

CAMACHO CALVO LAW GROUP LLC

GERI E. DIAZ

gdiaz@camachocalvo.law

356 E. Marine Corps Drive, Suite 201

Hagåtña, GU 96910

Tel No. 671.472.6813

Fax No. 671.477.4375

OFFICE OF THE ATTORNEY GENERAL
GOVERNMENT OF GUAM
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19-011
20-003

Attorney for Appellant

BASIL FOOD INDUSTRIAL SERVICES CORPORATION

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES CORPORATION,

Appellant.

Appeal No. OPA-PA-19-011

Appeal No. OPA-PA-20-003

CONSOLIDATED

APPELLANT BASIL FOOD INDUSTRIAL SERVICES CORPORATION'S COMMENTS TO AGENCY REPORT

Appellant Basil Food Industrial Services Corporation ("Basil") hereby submits its Comment on the Agency Report received on May 19, 2020. GSA contends that since there is allegedly no evidence that SH Enterprises' actions meet the definition of a gratuity or kickback pursuant to 5 G.C.A. § 5630, there is no violation. However, SH Enterprises knowingly and willfully violated the Guam Procurement Act, the Guam Procurement Regulations and the terms and conditions of the Invitation for Bid ("IFB") GSA-056-19 when it donated the use of the Hakubotan Building to the Government of Guam for use as a War Claims Processing Center.

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I. The Breach of Ethical Standards Promulgated By 5 G.C.A. § 5630 Includes Gratuities, Kickbacks And Favors To The Territory

In its Agency Report, GSA hones in on the definition of a gratuity and kickback and then prematurely terminates its analysis of whether SH Enterprises breached its ethical responsibilities when it found that SH Enterprises' actions did not meet those specific definitions. Here, GSA failed to conduct a full assessment of the arguments set forth in Appellant's Notice of Procurement Appeal dated February 27, 2020 when it neglected to consider the third type of ethical breach indicated in 5 G.C.A. § 5630 (d), namely, Favors to the Territory.

It is likely that GSA mistakenly took this stance because the affidavit¹ signed by Hui Sook Min, Vice President of SH Enterprises, only refers to gratuities and kickbacks in the heading, "AFFIDAVIT RE NO GRATUITIES or KICKBACKS." (Exhibit I, Notice of Procurement Appeal dated February 27, 2020.) However, GSA's limited approach to evaluating this issue is erroneous because 5 G.C.A. § 5630, which is entitled, "Gratuities and Kickbacks" actually contains four subsections: (a) Gratuities; (b) Kickbacks; (c) Contract Clause; and (d) Favors to the Territory. It is clear that a favor to the territory is also a type of ethical breach contemplated within 5 G.C.A. § 5630. That section states,

(d) Favors to the Territory. For purposes of this Section, a favor is anything, including raffle tickets, of more than de minimus value and whether intended for the personal enjoyment of the receiver or for the department or organization in which they are employed or for any person, association, club or organization associated therewith or sponsored thereby. It shall be a breach of ethical standards for any person who is or may become a contractor, a subcontractor under a contract to the prime contractor or higher tier contractor, or any person associated therewith, to offer, give or agree to give any employee or agent of the Territory or for any employee or agent of the Territory to solicit or accept from any such person or

¹ The Affidavit Regarding No Gratuities or Kickbacks refers to 2 GAR, Div. 4 § 11107(e), which, in turn, discusses the prohibition against gratuities and kickbacks set forth in 2 GAR, Div. 4, § 11206. As pointed out in footnote 2 of Appellant's Notice of Procurement Appeal dated February 27, 2020, the most current version of 2 GAR, Div. 4 Chapter 11 Public Contracting does not contain section § 11206. However, an earlier version of 2 GAR, Div. 4 Chapter 11 Public Contracting, dated November 1, 1984, contains section 11-206, which is identical to the most current version of 2 GAR, Div. 4, § 11107. This is Appellant's basis for analyzing sections 2 GAR, Div. 4, § 11107 and its counterpart, 5 G.C.A. § 5630 regarding the issue of gratuities and kickbacks.

entity or agent thereof, a favor or gratuity on behalf of the Territory whether or not such favor or gratuity may be considered a reimbursable expense of the Territory, during the pendency of any matter related to procurement, including contract performance warranty periods. (Emphasis added.)

5 G.C.A. § 5630(d).

Here, the use of the words “favor or gratuity” within the body of § 5630(d) to describe the ethical breach clearly underscores the fact that subsection (d) was contemplated to be another type gratuity that would result in an ethical breach prohibited by 5 G.C.A. § 5630. Further, sections § 5630 (a) for gratuities, (b) for kickbacks and (d) for favors to the territory all use the phrase, “[i]t shall be a breach of ethical standards...” to illustrate the fact that these are all types of ethical violations.

We encounter the same scenario when analyzing 2 GAR, Div. 4, § 11107, which is the counterpart to 5 G.C.A. § 5630. Notably, 2 GAR, Div. 4, § 11107 is also entitled, “Gratuities and Kickbacks” and lists identical subsections including (1) Gratuities; (2) Kickbacks; (3) Contract Clause; and (4) Favors to the Government of Guam².

Based on an analysis of 5 G.C.A. § 5630 in its entirety, GSA should have considered all subsections, including favors to the territory, as standards that could have been breached by SH Enterprises.

II. Other Sections of the GSA-056-19 Contract Also Discuss the Prohibition of Ethical Violations

To further boost the argument that GSA failed to consider 5 G.C.A. § 5630(d) as another type of ethical breach contemplated within the terms and conditions of GSA-056-19, there are

² 5 G.A.R. § 5630(d) is entitled, “Favors to the Territory” while 2 GAR, Div. 4, § 11107(4) is entitled, “Favors to the Government of Guam.” The language of both subsections are almost identical, with the exception of the use of “Government of Guam” instead of “Territory” in 2 GAR, Div. 4, § 11107(4).

other sections in the contract which provide a general, catchall prohibition against all ethical violations.

Specifically, as mentioned on page 10 of Appellant's Notice of Procurement Appeal, No. 31 of the General Terms and Conditions of the Invitation For Bid requires the bidder/contractor to warrant that he/she will not violate the prohibition against gratuities and kickbacks set forth in Chapter 11³ (Ethics in Public Contracting) of the Guam Procurement Act and Chapter 11 of the Guam Procurement Regulations.

Also, section 16.8 of the IFB entitled, "Debarment (Guam and Federal)," requires that the bidder/contractor warrant that it will comply with all of the provisions of 5 GCA Chapter 5⁴, Articles 9 and 11, subject to debarment and suspension. For reference purposes, Article 9 deals with Legal and Contractual Remedies and Article 11 discusses Ethics in Public Contracting. Most importantly, the entirety of 5 G.C.A. § 5630, including § 5630(d) discussing favors to the territory, is contained within Article 11.

Therefore, even under these additional sections of the contract, GSA should have reviewed the *entirety* of 5 G.C.A. § 5630 and 2 GAR, Div. 4, § 11107 to properly analyze the basis for Appellant's protest and appeal as to whether SH Enterprises breached its ethical duties when it provided its donation to the Government of Guam.

III. SH Enterprises' Donation of the Hakubotan Building to the Government of Guam Violated Ethical Standards

GSA further argues that the Governor is allowed to accept donations and that GSA had no knowledge of and was not involved in procuring the use of the Hakubotan building for use as the War Claims Processing Center. Accordingly, GSA argues that there was no ethical violation.

³ It is actually Article 11 in Chapter 5 of the Guam Procurement Act that discusses Ethics in Public Contracting.

⁴ 5 G.C.A. Chapter 5 is Guam's Procurement Law.

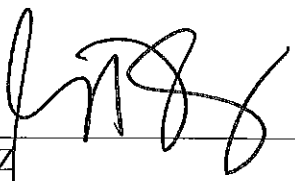
However, in determining whether there was a violation, the focus should actually be on SH Enterprises' very acts in this case which were prohibited by statute. To reiterate, 5 G.C.A. § 5630 (d) states, "It shall be a breach of ethical standards for any person who is or may become a contractor...to offer, give or agree to give any employee or agent of the Territory...a favor or gratuity...during the pendency of any matter related to procurement, including contract performance warranty periods." SH Enterprises' actions were undoubtedly an ethical violation pursuant this section as it willingly and overtly offered and donated the Hakubotan building to the Government of Guam while procurement appeal OPA-PA-19-001 was still pending and also while it was continuing to perform under the terms of the GSA-056-19 (Nutrition Services for the Comprehensive management, Operations and Maintenance of the Elderly Nutrition Program) contract.

IV. Conclusion

For all these reasons, including the arguments made in Appellant's Notice of Procurement Appeal dated February 27, 2020, Basil requests that SH Enterprises' contract be terminated and that SH Enterprise be either terminated or suspended as a government contractor.

DATED: Hagåtña, GU, May 29, 2020.

CAMACHO CALVO LAW GROUP LLC



GERI E. DIAZ
Attorney for Appellant
BASIL FOOD INDUSTRIAL SERVICES
CORPORATION