

BACKGROUND

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2 On April 13, 2012, Appellant filed the Notice of Appeal in this matter and attached
3 copies of the OPA's standard forms for Declaration of Court Action, Notice of Hearing, and
4 Hearing/Waiver. All of said standard forms were unsigned and did not include the case caption
5 of this matter. Additionally, the Appellant Attached a copy of its January 5, 2012 Protest Letter
6 to DOE and a copy of DOE's April 3, 2012 decision denying said protest. No other documents
7 were attached to Appellant's Notice of Appeal.¹ On April 27, 2012, DOE filed its Motion to
8 Dismiss and Motion for Expedited Decision and argued that the Appellant's appeal should be
9 dismissed because Appellant failed to include a statement of the grounds for its appeal and a
10 statement specifying the ruling requested, and any supporting exhibits or evidence to substantiate
11 its claims.² Additionally, DOE argued that the expedited procedures set forth in P.L. 31-40 be
12 used to decide this matter instead of the rules governing procurement appeals to the OPA set
13 forth in 2 G.A.R, Div. 4, Chap. 12, §12101 *et. seq.*³ On May 18, 2012, Appellant filed its
14 Response and Comments on DOE's Motion to Dismiss which alleged, in part, the issues of: (1)
15 Whether the wining bidder complied with Section 2.5.1.a of the IFB; and (2) The Appellant's
16 additional questions and examples set forth in paragraph 3, page 3 and 4 of the Appellant's
17 Response and Comment Letter filed on May 18, 2012. On May 21, 2012 DOE filed its Motion
18 to dismiss those allegations in Appellant's comments arguing that they are not properly before
19 the Public Auditor.
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25 ¹ Notice of Appeal filed on April 13, 2012.

26 ² Line 1, page 2, DOE's Motion to Dismiss and Motion for Expedited Decision
27 filed on April 27, 2012.

28 ³ Line 22, page 2, Id.

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DISCUSSION

A. DOE's Motion to Dismiss.

The Appellant was required to submit a statement setting forth the grounds of its appeal, as alleged by DOE. Generally, an appellant's notice of appeal shall contain a concise, logically arranged, and direct statement of the grounds of their appeal. 2 G.A.R., Div. 4, Chap. 12, §12104(b)(2). Here, the Hearing Officer finds that the Appellant failed to include a statement of setting forth the grounds of its appeal as required by 2 G.A.R., Div. 4, Chap. 12, §12104(b)(2). An appellant's failure to submit such a statement may result in dismissal of an appeal. 2 G.A.R., Div. 4, Chap. 12, §12104(b)(7). The Hearing Officer must now decide whether such dismissal is justified in this matter.

Although the Appellant's Notice of Appeal failed to include a statement of the grounds of its appeal, dismissal of the appeal is not warranted. An appeal may be dismissed for the Appellant's failure to provide a statement of the grounds of their appeal, however, there shall be no dismissal if the contracting officer had knowledge of the basis of the protest or the agency, in preparation of its Agency Report was not prejudiced by the non-compliance. 2 G.A.R., Div. 4, Chap. 12, §12104(b)(7). The Appellant argues that it filed its appeal and attached copies of its protest letter and DOE's decision denying the protest with the goal of clarifying DOE's denial of the protest.⁴ The Hearing Officer finds that Appellant's January 5, 2012 protest and DOE's April 3, 2012 Decision denying the protest concern the following general issues: (1) Whether DOE's properly denied Appellant's claim concerning whether bids submitted by Mega United

⁴ Page 1, Appellant's Response and Comments on DOE's Motion to Dismiss filed on May 18, 2012.

1 and Phil-Gets (Guam) International Trading Corporation dba J&B Modern Tech in response to
2 GDOE-IFB-035-2011 and GDOE-IFB-036-2011 (Structural Repairs and Roof Coating-Northern
3 A and Northern B) (Hereafter referred to as "IFB") complied with the licensing requirements as
4 set forth in the IFB; and (2) Whether DOE opened the bids submitted in response to the IFB and
5 whether the bids were responsive to the IFB; and (3) Whether the IFB's bid price basis was
6 sufficient to allow DOE to evaluate the bids submitted in response to the IFB and to determine
7 which bid offered the lowest price.⁵ As DOE responded to the Appellant's January 5, 2012
8 protest by denying it, the Hearing Officer finds that that DOE had actual knowledge of the basis
9 of the protest, and this protest is the basis of the appeal, the Hearing Officer also finds that DOE
10 has knowledge of the basis of Appellant's appeal. The Hearing Officer also finds that DOE's
11 Agency Report states that DOE claims to be unable to determine what Appellant is appealing,
12 and DOE responds to the appeal by reasserting DOE's responses to Appellant's protest set forth
13 in DOE's April 3, 2012 protest decision.⁶ Hence, Appellant's reassertion of their protest
14 allegations are the basis of their appeal and DOE's has reassertion of the reasons it denied
15 Appellants protest are DOE's defense against the appeal. Based on the foregoing, the Hearing
16 Officer finds that DOE's Motion to Dismiss must be denied because it had actual knowledge of
17 the basis of Appellant's protest and appeal, and it was not prejudiced in preparing its Agency
18 Report to respond to the appeal.

24 ⁵ Appellant's January 5, 2012 Protest and DOE's April 3, 2012 Decision denying
25 Appellant's protest, attached to Appellant's Notice of Appeal filed on April
26 13, 2012.

27 ⁶ Line 14, page 2, DOE's Agency Statement, Exhibit 51, Agency Report filed on
28 April 30, 2012.

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2 **B. DOE's Motion for Expedited Decision.**

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4 DOE moves the OPA to render an expedited decision in this matter arguing that the IFB
5 is dependent on federal funds that will lapse if not obligated by September 30, 2012. DOE
6 further argues that the expedited procedures set forth in P.L. 31-40 be used in place of the rules
7 governing procurement appeals set forth in 2 G.A.R., Div. 4, Chap. 12, §12101 *et. seq.* The
8 public law simply states that protests concerning DOE's capital improvement projects and air
9 conditioning repair and maintenance shall be submitted to the OPA who must either settle the
10 matter by mutual agreement or issue a written decision on later than ten (10) working days after
11 receipt of the protest. Section 8, P.L. 31-196. The effective date of P.L. 31-196 is March 28,
12 2012. The Hearing Officer finds that this new procedure applies to protests filed after March 28,
13 2012. Here the Appellant filed their protest on January 5, 2012, DOE denied the protest on April
14 3, 2012, and this matter came to the OPA pursuant to Appellant's April 13, 2012 Notice of
15 Appeal, made pursuant to the rules governing procurement appeals set forth in 2 G.A.R., Div. 4,
16 Chap. 12, §12101 *et. seq.* Thus, P.L. 31-196 is inapplicable to Appellant's appeal in this matter
17 because Appellant filed their protest prior to the law's effective date, and DOE decided the
18 Appellant's protest on April 3, 2012. The Hearing Officer also finds DOE's argument that the
19 OPA render a decision on this appeal rather disingenuous. The Hearing Officer notes that DOE
20 received the Appellant's protest on January 5, 2012 and did not render a decision on the protest
21 until almost three (3) months later on April 3, 2012. The Hearing Officer reminds DOE that
22 Guam Procurement Law requires DOE to decide protest in a prompt and expeditious manner. If
23 a protest is not resolved by mutual agreement, the head of a purchasing agency, or his or her
24 designee shall **promptly and expeditiously** (bold emphasis added) issue a decision in writing
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1 stating the reasons for the action taken, informing the protestant of its right to administrative and
2 judicial review, and a copy of such decision shall be mailed or otherwise furnished immediately
3 to the protestant, and any other party intervening. 5 G.C.A. §5425(c) and (d). Here, DOE failed
4 to render their decision on the Appellant's protest in a prompt and expeditious manner causing
5 an almost a three month delay at their level of the procurement protest resolution process. Had
6 DOE followed the law, this delay would not have occurred and this matter would likely have
7 been decided well before the September 30, 2012 deadline that now threatens the IFB's funding.
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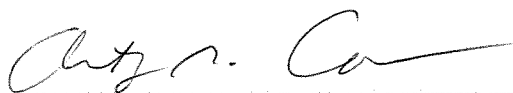
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11 **C. DOE's Motion to Dismiss in Part.**

12 Finally, DOE argues that the OPA lacks jurisdiction to decide the issues of: (1) Whether
13 the winning bidder complied with Section 2.5.1.a of the IFB; and (2) The Appellant's additional
14 questions and examples set forth in paragraph 3, page 3 and 4 of the Appellant's Response and
15 Comment Letter filed on May 18, 2012, because these are not properly before the OPA. The
16 Public Auditor's jurisdiction is limited to reviewing DOE's April 3, 2012 Decision denying
17 Appellant's January 5, 2012 Protest. 5 G.C.A. §5425(e). Therefore, if an issue on appeal was
18 not raised in Appellant's protest or DOE's decision denying the protest, the issue is not properly
19 before the Public Auditor because it is appearing for the first time on appeal and there is no
20 decision from DOE concerning such issues for the Public Auditor to review. The Hearing
21 Officer finds that the issues of: (1) Whether the winning bidder complied with Section 2.5.1.a
22 of the IFB; and (2) The Appellant's additional questions and examples set forth in paragraph 3,
23 page 3 and 4 of the Appellant's Response and Comment Letter filed on May 18, 2012 are not
24 properly before the Public Auditor because they are appearing for the first time on appeal.
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1 **CONCLUSION**

2 Based on the foregoing, DOE's Motion to Dismiss filed and Motion for Expedited
3 Decision filed on April 27, 2012 are hereby DENIED and DOE's Motion to Dismiss in Part filed
4 on May 21, 2012 is hereby GRANTED.
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7 **SO ORDERED** this 14th day of June, 2012 by:
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12 ANTHONY R. CAMACHO, ESQ.
13 Hearing Officer
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