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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>, "Geri 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

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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

[PROPOSED]
**FINDINGS OF FACTS AND
CONCLUSIONS OF LAW**

I. FINDINGS OF FACT

For several years there have been only two vendors who have provided home delivery of elderly food services and elderly nutrition program under the Department of Public Health and Social Services (DPHSS) – Appellant Basil Food Industrial Services Corporation (“Basil”) and SH Enterprises (“SH”). In March 2019, GSA issued an emergency procurement solicitation for the Elderl Nutrition Program, Home -Delivered Meals for the time frame of April 1, 2019 to and including April 30, 2019 (the “April 2019 emergency procurement”). Pursuant to this emergency procurement, GSA issued a Purchase Order to SH for the Nutrition Services for the Elderly Nutrition Program for April 1, 2019 through April 30, 2019. Basil’s Exhibit 1.

The specifications for the April 2019 Purchase Order were attached to the Purchase Order. Section 12.8 provided that if the vendor was issued a “C” rating from the Division of Environmental Health, DPHSS, then the awarded vendor shall be terminated. Basil’s Exhibit 2. On April 3, 2019, the Division of Environmental Health of DPHSS conducted a Food Establishment Inspection of SH . As a result, SH was givena letter of warning from DPHSS with

1 a “C” grade point and a Re-Inspection Request Form and guidance on completing and submitting
2 the form. Basil’s Exhibit 5. DPHSS as the administrator of the contract did not notify GSA.
3 However, Basil sent a letter to GSA on April 5, 2019, notifying GSA of the inspection, and
4 providing a copy of the inspection report and letter of warning. *Id.* On April 5, 2019, Tae Hong
5 Min, President of SH, submitted a letter withdrawing from the emergency procurement due to an
6 insufficient number of drivers to provide the services required in the emergency procurement in
7 a timely manner. Due to the insufficient number of drivers and late deliveries, SH had significant
8 payments deducted as penalties. That same day, GSA issued a Purchase Order to Basil for the
9 same services. Basil’s Exhibit 4.

10 On September 25, 2019, GSA issued IFB No. GSA-056-19 for Nutrition Services for the
11 Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program,
12 Congregate Meals and Home-Delivered Meals Components. The term for the contract was three
13 (3) years with the option to renew for two (2) additional one fiscal-year terms at the DPHSS’
14 discretion.

15 Section 15 of the General Terms and Conditions of IFB No. GSA-056-19 provided as
16 follows:

17 **DETERMINATION OF RESPONSIBILITY OF BIDDERS:** The Chief
18 Procurement Officer reserves the right for securing from bidders
19 information to determine whether or not they are responsible and to inspect
20 plant site, place of business, and supplies and services as necessary to
21 determine their responsibility in accordance with Section 15 of these
22 General Terms and Conditions.

23 Basil’s Exhibit 7 at Page 25 of 151.

24 Section 16 of the General Terms and Conditions provided:

25 **STANDARD FOR DETERMINATION OF LOWEST**
26 **RESPONSIBLE BIDDER:** In determining the lowest responsible offer,
27 the Chief Procurement Officer shall be guided by the following:

- 28 a) Price of items offered
- b) The ability, capacity, and skill of the Bidder to perform
- c) Whether the Bidder can perform promptly or within the
specified time.
- d) The quality of performance of the Bidder with regards to
awards previously made to him.
- e) the previous and existing compliance by the Bidder with

- 1 laws and regulations relative to procurement.
- 2 f) The sufficiency of the financial resources and ability of the
- 3 Bidder to perform.
- 4 g) The ability of the bidder to provide further maintenance and
- 5 services for the subject of the award.
- 6 h) The compliance with all of the conditions in the Solicitation.

7 *Id.* at Page 26 of 151.

8 Section 2.4 and 2.5. of the Program Specifications then provide that the Bidder provide

9 certain assurances. Section 2.5(a) specifically requires evidence “of latest graded Food Inspection

10 Report issued by the Guam Department of Public Health and Social services, Division of

11 Environment Health for the past 12 months preceding the submission of the bid[.]” Sections

12 2.5(b) and (c) then provide that absent a Food Inspection Report for the past 12 months, the Bidder

13 agrees that it must undergo an inspection from the Division of Environment Health, DPHSS and

14 receive at least a “B” grade before it can receive the award. *Id.* at Page 56 of 151. Section 2.5(f)

15 states the Bidder “list citation in the areas of procurement, questions costs, material weakness and

16 your organization’s non-compliance with contract provisions. Section 2.5(f) then lists nine

17 categories of items. *Id.*

18 The “Mandatory Federal Programs Forms” section identified six Mandatory Federal

19 Program Forms that were required to be completed, submitted and signed. *Id.* at Page 34 of 151.

20 The section provides in pertinent part: “**Failure to complete and submit the forms will**

21 **automatically disqualify the Bidder’s submission to this IFB, as being non-responsive.**” *Id.*

22 (Emphasis included in original). It also provides: “**Failure to comply with this [Required**

23 **Signature] provision will automatically disqualify the Bidder’s submission to this IFB, as being**

24 **non-responsive.**” *Id.* (Emphasis included in original).

25 On October 24, 2019, representatives from Basil and SH submitted their bids for this IFB

26 procurement and attended the bid opening. At the Bid Opening, GSA opened the bids and

27 identified the Mandatory Federal Programs Forms required had been submitted. On October 25,

28 2019, GSA conducted a bid analysis of the two bid packages that were submitted by SH and Basil.

In the sections captioned “Bid Package Submittal” items noted for submission include the Bid Guarantee, Statement of Qualification, Affidavits submitted, notarized and sealed, Other

1 Requirements, and Mandatory Federal Program Forms. Based on the analysis, GSA
2 recommended with the approval from the Director of DPHSS that the bid be awarded to SH as
3 the lowest responsive and responsible bidder. Neither Basil nor SH had provided information
4 regarding prior "C" ratings and below, although Basil also had prior "C" and "D" ratings from
5 the Division of Environmental Health, DPHSS. On October 30, 2019, GSA received the
6 concurrence from the Director of DPHSS that SH met the specification of IFB GSA-056-19.

7 On November 8, Basil was notified its bid was rejected due to high price. Basil's Exhibit
8 8. Also on November 8, 2019, GSA awarded IFB GSA-056-19 to SH. On November 22, 2019,
9 Basil filed a protest challenging the award to SH on the basis that SH was not eligible because it
10 was "neither a responsive nor responsible bidder" due to an alleged termination of the April 2019
11 Emergency Procurement. The GSA denied Basil's Protest on November 30, 2019. SH began
12 delivering meals on December 1, 2019.

13 On December 16, 2019, Basil appealed the GSA Decision denying its Protest requesting
14 that the Public Auditor determine that SH be disqualified from IFB056-19 as nonresponsive.
15 Basil's Notice of Appeal (Dec. 16, 2019).

16 On February 27, 2020, Basil submitted a second appeal to the Public Auditor alleging that
17 SH had violated 2 GAR Div. 4 § 11107(4) by donating space within the Hakubotan building, a
18 commercial building, to the Government of Guam for use as the Guam War Claims Center on
19 January 22, 2020.

20 21 **II. ANALYSIS**

22 **A. Basil's First Protest was not timely filed.**

23 Guam procurement law provides a 14-day window within which a bidder may protest a
24 method of source selection, solicitation, or award. It provides:

25 Right to Protest. Any actual or prospective bidder, offeror, or
26 contractor who may be aggrieved in connection with the method of
27 source selection, solicitation or award of a contract, may protest to
28 the Chief Procurement Officer, the Director of Public Works or the
head of a purchasing agency. The protest shall be submitted in

1 writing within fourteen (14) days after such aggrieved person knows
2 or should know of the facts giving rise thereto.

3 5 G.C.A. §5425(a)

4 The Guam Supreme Court recently discussed when the 14-day window of section 5425(a)
5 begins to run in, *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam (DFS II)*, 2020 Guam
6 24. The Guam Supreme Court explained:

7 Section 5425(a) speaks not in terms of *what* is being protested *but*
8 in terms of knowledge of the facts giving rise to a protest. 5 GCA §
9 5425(a); *see also* 2 GAR Div. 4 § 9101(c)(1). Therefore, a protest
10 filed more than 14 days after the disappointed offeror or bidder had
11 notice of the grounds for the protest is barred as untimely. This is
12 true “even if no contract has yet been awarded, even if the protest
13 was filed within [14] days of the agency’s selection of bidders or
14 offerors, and even if the protestant did not subjectively understand
15 or appreciate the ground for protest.” *Gateway Health Plan*, 172
16 A.3d at 705 (collecting cases); *see also UnitedHealthcare of Pa.,*
17 *Inc. v. Dep’t of Human Servs.*, 172 A.3d 98, 108 (Pa. Commw. Ct.
18 2017) (collecting cases) (same).

19 *Id.* at ¶ 87. (Emphasis added). Thus, the questions of when the statute of limitations begins to
20 run is an objective standard of “what a reasonable person should have known” and requires “an
21 analyst examining what facts are necessary to establish a protest claim and when the protester
22 knew, or should have known, facts establishing the essential elements of that protest claim... This
23 determination ‘depends on the cumulation of facts available to the protester.’” *Id.* at ¶ 88 (internal
24 citations omitted).

25 Basil’s is premised upon the belief that SH should have been be disqualified from
26 consideration from IFB GSA -56-19 because SH could neither be responsible nor responsive to
27 the IFB because of SH’s April 2019 alleged contract termination. Basil knew that of SH’s
28 withdrawal or alleged termination, as early as April 5, 2019 when they notified GSA of the same.
Basil undoubtedly knew the specifications and requirements of the IFB when they submitted their
bid on October 24, 2019. Based on these cumulation of facts, Basil knew or should have known
that that SH did not meet the specifications and requirements of the IFB when SH submitted its
bid on October 24, 2019. Because these are the facts establishing the essential elements of Basil’s

1 claim that SH was neither a responsive nor responsible bidder, the 14-day window of section
2 5425(a) began to run on October 24, 2019. Because Basil did not submit their protest until
3 November 22, 2019, their protest was untimely and their appeal must be denied.

4 Basil cannot claim they could not have known SH would not be disqualified as a non-
5 responsive or non-responsible bidder until SH was awarded the contract. A maxim of
6 jurisprudence that acquiescence in error takes away the right of objecting to it. 20 G.C.A. §
7 15108. This maxim is applicable to this matter because the record shows that Appellant did not
8 file a protest within fourteen (14) days after known of Basil's alleged termination and lowest bid
9 submission on October 24, 2019 because it assumed that SH's bid would be rejected. This
10 erroneous assumption does not constitute an exception to the fourteen (14) day period to file a
11 protest set forth in 5 G.C.A. Basil's argument must be rejected because it requires an interpretation
12 twice rejected by the Guam Supreme Court - that no bidder is aggrieved until the purchasing
13 agency has awarded a contract and therefore, there could be no appeal prior to the award of a
14 contract.

15 Pursuant to 5 GCA § 5425, Basil was required to file its Protest within 14 days of the bid
16 opening date, or by no later than November 7, 2019. Basil filed its Protest on November 22, 2019,
17 fifteen (15) days after the deadline for raising this claim. Basil's protest was not timely filed and
18 the Appeal should be dismissed.

19 **B. SH was the lowest responsive and responsible bidder.**

20 Basil contends that SH was neither responsive nor responsible when they allegedly failed
21 to disclose its alleged contract termination. Basil conflates responsiveness and responsibility. It
22 is critical to determine, first, whether the alleged nonconformity deals with the responsiveness of
23 a bid or the responsibility of the bidder. Responsiveness deals with the question whether the
24 bidder has provided exactly what the Government has requested in the bid specifications and
25 criteria. If the nonconformity deals, then, with matters of responsibility, there is no issue of
26 responsiveness. As discussed below, matters of responsibility are determined separately. (2)
27 Secondly, if the nonconformity is immaterial, as discussed below, it is nevertheless responsive;
28 responsiveness only applies to material nonconformities.

1 **1. SH's Bid package conformed in all material aspects to the IFB.**

2 “Responsive bidder means a person who has submitted a bid which conforms in all
3 material respects to the Invitation for Bids.” *See* 5 GCA § 5201(g). Title 2, Division 4, Section
4 § 3109(n) governs “Bid Evaluation and Award” further emphasizes the distinction between
5 responsiveness and responsibility. Basil’s protest is based on the alleged deficiencies in SH’s
6 Bidder Assurances. However, the distinction between bid responsiveness and bidder
7 responsibility makes clear that the Bidder Assurances go towards bidder responsibility. This is
8 further supported by Sections 15 and 16 of the General Terms and Conditions of the IFB.
9 Therefore, Basil’s protest that SH’s bid was non-responsive based on SH’s alleged failure to
10 provide Bidder Assurances was properly denied.

11 **2. The CPO properly determined that SH was a responsible bidder.**

12 SH was a responsible bidder and GSA’s determination that SH was responsible was well
13 within the CPO’s discretion permitted by law. Guam procurement law defines a responsible
14 Bidder as “means a person who has the capability in all respects to perform fully the contract
15 requirements, and the integrity and reliability which will assure good faith performance.” 5 GCA
16 § 5201(f). Responsibility of prospective contractors is covered by §3116 (Responsibility) of this
17 Chapter. *See* 2 GARR Div. 4 § 3109(n)(2). Under these regulations, a determination of
18 responsibility of a bidder is made on the basis of all information that may be submitted or available
19 up to the time of award. 2 GARR Div. 4 § 3116(a) & (b). This is in stark contrast to the
20 requirement that a bid may only deemed responsive based upon what is submitted in the bid
21 package. *See supra*. Section 3116 provides in pertinent part:

- 22 (b) (2) Standards of Responsibility.
- 23 (A). Standards. Factors to be considered in determining
24 whether the standard of responsibility has been met include
25 whether a prospective contractor has:
- 26 (i) available the appropriate financial, material,
27 equipment, facility, and personnel resources and expertise,
28 or the ability to obtain them, necessary to indicate its
 capability to meet all contractual requirements;
- (ii) a satisfactory record of performance;
- (iii) a satisfactory record of integrity;

- 1 (iv) qualified legally to contract with the territory;
and
2 (v) supplied all necessary information in connection
with the inquiry
3

4 (B) Information Pertaining to Responsibility. The
prospective contractor shall supply information requested by the
5 Procurement Officer concerning the responsibility of such
contractor. If such contractor fails to supply the requested
6 information, the Procurement Officer shall base the determination
of responsibility upon any available information or may find the
7 prospective contractor nonresponsible if such failure is
unreasonable.
8

9 (3) Ability to Meet Standards. The prospective contractor may
demonstrate the availability of necessary financing, equipment,
10 facilities, expertise, and personnel by submitting upon request:

11 (A) evidence that such contractor possesses such necessary
items;

12 (B) acceptable plans to subcontract for such necessary
items; or
13

14 (C) a documented commitment from, or explicit
arrangement with, a satisfactory source to provide the necessary
items.
15

16 (4) Duty Concerning Responsibility. Before awarding a contract,
the Procurement Officer must be satisfied that the prospective
17 contractor is responsible.

18 2 GARR Div. 4 § 3116(a) & (b).

19 Section 15 of the General Terms and Conditions of IFB GSA056-19 and the Bidder
20 Assurances section are consistent in that they put the bidders on notice that GSA may secure from
21 bidders' information to determine whether or not they are responsible. Based on the Bid Analysis
22 and concurrence from the Director of DPHSS, it was clear that the CPO was satisfied that SH was
23 responsible. Based on 2 GARR Div. 4 § 3116(b)(2)(B), if the bidders' did not provide certain
24 information requested – as Basil and SH did – then the procurement officer shall base the
25 determination of responsibility upon any available information. The Bid Analysis shows that
26 based on the information available, both bidders met the standards of responsibility identified in
27 Section 16 of the General Terms and Conditions of IFB GSA056-19. Therefore, Basil's protest on
28 this ground was properly denied.

1 **C. A decision on Basil’s Second Protest would deny SH due process of law and it not**
2 **properly before the Public Auditor.**

3 There are three different categories of controversies in Guam Procurement Law that may
4 be resolved by the Chief Procurement Officer and result in an agency decision. They can be
5 found in Article 9, Subarticle A of the Guam Procurement Law. *See* 5 G.C.A. §§ 5425, 5426 &
6 5427. These sections respectively give the Chief Procurement Officer or head of the purchase
7 agency the authority to resolve protested solicitations and awards, the authority to debar or
8 suspend, or the authorize to resolve contract and breach of contract controversies. *See Id.* Basil
9 filed a protest and second appeal pursuant to Section 5425, but the underlying facts giving rise to
10 Basil’s protest are not in the connection with the “method of source selection, solicitation, or
11 award of a contract” of IFB GSA-056-19. *See* 5 G.C.A. § 5425. Basil has made abundantly clear
12 on the record that it is challenging SH’s actions post-award and not “the method of source
13 selection, solicitation or award of a contract” as provided for in 5 G.C.A. § 5425.

14 Rather, Basil alleges SH’s act of donating commercial space for use by the Governor’s
15 office was either a violation of the Terms and Conditions of an existing contract and/or the failure
16 to abide by the ethical standards provided in 5 G.C.A. § 5630(d) and 2 GAR Div. 4, §11107(4).
17 There can be doubt that Basil seeks a remedy pursuant to 5 GCA § 5651(b) which is the debarment
18 and suspension of SH, because it has specifically stated so. Basil’s Remedies Brief, p.3 (Aug.
19 17, 2020). Section 5651 falls under the Remedies portion of Article 11 of the Guam procurement
20 law. It states in relevant part:

21 (d) Right of the Territory to Debar or Suspend. Debarment or
22 suspension may be imposed ... in accordance with the procedures set
23 forth in § 5426 of this Chapter for breach of the ethical standards of
24 this Chapter, provided that such action may not be taken without the
25 concurrence of the Attorney General.

26 (e) Due Process. All procedures under this Section shall be in
27 accordance with the Administrative Adjudication Law.

28 5 G.C.A. § 5651(d) & (e).

1 Although any member of the public may petition the CPO in accordance with procedure
2 set forth in Section 5426 of Guam Procurement Law, that is not was Basil did. If it had, it would
3 have triggered the administrative review process under Subsection (a) of that Section. See 5
4 G.C.A. § 5426(f)(“Any member of the public may petition the Chief Procurement Officer to take
5 action...pursuant to Subsection (a) of this Section.”)(emphasis added). Subsection (a) provides
6 the process for petitioning the CPO to take action against SH for the allegation violation as
7 follows:

8 After reasonable notice to the person involved and reasonable
9 opportunity for that person to be heard, the Chief Procurement
10 Officer, the Director of Public Works or the head of a purchasing
11 agency, after consultation with the using agency and the Attorney
12 General, shall have authority to debar a person for cause from
13 consideration for award of contracts. The debarment shall not be for
14 a period of more than two (2) years. The same officer, after
15 consultation with the using agency and the Attorney General, shall
16 have authority to suspend a person from consideration for award of
17 contracts if there is probable cause for debarment. The suspension
18 shall not be for a period exceeding three (3) months. The authority
19 to debar or suspend shall be exercised in accordance with
20 regulations promulgated by the Policy Office.

21 5 G.C.A. § 5426(a).

22 Basil invites the Public Auditor to set a precedent that would render the three distinct
23 sections of Article 9, Subarticle A of the Guam Procurement Law moot, and deny SH the due
24 process required by law. The Public Auditor declines to do so.

25 **III. CONCLUSION**

26 For the reasons set forth above, the denial of Basil’s protests are affirmed.

27 Respectfully submitted this 16th day of October, 2020.

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



VANESSA L. WILLIAMS, ESQ.