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OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

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BY: M. Unpingco

FILE No. OPA-PA 09-008

9 BEFORE THE OFFICE OF THE PUBLIC AUDITOR

10 In the Appeal of
11 O&M ENERGY, S.A.,

Appellant.

Docket No. OPA-PA-09-008

REPLY TO
O&M ENERGY RESPONSE TO
TEMES' MOTION TO DISMISS

12 Comes now, Intervenor Taiwan Electrical and Mechanical Engineering Services, Inc.
13 (hereinafter TEMES), by and through its counsel of record, The Law Offices of John S.
14 Unpingco & Associates, LLC, and submits this reply to the O&M Energy response to TEMES'
15 Motion to Dismiss.

16 As the first ground for its response O&M Energy alleges that "TEMES failed to show
17 prejudice and burden of proof rests with them." As authority for its proposition O&M Energy
18 cites to "2 GAR-Administration Division 4-Procurement Regulations." The problem with the
19 regulations cited is that the citation is not specific enough, it lacks the specific section of 2 GAR,
20 Division 4, that they are quoting from. 2 GAR, Division 4 is literally hundred of pages long.
21 Even taking into account the "(8)" before the paragraph in O&M Energy's December 16, 2009
22 letter it is of no use, as it is subsection 8 of what section?

23 Second, the cited section indicates the protest cannot be dismissed where the contracting
24 officer has actual knowledge of the protest or the agency was not prejudiced by the protestor's
25 noncompliance with the regulation. O&M Energy again assumes or presumes that the

COPY

1 contracting officer knows of the grounds for protest. Yet, they have not shown who is the
2 contracting officer and how he came upon the knowledge of their protest. The same can be said
3 of the agency not being prejudiced by their noncompliance. How do they know that the agency
4 was not prejudiced?

5 Third, we are an Intervenor. We got our information from the agency, the same way
6 everybody else does. We cannot be expected to be imbued with or our knowing everything the
7 agency knows.

8 Fourth, O&M Energy concedes that it did not comply with the procurement regulation.
9 O&M Energy by making this argument is admitting that it did not submit a concise, logically
10 arranged, direct statement of the grounds for appeal. It states in its response: "..., or the agency,
11 in the preparation of its report, was not prejudiced by the protestors' noncompliance". Emphasis
12 added. How did they know that the agency was not prejudiced? O&M Energy wants us to
13 assume, wrongfully as they did, that the agency was not prejudiced. This proves the central point
14 of our motion to dismiss!

15 As the second ground for its response O&M Energy asserts that it "has filed its factual
16 (SIC) evidence and specific factual grounds under Comments to the Agency Report in a timely
17 manner when in fact we (O&M Energy) were not served by the Guam Power Authority (GPA)
18 until November 16, 2009 (annex 3)." The critical date and fact from which the deadline for filing
19 the Comments on the Agency Report begins to run is "after the Public Auditor's receipt of the
20 (agency report)." 2 GAR § 12104(c)(4). It is noted that Mr. Danny Leon Guerrero was
21 representing O&M Energy at this time and still is. It is his responsibility to keep O&M Energy
22 informed of the filings. Finally, the filings were posted on the OPA website. The O&M Energy
23 response is replete with references to the website. Thus, what they are saying that they were not
24 served with whatever papers (they did not mention what it is they were not served with) rings far
25 too hollow. They have the capability to get the information from the internet. And, the fact still

1 remains that O&M Energy filed its comments to the agency report late. Therefore, we ask that
2 their comments not be considered for the reasons stated in our Motion to Dismiss.

3 O&M Energy next argues that: "All O&M Energy documentation submitted as part of the
4 appeal process is complete and comprehensive." This is patently false. In their protest letter to
5 Ms. Brooks dated October 23, 2009 they state:

6
7 We assert the plausible claim that TEMES is not the lowed responsible and
8 responsive bidden and did not submit a bid which conforms in as defined in the
9 General Terms and Conditions found under Section #17 pertaining to sections (D)
10 and (G) as well as other material deviations which we will further reserve the
right to present forthwith after we are afforded a fair opportunity to review the
complete procurement files of TEMES as well as GPA Bid Review Committee
findings and analysis.

11 ...
12 We therefore respectfully request your Good Office to hear our claims and permit
us the opportunity to present out substantive issues of Laws and Facts as we will
prepare a full and comprehensive protest after receipt of all pertinent procurement
records from GPA."

13 Emphasis added.

14
15 Whatever happened to their requests for more information? We submit that this is but a mere
16 attempt to cover up their shortcomings.

17 In addition, in Appellant's Comments to the Agency Report and request for additional
18 information filed on November 27, 2009, they stated:

19 To get in more detail in this regards [sic], we have requested the following
20 information:

21 1. Information proving the quality of performance of TEMES, Inc., with
22 regard to awards previously made to him [sic] (performance in all contracts
between GPA and TEMES, Inc. related to Cabras 1 and 2).

23 2. Performance of Measures: bonus and penalties accrued by TEMES Inc.
24 during the PMC Contract past performances and amounts to be paid or received
annually by TEMES Inc., according to Appendix G of the RFP.

1 What became of this request? How can O&M Energy now state that "all O&M Energy
2 documentation submitted as part of the appeal process is complete and comprehensive?" Why
3 the 180° turn in their position?

4 O&M Energy next contend that the "main points raised during the process of appeal" are
5 presented in their October 23, 2009 letter which references their September 18, 2009 letter and
6 July 30, 2009 letters which in turn references their previous communications dated June 27, 2009
7 and July 30, 2009. 2 GAR §12104(b)(3) requires a "concise, logically arranged, and direct
8 statement of the grounds for appeal." This is reiterated in Part IV of Appendix A. There is no
9 requirement that GPA be able to ferret out the grounds for appeal as O&M Energy is seeking .
10 Nor is there a requirement that we be able to "piece together the pieces of a puzzle" in order to
11 make out the grounds for appeal. What is required is a direct statement of the grounds for appeal.
12 To this end, there should have been a letter linking together all the pieces of the puzzle in the
13 protested letter! To submit a letter of explanation now in response to a motion to dismiss is far
14 too late. So, likewise, to submit a completed attachment 1, 2, and 3 now is also too late. The time
15 for submitting these was with the protest letter. So that there is a direct statement of the grounds
16 for appeal. Merely attaching letters to a cryptic protest letter is not a direct statement of appeal.
17

18 O&M Energy has failed to submit a direct statement of its grounds for appeal and
19 therefore the motion to dismiss should be granted. We ask that the motion to dismiss be granted
20 as much time and resources is being spent on this frivolous appeal.

21 Respectfully submitted this 21st day of December, 2009.

22 **The Law Offices of John S. Unpingco**
23 **& Associates, LLC**

24 By: _____

25 John S. Unpingco, Esq.
Attorneys for TEMES