

JAN 13 2012 ac
TIME: 3:00 PM BY: AC
FILE NO. OPA-PA: 11-017

1 THOMAS McKEE TARPLEY
2 A Professional Corporation
3 GCIC building
4 414 West Soledad Avenue, Suite 904
5 Hagatña, Guam 96910
6 Telephone: (671) 472-1539
7 Facsimile: (671) 472-4526
8 Email: ttarpley@attorneyguam.com

9 11ZP0316
10 Attorney for Appellant Kim Bros Construction Corp.

11 **OFFICE OF THE PUBLIC AUDITOR**

12 IN THE APPEAL OF

Docket No. OPA-PA-11-017

13 KIM BROS. CONSTRUCTION CORP.,

OPPOSITION TO MOTION TO DISMISS

14 Appellant.

15 DOE's motion to dismiss is based on the argument that Kim Bros.'s
16 September 26, 2011 letter was not a protest. DOE admits again, as it did
17 numerous times in its Answer to Appeal (GDEO0 143-147), that the "IFP had been
18 canceled" after bid opening. This was the main subject of the protest.

19 Kim Bros. previously discussed why the September 26, 2011 letter met the
20 criteria of a protest (See Section "C" of Appellants Comments on Agency Report and
21 Request for Hearing filed on December 15, 2011). This letter memorialized several
22 previous complaints Kim Bros. had made to DOE verbally (including the lack of
23 notice of the IFP cancellation) but also that "it is illegal to do a rebid when the bid
24 packages were opened" and "once the bids are opened, it must be awarded and not
25 go through another bid." This was a formal written declaration of disapproval and
objection delivered to DOE within 14 days of the cancellation, and thus was timely.

1 It is not mandatory to expressly use the word "protest." In the Appeal of Eons
2 Enterprises Corp. PA-PA-10-003. Once again to DOE attempts to make some
3 significance of the fact that the letter concludes by stating that if the letter is
4 ignored "we will have no other recourse but to seek legal assistance and claim
5 expenses incurred to include, among others, cost of estimating, bid bonds,
6 attorneys fees and other miscellaneous costs." This only shows that Kim Bros. had
7 not yet hired a lawyer. So what? A contractor does not need a lawyer to file a
8 protest, although he may well need one to file an appeal. This language does not
9 exclude the letter from being a protest. As the Hearing Officer determined In the
10 Appeal of Eons, supra, if DOE was confused as to whether the appellant's February
11 26, 2011 letter "was a protest or a complaint, it should have acted in good faith by
12 seeking clarification from the appellants instead of speciously treating the
13 appellant's letter as a complaint."

14 DOE's motion also ignores the fact that DOE's response to the protest (Mr.
15 Pido's letter of October 27, 2011) was a reaffirmation that the cancellation would
16 stand: "We appreciate your concerns and Kim Bros.' interest in bidding on DOE
17 projects. If DOE decides to re-issue the solicitation, we would certainly welcome
18 your participation." This was effectively a decision to deny the protest and thus this
19 appeal was also timely.

20 DOE's motion should therefore be denied.

21 Dated this 13th day of January, 2012.

22 
23 **THOMAS M. TARPLEY, JR.**
24 Attorney for Appellant
25