



Jerrick Hernandez <jhernandez@guamopa.com>

Fwd: SH Enterprise OPA-PA-19-011 and OPA-PA-20-003 Re: Brief on Remedies and Findings of Facts and Conclusions of Law

Vanessa L. Williams <vlw@vlwilliamslaw.com>

Fri, Oct 16, 2020 at 5:19 PM

To: "Alice B. Mendoza" <amendoza@icclawgroup.com>, "Ger E. Diaz" <gdiaz@icclawgroup.com>, Robert Kono <robert.kono@gsa.guam.gov>, Sandra Miller <smiller@oagguam.org>, Jerrick Hernandez <jhernandez@guamopa.com>, Clariza Roque <croque@guamopa.com>

Hafa Adai All,

I'm forwarding the email with the attached filings that were submitted to the OPA's office earlier. I apologize for all who were inadvertently not copied on the email the first time.

Thank you,

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On Fri, Oct 16, 2020 at 5:03 PM Angelyn Cayton <ac@vlwilliamslaw.com> wrote:

Mr. Hernandez,

Please see the attached for filing on behalf of SH Enterprises Inc.

Thank you.

Respectfully,

ANGIE CAYTON

PARALEGAL

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2 attachments

 **2020.10.16 SH Enterprises' Brief Re Remedies.pdf**
166K

 **2020.10.16 SH Enterprises' Proposed Findings of Facts and Conclusions of Law.pdf**
258K

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BEFORE THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF:

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

) DOCKET NO. OPA-PA-19-011
) OPA-PA-20-003

**SH ENTERPRISES, INC.'S
BRIEF RE: REMEDIES**

I. INTRODUCTION

On December 16, 2019, Basil Food Industrial Services Corporation (“Basil”) submitted this appeal to the Public Auditor. The hearing on the merits was heard on October 26, 2020 and the deadline for the briefs on the issues of remedies was set no later than October 16, 2020. SH Enterprises, Inc.’s (SH) brief regarding remedies is being timely submitted on October 16, 2020.

II. STATEMENT OF REMEDIES

Neither General Services Agency (“GSA”) or SH violated the procurement laws of Guam. GSA properly awarded the contract to SH based on SH’s submitting a complete bid package and bidding a significantly lower price. The Office of Public Auditor (“OPA”) should deny Basil’s appeal and award any costs allowed by law to SH that it has incurred in fighting the appeal of the denied protest before the OPA.

Even if Basil’s protest had been timely and its appeal successful, that would be no basis to terminate the contract awarded to SH. The remedies available under Guam procurement law depend on whether or not the contract has been awarded. *Fleet Services, Inc. v. Dept. of Administration*, 2006 Guam 6, ¶136, n.13. If, after the award of a contract, it is determined that the

1 award was in violation of law, and the person awarded the contract has not acted fraudulently, or
2 in bad faith, the contract may be ratified and affirmed, provided that doing so is in the best interest
3 of the Territory. 5 G.C.A. §5452(a)(1)(i).

4 There is no question the remedies in this situation are those that come after an award of
5 the contract was made. If the Public Auditor finds there was a violation of the procurement law,
6 it must determine whether the contract with SH should be ratified as being in the best interest of
7 Guam or should the contract be terminated and SH awarded its actual expenses and a reasonable
8 profit for the period the contract was in effect.

9 If the OPA were to find a violation of the procurement laws of Guam occurred, 5 G.C.A.
10 §5452(a)(1)(i) provides for the remedies after an award has been made. The law provides that if
11 the party awarded the contract “has not acted fraudulently or in bad faith”, there are two (2)
12 possible remedies. The first is that the contract be ratified and affirmed based on a finding that it
13 is in the best interest of Guam to do so. The second is to terminate the contract. If the contract is
14 terminated and the party awarded the contract did not act fraudulently or in bad faith, the party is
15 awarded reasonable compensation for their actual expenses incurred while the contract was in
16 effect, including a reasonable profit.

17 In this case, there was not even a scintilla of evidence to suggest that SH had acted
18 fraudulently or in bad faith. The purported violation is the type of violation which can be waived
19 without prejudice. Further, it is certainly in the best interest of the Territory that the contract
20 awarded to SH not be terminated, due to the need for nutrition services, operations, maintenance
21 and meals for Elderly Nutrition Program to continue uninterrupted. Under these circumstances,
22 even if Basil had met its burden in this case, it would still not be appropriate to terminate the
23 contract awarded to SH.

24 Reaffirmation and affirmation of a contract is the preferred action when the violation can
25 be waived without prejudice. 2 GARR Div. 4 §9106(c)(1). Even when the violation cannot be
26 waived without prejudice, the contract can still be affirmed. 2 GARR Div. 4 §9106(c)(3).

1 SH was the lowest bidder. This is clearly a significant saving for the Government of Guam,
2 and SH contends the OPA should find that this savings alone is in the best interest of Guam. There
3 is no question the Government of Guam requires these continued services for our manamko' and
4 this need has only increased and become more critical during the current pandemic. The
5 manamko' are getting quality, nutritious food and the people of Guam are paying the lowest price
6 for this. Therefore, the contract should be affirmed in the best interest of Guam. 5 G.C.A.
7 §5452(a)(1)(i).

8 As previously noted herein, the alternative is for the Government of Guam to pay SH for
9 its actual expenses reasonably incurred while the contract was in effect and a reasonable profit.
10 This would be a very bad choice for the Government of Guam. If the OPA made a ruling that this
11 remedy should be applied, the Government of Guam would have to pay SH for all expenses
12 incurred under the contract and a reasonable profit. This would seem to result in a double loss for
13 the Government of Guam if this remedy was chosen since not only would SH be paid, but the
14 higher bidder would be paid. This is not in the best interests of the people of Guam.

15
16 **III. CONCLUSION**

17 SH urges the OPA to find that there was no violation of the law and that the contract was
18 properly awarded to SH as the lowest responsive and responsible bidder. Alternatively, should
19 any violations of procurement law have been found, it was not based on any fraudulent action by
20 DH or bad faith. Therefore, the contract should be ratified and affirmed because doing so is in
21 the best interest of Guam.

22 Respectfully submitted this 16th day of October 2020.

23
24 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
Attorney for SH Enterprises, Inc.

25
26 
27 _____
28 VANESSA L. WILLIAMS, ESQ.