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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY  
HAGÁTÑA, GUAM

IN THE APPEAL OF K CLEANING ) OPA-PA-13-004  
SERVICES )

APPELLANT )

IN THE APPEAL OF ABLE ) OPA-PA-13-007  
INDUSTRIES OF )  
THE PACIFIC )

APPELLANT )

**MOTION TO DISMISS**

**COMES NOW** the Guam International Airport Authority, by and through Counsel Fisher & Associates, and Moves the Office of the Public Auditor to dismiss the instant Appeal of Able Industries of the Pacific, OPA-PA-13-007.

**\*\*\* STATEMENT OF FACT \*\*\***

Appellant asserts the following facts to be true;

1. That Appellant met with the Agency on 18 March 2013 and asked that it be awarded a contract pursuant to its status and 5 Guam Code Ann. §3001.1. *Id.*
2. That on 29 March 2013 Appellant was sent a letter from the Agency informing it that the Agency would continue with competitive sealed bidding. *Id at 2.*
3. That it submitted a bid but did not include a required bid bond. Based on this omission, pursuant to the language of the solicitation, the bid was rejected. *See Id at attachment C.*

- 1           4.      That it was notified of this on 03 May 2013. *Id.*
- 2           5.      On 23 May 2013, it wrote a letter to the Agency requesting clarification. *Id at p.*
- 3                        2.
- 4           6.      Also on 23 May 2013, Appellant sent a letter to the Agency requesting assistance
- 5                        in appealing the award.

6           The Agency received and opened bids in this matter on 29 March 2013. Appellant

7      learned of the facts constituting the basis of its appeal (it participated in the competitive sealed

8      bidding process) no later than 29 March 2013. Appellant made no protest to the Agency for 53

9      days<sup>1</sup>.

10                                 **\*\*\* MEMORANDUM\*\*\***

11           Appellant notes that “[t]he Public Auditor shall have the power to review and

12      determine de novo any matter properly submitted to her or him.” *Appeal at p.1*. This is

13      certainly true, but the matter must be properly before the Public Auditor.

14           Protests to an Agency must be made within the statutorily allowed period. “Any actual

15      or prospective bidder, offeror, or contractor who may be aggrieved in connection with the

16      method of source selection, solicitation or award of a contract, may protest to the Chief

17      Procurement Officer, the Director of Public Works or the head of a purchasing agency. The

18      protest shall be submitted in writing within fourteen (14) days after such aggrieved person

19      knows or should know of the facts giving rise thereto.” *5 Guam Code Ann. §5425(a)*. Here,

20      Appellant admits he knew of the Agency’s intent and its employment of the competitive bid

21      process on or about 29 March 2013. *Appeal at p. 2*. Having participated in the competitive

22      process, certainly he cannot be heard to say he didn’t know of it.

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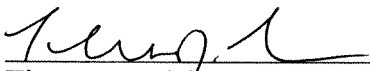
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25      <sup>1</sup> In fact, the Appellant never made a protest to the Agency. We accept its 23 May 2013  
letters as protests only for purposes of the motion.

1 It was only 53 days later that Appellant took action. (“On May 23, 2013, I submitted a  
2 request to Charles Ada, requesting clarification on the policy for awarding contracts to  
3 nonprofits.” *Id*)<sup>2</sup>. This is not a “should have known” circumstance, rather Appellant had  
4 actual knowledge of its grievance but did nothing until 30 days past its deadline<sup>3</sup>.

5 A timely Agency protest is an indispensable prerequisite to OPA jurisdiction. The  
6 Office of the Public Auditor hears appeals of agency protest decisions and is not a forum of  
7 first resort. Thus, without a timely agency protest, there can be no appeal. *See In the Appeal*  
8 *of Townhouse Department Stores, OPA-PA-08-011, p. 6*, “The threshold issue in this matter is  
9 whether IBSS’ December 4<sup>th</sup>, 2007, protest was timely.” Here, as is evident, and assuming  
10 Appellant submitted a protest, it was not timely, the appeal cannot be properly before the  
11 OPA and this appeal should be dismissed.

12 **FISHER & ASSOCIATES**

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15 Thomas J. Fisher, Esq.  
16 For Guam International Airport  
17 Authority

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20 <sup>2</sup> Again, Agency does not concede that this amounted to a protest. It is merely the next act by  
21 Appellant.

22 <sup>3</sup> If we assume the 29 March letter was an Agency decision on an earlier protest (the 18  
23 March letter), then Appellant was required to appeal to the Public Auditor by 15 April. He  
24 did not, and this Appeal is certainly time barred under that theory. If Appellant wants to  
25 change its theory of injury to improper rejection because a bid bond was not required of it, its  
protest was still untimely. Under this theory a protest was due by 17 May 2013.