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**RECEIVED**  
 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL**

IN THE APPEAL OF	)	Docket No. OPA-PA-19-011
	)	OPA-PA-20-003
BASIL FOOD INDUSTRIAL	)	
SERVICE CORPORATION,	)	
	)	PURCHASING AGENCY'S
	)	HEARING BRIEF
Appellant.	)	ON THE MERITS
	)	
	)	

**I. INTRODUCTION.**

Purchasing Agency **GENERAL SERVICES AGENCY (GSA)** files this Hearing Brief in support of its denial of Appellant Basil Food Service's protest. GSA also incorporates by reference the arguments and briefs submitted in support of its Motion for Summary Judgment with respect to the Hakubotan Building (OPA-PA-20-003).

## II. STATEMENT OF FACTS

A. The April 2019 Emergency Procurement for the Elderly Nutrition Program (GSA Purchase Order No. P19E-003-4).

Starting on or about March 15, 2019, GSA initiated an emergency procurement on behalf of the Department of Public Health & Social Services (DPHSS) by sending out a Request for Quotations (RFQ) for the federally funded<sup>1</sup> *Elderly Nutrition Program: Congregate and Home Delivered Meals*.<sup>2</sup> The emergency procurement was for thirty days covering the month of April 1 to 30, 2019.

In response to the RFQ, Appellant Basil Food submitted a bid,<sup>3</sup> as did Appellee SH Enterprises.<sup>4</sup> On March 28, 2019, GSA awarded Purchase Order No. P19E-003-4 for the emergency procurement to SH Enterprises.<sup>5</sup>

On April 3, 2019, DPHSS conducted an inspection of SH's food establishment. The inspection found thirty eight demerits, which under 10 GCA § 23106(c), warranted a letter grade of "C" plus a Letter of Warning.<sup>6</sup>

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1 The program is funded by the Administration of Community Living, U.S. Department of Health and Human Services, as authorized through the Older Americans Act of 1965 (42 U.S.C. Chapt. 35).

2 GSA Exhibits A to D.

3 GSA Exhibit B.

4 GSA Exhibit C.

5 GSA Exhibit E; Basil Food Exhibit 1; Basil Food Notice of Appeal Exhibit C.

6 Basil Food Exhibit 3; Basil Food Notice of Appeal Exhibit E.

On April 5, 2019, Basil sent a letter to GSA notifying the agency that Basil had learned of the C rating given to SH and demanding that GSA take action.<sup>7</sup> Also on April 5, 2019, SH Enterprises advised GSA that it was withdrawing from the purchase order because it lacked enough drivers to ensure delivery of the program's home meals.<sup>8</sup> Upon the withdrawal of SH, the purchase order was awarded to Basil Food.<sup>9</sup>

**B. The September 2019 Procurement for the Elderly Nutrition Program (IFB No. GSA-056-19).**

Several months later on September 25, 2019, GSA published in the Guam Daily Post, an Invitation for Bid (IFB) No. GSA-056-19 seeking "*Nutrition Services for the comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals, and Home-Delivered Meals Component.*" The services sought by the IFB were similar to that of the emergency procurement, but for a longer period of time. Instead of thirty days, the IFB contract had a term of three years, with an option to renew for two additional one-year terms (total five years).

Section 2.4/2.5(f) of the IFB required that if a bidder had been awarded a government contract in the past, then the bidder must list any citations received that

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<sup>7</sup> Basil Food Exhibit 5.

<sup>8</sup> GSA Exhibit F; Declaration of Leslie A. Travis in Support of SH's Motion for Summary Judgment at Exhibit A (Jan. 31, 2020).

<sup>9</sup> Basil Food Exhibit 4; Basil Notice of Appeal Exhibit F.

were related to that previous contract.<sup>10</sup> The IFB additionally required each bidder to sign and submit a written certification (aka the B-4 Certification) warranting that the bidder had not been “debarred, suspended, or declared ineligible, or voluntarily excluded” to be a contractor during the previous three-year period.<sup>11</sup> Three bidders responded to the IFB: Basil Food, SH Enterprises, and Sunleader Guam, Co. Ltd.<sup>12</sup>

A public bid opening for the IFB was held on October 24, 2019, and representatives of all three bidders (Basil, SH Enterprises and Sunleader) were present. During the bid opening, receipt of the required forms (including each bidder’s B-4 certification) was noted and accepted on the audio-recorded record.<sup>13</sup> After the bids were opened, SH Enterprises was found to have been the lowest responsive and responsible bidder.<sup>14</sup>

On November 8, 2019, GSA issued a Bid Status Report recommending award of the contract in GSA-056-19 to SH Enterprises.<sup>15</sup> That same day, GSA also notified

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<sup>10</sup> Procurement Record at Tab 4, p. 56.

<sup>11</sup> Procurement Record at Tab 4, p. 38.

<sup>12</sup> GSA Exhibit G (Basil Food bid submittal); GSA Exhibit H and Basil Food Exhibit 7 (SH bid submittal).

<sup>13</sup> Declaration of Leslie A. Travis at Exhibit B [audio recording of bid opening].

<sup>14</sup> *Id.*; Procurement Record at Tab 9 (GSA Bid Analysis dated October 25, 2019).

<sup>15</sup> Basil Food Exhibit 8.

SH of its intention to award it the contract.<sup>16</sup> Finally, also on November 8, 2019, GSA awarded Purchase Order No. P206A00841 to SH Enterprises.<sup>17</sup>

Fourteen days later on November 22, 2019, Basil Food filed a procurement protest with GSA over the award of the contract to SH Enterprises.<sup>18</sup> GSA denied the protest on November 30, 2019.<sup>19</sup> This appeal followed on December 16, 2019.

**C. The Hakubotan Building Appeal (OPA-PA-20-003).**

On February 25, 2020, Basil Food filed another Notice of Appeal purportedly related to OPA-PA-19-011 and which protested the donation by SH Enterprises to the Governor of Guam of temporary office space in the Hakubotan building for use as the Guam War Claims Office. Because the Hakubotan building and the elderly congregate meal protest appeals involved identical parties and allegedly overlapping issues, the two appeals were consolidated on March 13, 2020 by order of the Hearing Officer.

GSA's arguments in defense of OPA-PA-20-003 were briefed in its Motion for Summary Judgment, and those moving pleadings are incorporated in full herein by this reference.

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<sup>16</sup> GSA Exhibit I.

<sup>17</sup> Basil Food Exhibits 9 and 11.

<sup>18</sup> GSA Exhibit J; Basil Food Notice of Appeal Exhibit I.

<sup>19</sup> GSA Exhibit L; Basil Food Exhibit 13; Basil Food Notice of Appeal Exhibit G.

### III. ARGUMENT.

#### A. SH Enterprises' Withdrawal From the April 2019 Emergency Procurement Purchase Order Contract was a Legal And Voluntary Rescission and not a "Termination For Cause."

Basil Food's Notice of Appeal argues that SH Enterprises was a non-responsive bidder who should be disqualified from the IFB because its withdrawal from the April 2019 emergency procurement is "highly questionable."<sup>20</sup> Specifically, Basil alleges that SH's withdrawal from the April 2019 emergency procurement constituted an "automatic termination for cause"<sup>21</sup> due to the C rating received.

When a program or activity involves federal funds such as the Elderly Nutrition Program, participants in the program are required to certify on Form B-4 if during the preceding three-year period they have been "debarred, suspended, or declared ineligible, or voluntarily excluded" or if they have had a public contract "terminated for cause or default."

Basil Food contends that when SH Enterprises received a C rating from DPHSS in the April 2019 emergency procurement, it did not really withdraw from the contract, but rather that the rating "triggered an automatic termination for cause."<sup>22</sup> According to Basil, this means that SH was non-responsive when on October

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<sup>20</sup> Basil Notice of Appeal at p. 6.

<sup>21</sup> Basil Notice of Appeal at p. 5.

<sup>22</sup> *Id.*

9, 2019, it signed the B-4 certification and represented that it had not had a public contract “terminated for cause or default” within the preceding three-year period.

This is a misstatement of the plain language of the April 2019 emergency procurement’s specifications. Nothing in those specifications or in the law supports an automatic termination for cause. Rather, the specifications detail at Section 12.8 that in the event a vendor receives a C rating from DPHSS, the vendor “shall be terminated,” and not that an automatic termination for cause is provoked:

**12.8 Termination for Non-Compliance with Regulatory Requirements.** In the event the Vendor who is awarded this emergency procurement for the provision of ENP Nutrition Services is issued a “C” rating from the Division of Environment Health, DPH&SS or is issued a ‘Stop Order’ by the Guam Fire Department, the awarded Vendor *shall be terminated* as the Vendor of the ENP Nutrition Services.<sup>23</sup>

Section 12.8 creates a legal obligation on the part of GSA to terminate within a reasonable period of time. In this case, however, before GSA could act, SH submitted its withdrawal and GSA did not disagree. As a matter of law, SH’s withdrawal from the April 2019 emergency procurement constituted not a termination for cause, but rather a statutory rescission of that contract.

Under Guam law, a “*rescission*” is effected when a party discovers facts that permit him to extinguish the contract and the other party consents to it. 5 GCA § 8902(5). In this case, and regardless of the underlying reasons, SH withdrew from the contract before GSA could terminate it. Because the withdrawal occurred prior to

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<sup>23</sup> Basil Food Exhibit 2 at p. 18; Basil Food Notice of Appeal Exhibit D at p. 18. (Emphasis added).

GSA taking action under Section 12.8, the act of terminating became moot.

And because GSA did not object to the withdrawal (thereby giving its consent), a permissible contractual rescission occurred as a matter of law. Under the Procurement Law at 5 GCA § 5427(a) and (b), the Chief Procurement Officer is authorized by statute to resolve rescission controversies through mutual agreement similar to that provided for in the rescission statute at 18 GCA § 8902(5).

*See also*, 2 GARR §9103 (the Chief Procurement Officer is broadly authorized to resolve by mutual agreement without litigation and “without limitation” the “full spectrum of disagreements” involving contractual controversies, including controversies involving rescission of contract).

Basil Food further attempts to discount SH’s responsiveness to the IFB by arguing that the withdrawal was required to be supported by a written determination of the Chief Procurement Officer pursuant to 5 GCA § 5211(f).<sup>24</sup> This argument is inapplicable to the current case and therefore unavailing.

First, the argument is untimely in that it was not raised in Basil’s original November 22, 2019 protest to GSA.

Second, and most importantly, Section 5211(f) applies to the withdrawal of bids or the cancellation of contracts based on “bid mistake” or “inadvertently erroneous bids” (e.g., mistakes in bid price or quantity, etcetera). Section 5211(f) does not apply

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24 Basil Food Notice of Appeal at p. 6.



to a bidder's voluntary rescission based on an inability to continue performing a contract that had been awarded to it:

Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or *to cancel awards or contracts based on bid mistakes*, shall be supported by a written determination made by the Chief Procurement Officer. . . .

5 GCA § 5211(f) (emphasis added).

**B. GSA Properly Responded to Basil's Allegations Over SH Enterprises' Submittal of a List Of Citations as Required by Section 2.4/2.5(F) of the IFB.**

Basil Food continues its argument that SH was a non-responsive bidder by claiming that SH should have been disqualified from the IFB because it did not include a list disclosing citations received in the past three years related to other government contracts.<sup>25</sup> The inclusion of this list is a requirement of Section 2.4/2.5(f) of the IFB.<sup>26</sup>

In its November 30, 2019, denial of Basil's original protest<sup>27</sup> GSA noted that although SH Enterprise did not submit inspection reports for the past three years,<sup>28</sup> it did submit one report. Basil likewise also submitted only one year's worth of citations and not three. Basil also failed to provide the citation reports for its

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<sup>25</sup> Basil Notice of Appeal at p. 4.

<sup>26</sup> Procurement Record at Tab 4, p. 56.

<sup>27</sup> GSA Exhibit L; Basil Food Exhibit 13; Basil Food Notice of Appeal Exhibit G.

<sup>28</sup> Within the inspection reports are citations (aka demerits) that are responsive to Section 2.4/2.5(f). *See e.g.*, Basil Food Exhibit 3; Basil Food Exhibit D (DPHSS inspection report of SH Enterprises dated April 3, 2019).

contracts with the Department of Corrections where it had numerous C and D ratings.

Faced with this, GSA employed a comparative analysis in its protest denial because otherwise, Basil too would be irresponsible and unresponsive for failing to submit all of its citation reports and information. This comparative analysis is relevant in that it was within the ambit of what the IFB specifications sought (“all government service contracts during this period”) and could reasonably be used to ascertain the fitness of a vendor.

To level the field, and as authorized by the General Terms and Conditions of the IFB<sup>29</sup> and Section 3109(m)(4)(B) of the procurement regulations, GSA waived both SH and Basil’s deficiencies with respect to the citation list as a minor informality. A minor informality is “a matter of form, rather than substance evident from the bid document, or insignificant mistakes that can be waived” after bid opening but before award and which has a negligible effect on price, quantity, quality, delivery, or contractual conditions. 2 GARR § 3109(m)(4)(B).

The waiver of three years’ worth of citations was confirmed in a written determination dated November 30, 2019 and concurred by the Office of the Attorney General and the Director of the DPHSS:

The Director of Public Health and Social Services has reviewed the bid specifications and agrees that the failure to submit the previous three (3) years inspection reports by both bidders (S.H. Ent. & Basil Food Service) is a minor informality.<sup>30</sup>

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<sup>29</sup> Procurement Record at Tab 4, p. 26, ¶22 (“The right is reserved as the interest of the Government may require to waive any minor irregularity in bid received.”).

<sup>30</sup> GSA Exhibit K at p. 1, ¶ 4; Basil Food Notice of Appeal Exhibit H.

Because GSA was within its statutory and contractual authority to waive the Section 2.4/2.5(f) citation list as a minor informality over a matter of form, and because both Basil and SH Enterprises were treated equally and had their respective deficiencies waived, the claim that SH was non-responsive or that Basil was treated unfairly is of no merit.

C. The Automatic Stay Provisions of 5 GCA § 5425(g) do not Apply to Post-Award Contracts.

Basil Food claims that with respect to IFB No. GSA-056-19, GSA violated the automatic stay statute at 5 GCA § 5245(g) by awarding SH Enterprises the contract for the congregate meal program without giving Basil two days' notice "that the contract was to proceed."<sup>31</sup>

It is unclear how Basil came to the conclusion that Section 5245(g) requires that a bidder be given two-days' notice before a contract is "to proceed" because that is not what the statute says. What Section 5245(g) says is that "*in the event of a timely protest,*" the Territory shall not proceed with the solicitation or award of the contract until there has been a final resolution of the protest. But if the Governor declares an emergency, or if there is a written determination by the CPO and the Attorney General and the protestant is given two days' notice. 5 GCA § 5245(g)(1)-(2), then the automatic stay is inapplicable.

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<sup>31</sup> Basil Food Notice of Appeal at pp. 7-8.

At this juncture, the posture of this appeal and the contract at issue is *post-award*. The bids in GSA-056-19 were publicly opened on October 24, 2019 in front of Basil, SH Enterprises, and Sunleader.<sup>32</sup> Fifteen days later on November 8, 2019, the contract was awarded to SH.<sup>33</sup> And it was not until another fourteen days after the award (on November 22) that Basil filed its original protest with GSA.<sup>34</sup>

The automatic stay and two-day notice rule of Section 5425(g) is triggered when a timely protest is filed *before* the award is made, and not after. This rule has been conclusively established by the courts of Guam. “In order to trigger the automatic stay, [the] protest must have been timely and *before the award was made*.” *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15, ¶ 35 (emphasis added. *See also, TLK Marketing Co., Ltd. v. GVB, et al*, CV0914-16 DECISION & ORDER at p. 10 (Super. Ct. Guam Nov. 13, 2018) (citing *Guam Imaging* and affirming underlying Public Auditor decision in OPA-PA-16-003 at p. 3 (June 15, 2016) that automatic stay is not available post-award).

It goes without saying that if no protest is filed, then there is no protested procurement to stay. And if there is no procurement to stay, then not only is there is no legal reason to prohibit making an award, but there is also no “protestant” available to receive the two-day notice that an award is to be made.

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<sup>32</sup> Declaration of Leslie A. Travis at Exhibit B [audio recording of bid opening].

<sup>33</sup> GSA Exhibit I; Basil Food Exhibits 9 and 11.

<sup>34</sup> GSA Exhibit J; Basil Food Notice of Appeal Exhibit 1.

Basil knew at the bid opening on October 24, 2019, that SH Enterprises was the low bidder and that the contract award to SH was imminent. Basil also knew about the C rating given to SH in the April 2019 emergency procurement and had already formulated a belief (albeit mistaken) that the effect of the rating was an “automatic termination for cause.”<sup>35</sup> And although GSA did not need to wait after the bid opening to make an award of the IFB, it did so and the contract was not actually awarded until fifteen days later on November 8, 2020.

Had Basil filed its protest during those fifteen days between October 24 and November 8, the automatic stay would have applied. But Basil did *not* file its protest before November 8. And not that it makes any difference in the analysis here, but even *after* November 8, Basil waited a full two weeks until right up to the protest filing deadline (and nearly one month after the October 24 bid opening) before finally filing on November 22.

The law is clear: Timing matters. Because Basil failed to file its protest before the award to SH was made on November 8, the automatic stay allowed for by 5 GCA § 5245(g) was not triggered and is inapplicable here.

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35 Basil Food Exhibit 5.

#### IV. CONCLUSION AND RELIEF SOUGHT.

The contract for the Elderly Nutrition Program in GSA-056-19 was correctly awarded to SH Enterprises. Whatever the reason behind SH's withdrawal from the April 2019 emergency procurement, as a matter of law and contract, the withdrawal was not an "automatic termination for cause" but rather a rescission that the Chief Procurement Officer was statutorily authorized to accept under 2 GARR §9103 and 18 GCA § 8902(5).

GSA also properly exerted its authority under the IFB and the procurement regulations at 2 GARR § 3109(m)(4)(B) when it waived as a minor informality the failures of both Basil and SH's to submit a citation list. Finally, because this appeal was filed as a post-award protest, the automatic stay and two-day notice requirement provided for by 5 GCA § 5425(g) are inapplicable.

For all the above reasons and the reasons set forth in GSA's Motion for Summary Judgment, and for all the evidence and arguments that will be presented at the administrative hearing on this matter, it is respectfully prayed that the Public Auditor issue a directed verdict or else render a decision in favor of GSA on all claims and issues presented, and that Basil Food take nothing by its protest appeal.

Respectfully submitted on this 7th day of August, 2020.

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