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Appeal of Basil Food Industrial Services Corporation, OPA-PA-19-011 and OPA-PA-20-003

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Hafa Adai,

Attached for filing, please find Appellant Basil Food Industrial Services Corporation's Proposed Findings of Facts and Conclusions of Law in regards to the above mentioned subject matter.

Kindly confirm your receipt of the attached document. Should you have any questions or concerns regarding this matter, please do not hesitate to give us a call. Thank you.

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Appellant Basil Food Industrial Services Corporation's FOFCOL.pdf
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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 PROPOSED
FINDINGS OF FACTS AND
CONCLUSIONS OF LAW**

This matter came before the Public Auditor Benjamin Cruz of the Office of Public Accountability (“OPA”) on October 5, 5 and 7, 2020. Appellant Basil Foods Industrial Services (hereinafter “Basil”) submits its proposed Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

Only for ultimate or controlling issues. Only those facts essential to the cause of action and that would have a direct effect on the judgment or one that supports a judgment for one party or another.

On March 28, 2019, SH Enterprises was awarded Purchase Order No. P196E00314 for the Provision of Nutrition Services for the Comprehensive Management, Operations and Maintenance

For The Department of Public Health and Social Services (“DPHSS”) Elderly Nutrition Home-Delivered Meal Program (hereinafter the April 2019 contract”). The services dates were from April 1, 2019 to April 30, 2019. Basil Exhibit 1.

Section 12.8 of the Specifications for the April 2019 contract stated that if a Vendor who is awarded the contract is issued a “C” rating from DPHSS, the awarded Vendor shall be terminated as the Vendor for Elderly Nutrition Program [“ENP”]. Basil Exhibit 2.

SH Enterprises began providing meal services to the manamko pursuant to the April 2019 contract on April 1, 2019. Basil Exhibit 1.

Two days later, on April 3, 2019, DPHSS issued a Food Establishment Inspection Report for SH Enterprises noting thirty-eight (38) demerits and the issuance of a C rating for its numerous violations of the Guam Food Code. Basil Exhibit 3.

On April 5, 2019, SH Enterprises withdrew from the April 2019 contract on the basis that it did not have a sufficient number of delivery drivers to deliver the meals to the manamko in a timely manner. GSA Exhibit F.

That same day, on April 5, 2019, GSA issued Purchase Order No. P196E00431 to Basil for the provision of food services to the manamko for the period of April 8, 2019 to April 30, 2019. Basil Exhibit 4.

Six months later, on September 25, 2019, GSA issued an Invitation for Bid (“IFB”) No. GSA-056-19. The IFB was to provide an estimated seven hundred (700) to eight hundred (800) meals to the manamko at designated sites, including twelve (12) Senior Citizen Centers and three (3) Adult Day Care Centers (congregate component). This contract also included the provision of approximately one thousand (1,000) to one thousand two hundred (1,200) meals to those manamko who live at home (home-delivered meals component). Basil Exhibit 7.

The IFB mandated the bidders to submit specific documents or to make certain disclosures. Specifically, the bidders were required to notify the purchasing agency whether they ever had a government contract terminated for cause in the last three years. Basil's Exhibit 7, page 38 of 151. The IFB also required that the bidders submit evidence of latest graded Food Inspection Reports issued by the Guam DPHSS, Division of Environmental Health ("DEH") for the past 12 months preceding the submission of the bid and a list of citations in the areas of procurement, questioned costs, material weaknesses and the bidder's non-compliance with contract provisions for any government contracts awarded in the past 3 years. Basil Exhibit 7, page 56 of 151, Section 2.4 and 2.5.

During the Bid Opening on October 24, 2019, the bid packets for both SH Enterprises and Basil were opened. Michael Zhou of Basil appeared at this Bid Opening. (Testimony of Michael Zhou, October 6, 2019, 18:05.) GSA did not award the contract to either of the vendors at this time. (Testimony of Michael Zhou, October 6, 2019, 18:50.)

Basil had a prior government contract to provide food services for the manamko that was terminated on June 1, 2016. (Testimony of Michael Zhou, October 6, 2019, 25:50; Basil Exhibit 19.) The basis for the denial was that it had received a D rating from DPHSS, as well as similar ratings in the past. Basil Exhibit 19. Basil protested the termination and then appealed to the Superior Court of Guam. (Testimony of Michael Zhou, October 6, 2019, 26:39; see also Basil Food Industrial Services Corporation vs. Territory of Guam; General Services Agency, Department of Administration; and the Office of Public Accountability, CV0995-16.) Basil further appealed to the Supreme Court of Guam and the Judgment was issued on December 31, 2019. (See Basil Food Industrial Services Corporation vs. Territory of Guam; General Services Agency, Department of Administration; and the Office of Public Accountability, CVA18-030.)

Mr. Min is the President of SH Enterprises. He prepared the bid packet for the IFB No. GSA-056-19 and IFB No. GSA-001-20. (Testimony of Mr. Min, October 6, 2019, 1:15:20.) At times, Mr. Min would explain some of the contract terms to Mrs. Min if she didn't understand it. (Testimony of Mr. Min, October 6, 2019, 1:16:10.) Mr. Min has experience with the local procurement process since SH Enterprises has been awarded government contracts since 2004. (Testimony of Mr. Min, October 6, 2019, 1:17:15.) When the bid packets for GSA-056-19 and IFB GSA-001-20 were submitted, he understood the entirety of the requirements and specifications in the IFBs and he intended to comply with them. ((Testimony of Mr. Min, October 6, 2019, 1:18:41.) He further understood the prohibition against ethical violations. (Testimony of Mr. Min, October 6, 2019, 1:28:48.)

On November 8, 2019, GSA awarded the GSA-056-19 to SH Enterprises. Basil Exhibit 8.

The General Terms and Conditions for GSA-056-19 states that the standard for determining the lowest responsible bidder includes the following factors: (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 specifications; (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 laws and regulations relative to procurement; (f) the sufficiency of the financial resources and ability of the Bidder to perform; (g) the ability of the Bidder to provide future maintenance and services for the subject of the award; and (h) the compliance with all of the conditions to the solicitation. Basil Exhibit 7.

Basil issued a Freedom of Information Act (FOIA) request to GSA on November 12, 2019 requesting a complete copy of all documents submitted by SH Enterprises in response to the IFB.

The responsive documents revealed that SH Enterprises did not submit the required information and documents pursuant to the Bidder Assurances in sections 2.4 and 2.5 of the IFB.

Basil filed its protest on November 22, 2019 on the basis that SH Enterprises was neither a responsive nor a responsible bidder.

GSA denied Basil's protest on November 30, 2019. GSA also issued a Written Determination that same day advising that the failure to submit the previous three (3) years inspection reports by SH Enterprises and Basil is a minor formality. This document was also signed by the Deputy Attorney General. GSA Exhibit K.

Basil filed its Notice of Procurement Appeal on December 16, 2019.

SH Enterprises, Inc. issued a letter to Governor Leon Guerrero on January 22, 2020 agreeing to donate "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." Basil Exhibit 14.

While this appeal was pending, the Pacific Daily News reported on January 24, 2020, that the new War Claims Processing Center was now open to the public at the Hakubotan building in Tamuning.

On January 29, 2020, SH Enterprises submitted its bid for IFB No. GSA-001-20 for Food Services For Department of Corrections ("DOC") Inmates and Detainees. This contract was for a term of three (3) years with two options to renew for an additional fiscal year. Basil Exhibit 17.

GSA awarded this new DOC contract to SH Enterprises on February 25, 2020. Basil Exhibit 18.

Basil's filed a second timely protest to GSA-056-19 on February 7, 2020 as a result of SH Enterprises ethical violations.

The next day, on February 8, 2020, GSA denied Basil's protest based on 5 GSA § 5630 (a) and (b).

When it submitted its bid packet for GSA-056-19, SH Enterprises should have informed GSA that it had failed to fulfill the requirements of the April 2019 contract in that it did not have enough drivers to deliver the meals to the manamko. (Testimony of Claudia Acfalle, October 5, 2020, 50:00 and Testimony of Anita Cruz, October 6, 2020, 1:37:50.)

SH Enterprises should have also informed GSA of its non-compliance with the terms of the April 2019 contract when it received a C rating from DPHSS. (Testimony of Claudia Acfalle, October 5, 2020, 50:36.)

GSA would have taken into consideration whether SH Enterprises' non-compliance with the terms of the April 2019 contract, namely, that it did not have enough drivers to deliver the meals and that it received a C rating from DPHSS when determining if SH was a responsible bidder. (Testimony of Claudia Acfalle, October 5, 2020, 52:15.)

GSA would have placed great weight on SH Enterprises' failure to comply with the Guam Food Code in April 2019 when determining whether it was a responsible bidder. (Testimony of Claudia Acfalle, October 5, 2020, 53:48.)

The failure to have the citations included SH Enterprises bid packet would deem them a non-responsive bidder. (Testimony of Claudia Acfalle, October 5, 2020, 2:42:15.)

After SH Enterprises bid packet for GSA-056-19 was opened, Anita Cruz of GSA analyzed it and then forwarded her report and the bid packet documents to DPHSS for their review and evaluation. Anita Cruz verified that SH Enterprises had provided those documents listed on GSA's bid checklist (Basil's Exhibit 7, page 1 of 151) as well as the required federal documents. She did

not verify if SH Enterprises submitted the additional documents requested in the Bidder Assurances section of GSA-056-19. (Testimony of Anita Cruz, October 6, 2020, 1:41:20.)

SH Enterprises' bid packet did not contain the April 3, 2019 C rating inspection report from DPHSS. (Testimony of Anita Cruz, October 6, 2020, 2:29:55.)

GSA's Analysis Report of the bids from SH Enterprises and Basil did not include an analysis of the Bidder Assurances Requirements pursuant to sections 2.4 and 2.5f of GSA-056-19. (Testimony of Anita Cruz, October 6, 2020, 1:46:39.)

The Bidders Assurances sections (sections 2.4 and 2.5f) of GSA-056-19 are specifications for DPHSS. Thus, DPHSS is tasked with the job of reviewing and analyzing if SH Enterprises met the requirements. (Testimony of Anita Cruz, October 6, 2020, 1:47:20.)

The only two vendors who have competed for emergency procurement food services contracts in the past few years are Basil and SH Enterprises. (Testimony of Anita Cruz, October 6, 2020, 2:26:55.)

GSA did not include the required documents listed in the Bidder Assurances section of GSA-056-19 when preparing its bid packet checklist. (Testimony of Anita Cruz, October 6, 2020, 2:35:10.)

The Chief Procurement Officer does not get deeply involved in analyzing the bid packets; the Buyer/Supervisor [Anita Cruz] does so. Upon receipt of the bid recommendations, Claudia Acfalle quickly reviews and approves it prior to award to the vendor. (Testimony of Claudia Acfalle, October 5, 2020, 1:39:21.)

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II. CONCLUSIONS OF LAW

A. TIMELINESS OF BASIL'S NOVEMBER 22, 2019 PROTEST

Basil's protest of the award of GSA-056-19 to SH Enterprises on November 22, 2019 was timely. Under Guam procurement law, an actual bidder who may be or 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 held that "the 14-day window of section 5425(a) begins to run...when the protester knew, or should have known, facts *establishing the essential elements of that protest claim.*" DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam 14 ¶ 88. Emphasis added.

Basil's prior knowledge of SH Enterprises' April 3, 2019 C Rating from DPHSS, coupled with its confirmation during the Bid Opening on October 24, 2019 that SH Enterprises had filed a bid packet for IFB No. GSA-056-19, was simply not enough to arm it with the essential facts to give rise to a protest.

IFB No. GSA-056-19 required that all bidders submit a number of documents, including a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion, its DPHSS inspection reports for the past 12 months, and a list of citations of non-compliance of the provisions¹ in its government contracts within the past 3 years. Nowhere in IFB No. GSA-056-19 does it state that the failure to provide these documents will result in the immediate or absolute disqualification of a bidder. This is especially true considering that section 16 of the General Terms and Conditions of IFB No. GSA-056-19 lists eight factors that must be evaluated by the Chief Procurement Officer when determining the lowest responsible bidder.

¹ This requirement is pursuant to sections 2.4 and 2.5f of the Bidder Assurances section of IFB No. GSA-056-19.

During the bid opening, GSA verified that both Basil and SH Enterprises had provided all the required documents on its checklist, as listed on page 1 of 151 of IFB No. GSA-056-19. GSA, however, did not verify whether Basil or SH Enterprises had provided its DPHSS inspection reports for the past 12 months or a list of citations of non-compliance with its government contracts within the past 3 years. GSA claimed that it was DPHSS's task to verify the presence of these documents and to analyze the information. Accordingly, at the conclusion of the bid opening, GSA did not award the contract to any vendor.

Upon notice on November 8, 2019 that GSA was awarding GSA-056-19 to SH Enterprises, Basil was now armed with the knowledge that it was aggrieved, and it is only at this point that the "knew or should have known" threshold for a protest was reached.

Basil immediately issued a FOIA to GSA and requested the entire bid documents submitted by SH Enterprises. Upon receipt of the responsive documents, Basil confirmed that it did not contain SH Enterprises' inspection report from DPHSS dated April 3, 2019 or any information relating to its non-compliance with the terms and conditions of the April 2019 contract. Basil then filed a timely protest on November 22, 2019.

In further consideration of when the 14-day clock begins to tick, a party becomes aggrieved when they become aware of a violation of one of the procurement law's substantive provisions or the terms of the RFP." DFS Guam L.P., 2020 Guam 14 ¶ 84.

There was no violation of a substantive portion of the procurement law or the terms of the IFB on the day of the Bid Opening held on October 24, 2019. SH Enterprises' failure to submit documents or information pursuant to sections 2.4 or 2.5f of the Bidder Assurances on the day of the Bid Opening did not violate any substantive provision of the procurement laws, and was therefore, not actionable. Further, SH Enterprises' submittal of the signed Certification Regarding

Debarment, Suspension, Ineligibility and Voluntary Exclusion on the day of the Bid Opening, without more, was also not a violation of the procurement laws, and was not actionable.

More importantly, there was no violation of the terms of IFB No. GSA-056-19 on the day of the Bid Opening, as the Chief Procurement Officer and DPHSS were still tasked with the duty of reviewing and analyzing the bid packet materials. Therefore, the mere submittal of the bid packets did not provide the foundation for a protest on October 24, 2019. The actual catalyst that led to 14-day clock to start ticking occurred on November 8, 2019 when Basil learned that SH Enterprises would be awarded the contract despite the exclusion of relevant information relating to its performance under the April 2019 contract.

DFS Guam LP is distinguishable from the present case as it involved Guam's Procurement Laws and Regulations prohibiting ethical violations. In DFS Guam LP, the basis for the protest was an ethical violation resulting from a trip made by two members of the GIAA Board of Directors with the Guam Visitors Bureau Delegation to South Korea. During this trip, it is alleged that these board members received gifts from Lotte, who was a bidder for the retail concession at the airport. 5 GCA Chapter 5, Article 11 discusses ethics in public contracting and it clearly lays out the ethical standards for public employees and non-employees. 5 GCA § 5630 further discusses the prohibition of gratuities, kickbacks and favors to the Government of Guam. The very occurrence of this trip which resulted in the GIAA Board of Directors receiving gifts at the Lotte department store in Seoul was sufficient for a protest based on a violation of a substantive provision of Guam's Procurement Law, namely, the prohibition of ethical violations. At that point, DFS became aggrieved due to the continued consideration of Lotte for the concessionaire contract, and

therefore, had an immediate basis to file a protest.

B. SH ENTERPRISES WAS NOT A RESPONSIVE OR RESPONSIBLE BIDDER AS IT FAILED TO DISCLOSE ITS NONCOMPLIANCE WITH THE CERTAIN TERMS OF THE APRIL 2019 CONTRACT

Guam Procurement Law defines a responsive bidder as a person who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA § 5201(g). A responsible bidder is one who has the capability in all respects to carry out the contract's requirements to the fullest extent while preserving its integrity and reliability. 5 GCA § 5201(f).

Sections 2.4 and 2.5(f) of the Bid Specifications for IFB No. GSA-056-19 require each bidder to list citations in the areas of procurement, material weaknesses, and its organization's noncompliance with contract provisions for the prior three years.

When it submitted its bid packet for IFB No. GSA-056-19 in October 2019, SH Enterprises willfully failed to notify GSA of its noncompliance with the April 2019 government contract for food services for the manamko. Specifically, SH Enterprises did not provide a complete copy of its inspection reports from DPHSS in the past twelve (12) months, including the April 3, 2019 inspection report wherein it received a C rating from DPHSS.

SH Enterprises also willfully failed to notify GSA that it did not comply with the April 2019 contract's requirement that it have a sufficient number of delivery drivers to ensure the meals were served to the manamko in a timely manner. Due to the mounting complaints it received because of its late deliveries, SH Enterprises withdrew from the contract after five (5) days.

This evidence of noncompliance with the April 2019 contract should have been reported to GSA when SH Enterprises submitted its bid packet for IFB No. GSA-056-19. These were required documents and SH Enterprises' failure to provide them makes it is a nonresponsive bidder.

Further, due to the failure to provide these documents, GSA and DPHSS could not have completed an adequate and fully informed analysis of whether SH Enterprises was a responsible bidder.

GSA argues that both SH Enterprises and Basil has failed to provide all of their inspection reports in their bid packet for IFB No. GSA-056-19. Basil had one of its contract's terminated in June 2016, which is outside of the three (3) year requirement indicated in the IFB No. GSA-056-19. Therefore, it was not required to be produce information regarding this termination pursuant to the IFB's specifications. Further, GSA claims that Basil failed to advise of its ongoing court case which ended up in the Supreme Court of Guam. This claim does not carry any weight as the basis for that case stemmed from events outside of the 3 year period. Also, GSA was fully aware of the status of this court case as it was a defendant and was involved in the proceedings.

Despite its contention that the failure for Basil and SH Enterprises to submit all of its inspection reports in the past three (3) years was a minor informality, GSA did not meet the fair and equitable treatment standard when it awarded the contract to Basil before receiving the waiver from the Deputy Attorney General on November 30, 2019.

C. SH ENTERPRISES' DONATION OF THE HAKUBOTAN BUILDING IN JANUARY 2020 VIOLATED THE ETHICAL PROHIBITIONS IN THE GUAM PROCUREMENT ACT, THE GUAM PROCUREMENT REGULATIONS, AND THE TERMS AND CONDITIONS OF GSA-056-19.

SH Enterprises became a contractor of the Government of Guam on November 8, 2019 when it was awarded the GSA-056-19. At that very instance, it became bound to all the terms and conditions outlined in that Contract, including 2 GAR, Div. 4, § 11107 which prohibits gratuities, kickbacks, or favors.

Mrs. Min, the Vice President of SH Enterprises, signed the No Kickbacks or Gratuities Affidavit form which was included as part of IFB No. GSA-056-19. She conceded that neither she

nor her officers, representatives, agents, subcontractors, or employees have violated or are violating the prohibition against gratuities and kickbacks set forth in 2 GAR Div. 4 § 11107(e). Further, both Mr. and Mrs. Min understood the prohibition against ethical violations and intended to abide by the terms and conditions of GSA-056-19.

SH Enterprises violated GAR, Div. 4, § 11107, subsection 4, by providing a favor to the Government of Guam during the pendency of Basil's protest and appeal of GSA-056-19. The donation of the Hakubotan building, including the utilities and parking space, to the Government of Guam in January 2020, was more than *de minimus* in value. Further, there is no legal requirement that there be a direct correlation between this action and the award of the government contracts to SH Enterprises. Accordingly, SH Enterprises donation was a breach of Guam Procurement Laws and Regulations on ethical standards.

DATED: Hagåtña, GU, October 16, 2020.

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