March 29, 2013 state that the activity took place at the GIAA Board Conference Room #3, Ground Floor. See, Tab A of Agency Procurement Record. There is no attendance sheet or other document such as a receipt sheet stating the bids were received at the office of the GIAA Executive Manager. Therefore, there is no evidence in the record that any of the activity took place anywhere other than the GIAA Conference Room as directed by the Invitation for Bid. The only reference in the Invitation for Bid to the GIAA Executive Manager's Office is that was where interested parties could review or obtain bid documents. There is no reference to any further activity taking place at the GIAA Executive Manager's Office in the Invitation for Bid.

GIAA also contends that Appellant's initial protest was late because it was not filed within fourteen days of his knowing there was a problem with the language of the Invitation for Bid. GIAA argues that Appellant should have been aware of the ambiguity in the language from when he received the Invitation for Bid. This of course is a ludicrous argument. Appellant did not become aware that there was any question about where the bid was supposed to be delivered and opened until the date of the bid opening when his representative was sitting in the GIAA conference room waiting for the proceedings to take place. GIAA for some reason believes the instruction to bidders

page of the Invitation for Bid is more controlling than the first page of the Invitation for Bid that says nothing about the office of the Executive Manager, and it implies the instruction page should control, even though that page refers (and emphasized) the Invitation for Bid. Therefore, GIAA's argument that Appellant's initial protest was not timely is a red herring that should be ignored in these proceedings.

In reviewing the facts, GIAA should admit it failed to follow its own Invitation for Bid requirements and then compounded the problem by failing to follow the law when it denied Appellant's protest. Such failure to follow the law by GIAA that affects Appellant and other bidders from getting fair treatment in the procurement process should not be condoned by the OPA.

GIAA admits that it failed to advise K Cleaning of its right to administrative and judicial review as required by 5 GCA §5425(c). GIAA argues that this failure to advise K Cleaning of its appeal rights did not result in the letter rejecting the protest not taking affect the date it was served. GIAA cites *In The Appeal of Eons Enterprises, Inc.*, OPA-PA-10-003 to support this argument. A review of that decision demonstrates that it does not support GIAA's argument.

In the *Eons* case there were two issues before the OPA. The first was whether or not *Eons* three sentence letter was a proper protest. Unlike the case at bar, in *Eons* the Guam Community College argued that the letter was not a proper protest. The OPA in reviewing the letter determined that it met all the "written form requirements of a procurement protest". Next the OPA went on to determine if GCC's letter was a decision denying the protest. In the decision the OPA noted that GCC failed to advise the Appellant of its right to administrative and judicial review as quoted by GIAA in its motion. But the salient point is that there was no issue in *Eons* that *Eons* appeal was

untimely. As noted by the OPA in the background section of the Decision and Order, *Eons* received GCC's May 10, 2010 "Decision" letter on or about May 24, 2010. *Eons* filed its appeal two days later on May 26, 2010. There was no issue in that case of *Eons* being notified of appeal rights because *Eons* apparently was aware of its rights and timely filed its appeal.

If GIAA's argument is correct, then the OPA would not have had jurisdiction to decide *Eons* appeal because the right to review language was absent in that case. But that clearly was not the result. The OPA went on to decide the case because the appeal was timely filed. As noted in 2 GAR §12104(c)(9), the OPA has the right to raise issues of jurisdiction on its own. The fact the OPA did not raise an issue of jurisdiction in the *Eons* case would appear to reflect that the OPA did not find the absence of the review language in the rejection letter sufficient to deprive the OPA of jurisdiction in that case where the appeal was filed in a timely manner as required by 5 GCA §5425(e). Therefore, *Eons* in no way supports GIAA's argument that failing to advise a Protester of his right to administrative and judicial review does not affect the time to appeal that decision.

As Appellant noted in his appeal, Superior Court, Judge, Michael J. Bordallo ruled in *Sumitomo Construction vs. Government of Guam Department of Public Works, SP0274-98*, that where the agency fails to inform the Protestant of its right to administrative and judicial review, the Protestant/Petitioner should be allowed a reasonable amount of time to file an appeal. A similar Decision and Order was issued by Judge, Steven S. Unpingco of the Superior Court of Guam in *Pacific Security Alarm, Inc., vs. Department of Public Works, CV0591-05*. In the *PSA* case the Court noted, "Furthermore, equitable tolling is justified and dismissal is not appropriate as the May

27, 2005 letter violates due process since it did not inform or advise *PSA* how to exercise its rights to administrative and judicial review. (Cite omitted)". The Court went on to note that the decision letter included the language from the statute informing the protestant of its right to seek administrative and judicial review. However, because there was no Appeals Board at the time, the Court ruled that just giving this information was insufficient and that the agency should have provided the Protestant with information as to how the appeal process worked when there was no appeals board. The Court concluded that due process precludes dismissal of the case.

In this case, GIAA failed to include the necessary language advising Appellant of its right to administrative and judicial review. It is clear from the *Sumitomo* case that GIAA's failure to include this language made its decision subject to the appeal being filed beyond the fifteen days required by 5 GCA §5425(e). Therefore, Appellant's appeal was not late.

GIAA next argues that if the decision letter that GIAA issued to Appellant is not a final decision letter then at this point and time the OPA does not have jurisdiction because a decision letter has not been issued. As noted above, if GIAA's argument is correct, how would it explain the result in the *Eons* case. As GIAA notes in its motion, the OPA noted that in *Eons*, GCC failed to advise *Eons* of its review rights. The OPA did not find that the failure to include the language as to review rights deprived the OPA of jurisdiction to review the case. The OPA found the letter was a decision determining a protest, and the appeal was appropriate.

In this case there is no reason the letter should be considered depriving the OPA of jurisdiction. All this would do is delay the procurement appeal process. That is neither in GIAA or Appellant's best interest. The OPA should find, as Judge Bordallo

did in the *Sumitomo* case, that the failure of GIAA to include the review language required by 5 GCA §5425(c)(2) extended the time for Appellant to appeal the denial of the protest.

GIAA's position could lead to gamesmanship similar to what the OPA had to address *In The Appeal of Town House Department Stores, Inc., dba Island Business Systems and Supplies*, OPA-PA-08-003. In that case the Appellant filed a protest with GPSS alleging improper procurement. Over a month later the Appellant requested GPSS issue a final decision on the protest. A little less than a month later GPSS issued the purchase order but it never issued a decision on the protest. Over two months after filing its protest the Appellant filed the appeal with the OPA because GPSS had not issued a decision and the Appellant also requested other relief. In reviewing the facts of that case, the OPA determined that the matter was not ripe for review because GPSS had not rendered a decision on the initial protest. In that case the OPA determined that it did not have a decision subject to its review. But the OPA went on to determine that it had the authority to compel the agency to produce a decision finding "sixty-five (65) day delay in issuing decision is an act of bad faith and threatens the integrity of the procurement process." The OPA went on to cite 5 GCA §5425 (c) and (d) stating that the agency "shall promptly and expeditiously issue a decision in writing stating the reasons for the action taken, informing the Protestor of its right to administrative and judicial review, and a copy of such decision shall be mailed... to the Protestor,..."

Unlike *Townhouse*, GIAA did produce a decision on Appellant's protest. Its shortcoming was its failure to advise Appellant of his right to review. This did not deprive the OPA of jurisdiction. It just requires Appellant to have an opportunity to file

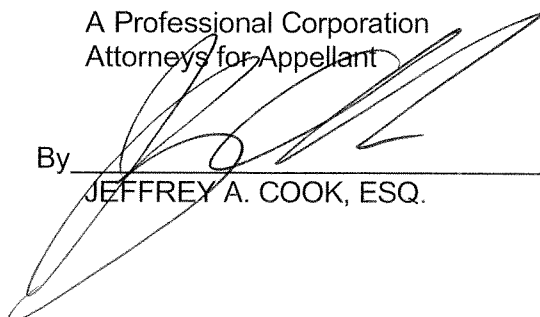
his appeal based on due process grounds as noted in the *PSA* case decided by Judge Unpingco.

In Conclusion, GIAA's Motion to Dismiss should be denied. GIAA clearly violated 5 GCA §5425(c) and in fact admits it did so. This failure on GIAA's part is sufficient for the OPA to accept the appeal of the denial letter one day late based on due process grounds. If for any reason the OPA agrees with GIAA that the OPA does not have jurisdiction because the April 18, 2013 letter is not a decision in writing pursuant to 5 GCA §5425 and thus does not create jurisdiction in the OPA, Appellant asks that the OPA order GIAA to immediately file a proper denial letter pursuant to that section. The OPA clearly has authority to make such an order. *See, In The Appeal of Townhouse Department Stores, Inc., dba Island Business Systems and Supplies, OPA-PA-08-003.* In such a situation Appellant further asks the OPA to then immediately file its appeal. Finally, Appellant asks the OPA to issue or continue a stay order that GIAA may not finalize contracts with other vendors pending the resolution of Appellant's appeal of the denial of his protest.

Respectfully submitted this 24th day of May, 2013.

CUNLIFFE & COOK
A Professional Corporation
Attorneys for Appellant

By



JEFFREY A. COOK, ESQ.