



Office of the Attorney General
 Leevin Taitano Camacho
 Attorney General of Guam
 Solicitor Division
 590 S. Marine Corps Drive
 ITC Bldg., Ste. 802
 Tamuning, Guam 96913 • USA
 Tel. (671) 475-3324 Fax. (671) 472-2493
 www.guamag.org
 Attorneys for the Government of Guam

RECEIVED
 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS

DATE: 08/10/2020

TIME: 2:30 AM PM BY: T.B

FILE NO OPA-PA: 19-011/20-003

**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
)	SUPPLEMENTAL EXHIBIT M
Appellant.)	(RE: BASIL PROTEST NOTICE
)	DATED FEBRUARY 7, 2020)
)	
)	

The Purchasing Agency hereby supplements the Procurement Record in this consolidated case and its Hearing Exhibit List (filed on March 13, 2020), to include the attached original protest letter of Basil Food Services to General Services Agency dated February 7, 2020. This exhibit was previously filed by Basil as *Exhibit F* to its Notice of Appeal filed with the OPA on February 27, 2020.

ORIGINAL

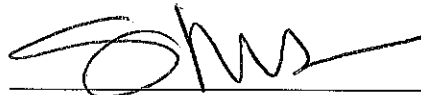
SUPPL. EXHIBIT NO.	DATE	DESCRIPTION	ADMITTED
M	07 Feb. 2020	Letter to Chief Procurement Officer Re. Protest of the Award of the GSA- 056-019 to SH Enterprises, Inc. Based on Ethical Violations	

GSA expressly reserve its right to continue amending or supplementing this Exhibit List in order to identify any additional relevant evidence or documents that may be used in its defense or in rebuttal. GSA also continues to reserve the right to question and use any documents identified by Appellant Basil Food Services (Basil) and interested party SH Enterprises (SH).

Respectfully submitted on this 10th day of August, 2020.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By:



SANDRA C. MILLER
Assistant Attorney General

EXHIBIT M

Letter to Chief Procurement Officer Re. Protest
of the award of the GSA-056-019 to SH
Enterprises, Inc. Based on Ethical Violations

07 February 2020



CAMACHO
CALVO
LAW GROUP LLC

February 7, 2020

VIA HAND DELIVERY

GENERAL SERVICES AGENCY
590 S. Marine Corps Drive, Suite 219
Tamuning, Guam 96932

Attention: Claudia Acfalle, *Chief Procurement Officer*

Re: **PROTEST OF THE AWARD OF GSA-056-019 TO SH ENTERPRISES, INC.
BASED ON ETHICAL VIOLATIONS**

Dear Ms. Acfalle:

Basil Foods Industrial Services ("Basil") protests the award of Bid No. GSA-056-19 issued by GSA to SH Enterprises, Inc. for the Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Components due to its violation of Guam's procurement laws and regulations. You may reach Basil through its attorneys, Camacho Calvo Law Group LLC, Geri E. Diaz, Esq., at 356 E. Marine Corps Drive, Suite 201, Hagåtña, Guam 96910.

I. BASIL'S PROTEST IS TIMELY

Under Guam procurement law, an actual bidder who has been aggrieved in connection with the method of source selection, solicitation or award of a contract may file a protest to the Chief Procurement Officer "in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 G.C.A. § 5425(a). The Supreme Court of Guam confirmed this timeline, and explained that the Guam Administrative Rules and Regulations ("GAR") also prescribe the same time standards for filing a protest. Teleguam Holdings, LLC v. Guam, 15 Guam 13 ¶¶ 22-23.

On January 24, 2020, it was reported in the Pacific Daily News that the War Claims Processing Center had opened its new location in the former Hakubotan building in Tamuning. **Exhibit A.** That same day, one of the topics discussed during the Patty Arroyo Show on Newstalk K57 was the new site for the War Claims Processing Center. While on-air, a listener called in and questioned Ms. Arroyo on whether the government had gone through the procurement process to secure the former Hakubotan building as the new location for the processing center. Ms. Arroyo's response was that the building, its fixtures and the utilities were donated.

Received by:

William J. Melendez
2/10/2020 @ 8:32am

COPY

Claudia Acfalle
GENERAL SERVICES AGENCY
February 7, 2020
Page 2

The undersigned immediately served a Freedom of Information Act (FOIA) request on the Governor's office on January 24, 2020 to obtain documentation confirming whether the building was, in fact, donated per the statements made during the radio show. **Exhibit B.**

On January 30, 2020, in response to the FOIA request, the undersigned received a copy of a one-page document dated January 22, 2020 from S.H. Enterprises, Inc. to Governor Leon Guerrero indicating that it was donating "the temporary utilization of approximately +/- 5,000 square feet of commercial space located on the first floor, utilities, and access to the building's parking lot for the Guam War Claims Center." **Exhibit C.** This document is significant in that it is clear and convincing evidence that S.H. Enterprises had violated 2 GAR, Div. 4, § 11107(4) and 5 G.C.A. § 5630(d) which prohibits favors to the government.

Basil's first knowledge of a potential ethical violation committed by S.H. Enterprises occurred upon hearing the statements made on Patti Arroyo's January 24, 2020 on-air show on Newstalk K57. Accordingly, the filing of this protest on February 6, 2020 is timely.

II. S.H. ENTERPRISES, INC. PROVIDED A FAVOR TO THE GOVERNMENT OF GUAM IN VIOLATION OF ETHICAL STANDARDS SET FORTH IN THE PROCUREMENT LAWS AND REGULATIONS

GSA issued Bid Invitation No. GSA-059-019 for Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Meals Components. **Exhibit D.** Included in the very first page of the 151-page document was a Special Reminder to Prospective Bidders of the required documents to be included in the bid envelope for consideration during the bid opening, including the Affidavit Disclosing Ownership and Commissions, the Affidavit Regarding No Gratuities or Kickbacks, and the Affidavit Regarding Ethical Standards. **Exhibit E.** Hui Sook Min, one of the authorized representatives for S.H. Enterprises, acknowledged receipt of the Special Reminder form on October 8, 2019. **Exhibit D.**

In the Affidavit Disclosing Ownership and Commissions, Mrs. Min affirmed that she is an authorized representative of S.H. Enterprises, Inc., and that she owned 50% interest in this company while Tae Hong Min owned the remaining 50%. **Exhibit E.**

Mrs. Min also affirmed in the Affidavit Regarding No Gratuities or Kickbacks that she is the Vice-President of S.H. Enterprises, Inc. and that to the best of her knowledge, neither she nor any of S.H. Enterprises' officers, representatives, agents, subcontractors, or employees have violated, [or] are violating the prohibition against gratuities and kickbacks set forth in 2 GAR Division 4 § 11107(e). She promised on behalf of S.H. Enterprises *not to violate* that provision and she also affirmed that neither she nor any of S.H. Enterprises' officers, representatives, agents, subcontractors, or employees have offered, given or agreed to give, any government of Guam employee or former government employee, any payment, gift, kickback, gratuity or offer of employment in connection with S.H. Enterprises' bid proposal. **Exhibit E.**

Basil protests the award of GSA-056-019 to S.H. Enterprises because S.H. Enterprises donated approximately +/- 5,000 square feet of commercial space on the first floor of the former Hakubotan building, including utilities and access to the building's parking lot, as a favor to the Government of Guam for use as the Guam War Claims Processing Center. This donation is in direct contravention to the contract specifications set forth in GSA-056-019 and is a violation of 2 GAR, Div. 4, § 11107(4) Favors to the Government of Guam and 5 G.C.A. § 5630(d) Favors to the Territory.

A. The Purpose of Guam's Procurement Laws and Regulations

At the onset, it should be emphasized that the underlying purposes and policies of the procurement law is to provide for increased public confidence in the procedures followed in public procurement, to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory, to foster effective broad-based competition within the free enterprise system, to provide safeguards for the maintenance of a procurement system of quality and integrity, etc. 5 G.C.A. § 5001; 2 GAR, Div. 4 § 1102.

Guam's procurement laws and regulations includes essential standards of ethical conduct as well as standard policies and procedures which must be observed and adhered to by those doing business with the Territory in order to advance these goals. 5 G.C.A. § 5625; 2 GAR, Div. 4 § 1101.

B. The Prohibition of Favors to the Government

The Affidavit Regarding No Gratuities or Kickbacks, which was signed by Mrs. Min specifically references 2 GAR, Div. 4, § 11107(e). That section states,

(e) Contract Clause. The following clause shall be conspicuously set forth in every contract and solicitation therefor:

REPRESENTATION REGARDING GRATUITIES AND KICKBACKS

The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in §11206 (Gratuities and Kickbacks) of the Guam Procurement Regulations.

2 GAR, Div. 4, § 11107(e).

A gratuity is defined as "a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received." 5 GCA § 5601(f); 2 GAR, Div. 4, § 11101(a)(6) and § 1106 (41). A gratuity may include "any tangible and intangible benefit in the nature of gifts, favors, entertainment, discounts, passes, transportation, accommodation, hospitality, or offers of employment. Nominal value means actual worth or actual cost, whichever is greater, which does

not exceed \$25 individually or cumulatively.” 2 GAR, Div. 4, § 11101(a)(6). Based on these definitions, gratuities and favors are one in the same.

At issue in this protest is the violation of 2 GAR, Div. 4, § 11107(4), which states,

(4) Favors to the Government of Guam. For purposes of this subsection, a favor is anything, including raffle tickets, or more than *de minimis* 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...to offer, give or agree to give any employee or agent of the government of Guam or for any employee or agent of the government of Guam to solicit or accept from any such person or entity or agent thereof a favor or gratuity on behalf of the government of Guam whether or not such favor or gratuity may be considered a reimbursable expense of the government of Guam, during the pendency of any matter related to procurement, including contract performance warranty periods. [Emphasis added.]

2 GAR, Div. 4, § 11107 (4). Its counterpart, 5 G.C.A. § 5630(d), is nearly identical, but instead of “Government of Guam,” it uses the word “Territory.”

Upon signing the Affidavit Regarding No Gratuities or Kickbacks, Mrs. Min, on behalf of S.H. Enterprises, acknowledged that she was fully apprised of the ethical standards prohibiting gratuities, and she knowingly affirmed that neither she nor S.H. Enterprises’ representatives had violated, were violating, or will violate this prohibition. In fact, her signature on this document evidences not only her knowledge and intent to comply with this requirement, but also her assurance that S.H. Enterprises and its representatives would comply as well.

Surprisingly, however, S.H. Enterprises’ willfully breached the contract when it donated a section of the former Hakubotan building to the government less than three months after it was awarded the GSA-056-019 contract. This act was a complete deviation from S.H. Enterprises’ promise to comply with the contract’s specifications and requirements and is a significant breach of the ethical standards proclaimed in Guam’s procurement laws and regulations. It should be noted that the sheer size of the benefits provided to the Government of Guam for the free use of the former Hakubotan building, which includes utilities and parking, far exceeds the thresholds of what is considered a *de minimus* value. Also, at the time this favor was provided to the government, S.H. Enterprises was already a government contractor as it had been just awarded a multi-million dollar procurement contract¹ (GSA-056-019).

¹ S.H. Enterprises’ contract period for GSA-056-019 commenced on November 8, 2019 and is set to last for three years with the option to renew for two additional years. Exhibit F.

Claudia Acfalle
GENERAL SERVICES AGENCY
February 7, 2020
Page 5

In assessing the appropriate remedy for this violation, we must hone in on the purpose and policies of Guam's Procurement law, which were implemented to ensure the fair and equitable treatment of all those who participate in the procurement system, to increase individual's confidence in the public procurement process, to encourage healthy competition, to ensure the quality and integrity of the procurement system, etc. Clearly, S.H. Enterprises violation of the prohibition against favors to the government chips away and negates the public's trust in the procurement system.

Based on the foregoing, Basil respectfully requests the following:

1. That this protest be granted;
2. That GSA terminate its contact with S.H. Enterprises and reissue the Invitation For Bid for the Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Components;
3. That GSA debar or suspend S.H. Enterprises from being a government contractor; and
4. For any other relief available to Basil under Guam law.

Sincerely,

CAMACHO CALVO LAW GROUP LLC


Geri E. Diaz

Enclosures(s): See Exhibits A to E.

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