



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of Johndel International, Inc. dba. JMI Edison, Docket N. OPA-PA-23-002

R. Marsil Johnson <rmarsjohnson@bsjmlaw.com>

Thu, Oct 26, 2023 at 4:55 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: "Joshua D. Walsh" <jdwalsh@rwtguam.com>, William Brennan <Wbrennan@arriolafirm.com>, Vince Duenas <vduenas@guamopa.com>, Thyrza Bagana <tbagana@guamopa.com>

Dear Mr. Hernandez:

Please see the attached **Supplemental Brief on Emergency** (18 pages) for e-filing in the above-referenced matter. Kindly acknowledge receipt via return e-mail.

Thank you. Should you have any questions, please let us know.

Regards,

R. Marsil Johnson

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2023.10.26 - Interested Party Menzies Supplemental Brief on Emergency re OPA PA-23-002.pdf

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

13 In the Appeal of)	Docket No. OPA-PA-23-002
)	
14 Johndel International, Inc. dba. JMI-)	INTERESTED PARTY
15 Edison,)	MENZIES AVIATION'S
)	SUPPLEMENTAL BRIEF ON
16 Appellant.)	EMERGENCY PROCUREMENT
)	
)	

17 Interested Party AIRCRAFT SERVICE INTERNATIONAL, INC. DBA MENZIES AVIATION
18 (“Menzies”), pursuant to Hearing Officer Joseph McDonald’s October 12, 2023 verbal order,
19 hereby submits its Supplemental Brief on Emergency Procurement in the above-captioned matter.

20 **REQUEST FOR SUPPLEMENTAL BRIEFING**

21 At the October 12, 2023, Office of Public Accountability (“OPA”) hearing in this matter,
22 Hearing Officer McDonald requested that the parties provide supplemental briefing on the
23 following issue:

24 When I look at the definition of “emergency” I would like to know are there any
25 other analogs like this one? Where the emergency is brought about through
26 litigation or a stay or some event that’s created by humans as opposed to natural
27 emergency. Are there any other cases where something like this was treated as an
28 emergency?
Secondly, in those events, if we can find them, how long did the emergency
continue?
And of course, not just that there was a sufficient analogue, but any analysis of why
it was called an emergency when it was a human-created event.

1 See Audio October 12, 2023; 2:28:55 to 2:33:35.

2 **ARGUMENT**

3 **A. THE GOVERNMENT OF GUAM REGULARLY USES EMERGENCY PROCUREMENT TO**
4 **PROVIDE GOODS AND SERVICES WHERE AN EXISTING ATTEMPT AT PROCUREMENT**
5 **HAS BEEN STALLED DUE TO A PROTEST OR OTHER PROCEDURAL HURDLE**

6 Government of Guam agencies regularly use emergency procurement to procure goods and
7 services where the emergency cited is solely due to human intervention in the form of procurement
8 protests.

9 Examples of the government of Guam using emergency procurement to ensure that goods
10 and services are procured can be seen as far back as 1984. They include a 1984 Department of
11 Public Works (“DPW”) school bus procurement, a 2018 GDOE custodial services contract, and a
12 2018 prison food services contract for the Guam Department of Corrections.

13 In 1984, the Governor of Guam issued an executive order declaring the need for emergency
14 procurement of school buses on the basis that “rejection of all bids submitted for the purchase of
15 up to thirty school buses for FY 1984 and an additional ten school buses for FY 1985 has resulted
16 in a serious delay in the procurement of the much needed buses, an emergency situation now exists
17 that threatens the safety of the territory's school children and the government's ability to efficiently
18 administer our island-wide school bus transportation system.” See Executive Order No. 84-20,
19 Exhibit “A” and available online¹. Governor Bordallo found that “the lack of new buses seriously
20 threatens the welfare and safety of the territory's school children; and time and other circumstances
21 will not permit the delay required to resolicit competitive sealed bidding.” *Id.* As a result, school
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26 ¹ Government of Guam Office of the Governor Executive Order No. 84-20 (Available at:
27 <http://governor.guam.gov/governor-content/uploads/2017/08/E.O.-84-20-Declaration-of-Emergency-for-Procurement-of-scho.pdf>).

1 buses were procured. They do not appear to have been procured on a temporary basis. They were
2 instead procured permanently.

3 In October 2018, the Guam Department of Education requested that the governor of Guam
4 issue an executive order declaring an emergency because “[t]he current GDOE custodial services
5 contract expires on September 30, 2018. In June, the procurement for new custodial services was
6 initiated. However, a protest was filed and subsequently appealed to the Office of Public
7 Accountability (OPA), resulting in a stay of the procurement process. The current appeal leaves
8 the department in jeopardy of not having a custodial services contract in place by October 1, 2018.”
9
10 *See* Guam Department of Education Release, September 26, 2018, Exhibit “B” and available
11 online². The protest that prompted the emergency procurement was withdrawn on October 22,
12 2018. Notice of Dismissal, so the emergency did not last long.

13 In June 2019, a decision was issued by the Office of Public Accountability on emergency
14 procurements for prison food services that had spanned three years. This emergency procurement
15 is unique in that it is the only time any government of Guam agency has been admonished for
16 using emergency procurement. That said, the concern appears to have been less over the fact that
17 emergency procurement was used and more over the fact that emergency procurement was used
18 without any recognizable emergency, even in the form of a pending protest to an earlier-issued
19 IFB or RFP. The issue was decided by the Office of Public Accountability on June 11, 2019. The
20 Public Auditor held that:
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23 The fact GSA has been utilizing emergency procurement for food services for the
24 past three years shows their inability to work within the procurement system, which

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26 ² Guam Department of Education Release “Superintendent Requests Emergency Procurement for
27 Custodial Services”, September 26, 2018. (Available at:
28 https://gdoeiao.weebly.com/uploads/3/8/6/4/38647375/09.26.18_superintendent_requests_emergency_procurement_for_custodial_services.pdf).

1 is unconscionable. At this point, it cannot be determined whether the actions of
2 GSA are due to incompetence, ineptitude, or are intentional.

3 The procurement record filed by GSA did not indicate any emergency procurement
4 declaration signed by the Governor in December 2018 or any new purchase order
5 for the new 90-day period beginning January 2019, which shows there is an
6 incomplete procurement record.

7 *See* Decision and Order re Purchasing Agency’s Motion to Dismiss Appeal OPA-PA-19-002, June
8 11, 2019, Exhibit “C” and available online³. No RFP or IFB was pending or on appeal when the
9 emergency procurements were issued by the GSA. Therefore, the problem was not with GSA’s
10 use of emergency procurement, but rather with the fact that they had used emergency procurement
11 without any emergency occurring first, either natural or human-caused. One supposes, based on
12 the previous examples, that had an IFB or RFP been issued GSA been unable to put a replacement
13 contract in place prior to the expiration of the previous contract, then the use of emergency
14 procurement would have been just as acceptable.

15 **B. GIVEN JMI’S PENDING PROTEST, THE GUAM INTERNATIONAL AIRPORT HAS NO OTHER**
16 **SOURCE OF PROCUREMENT AVAILABLE TO IT ASIDE FROM EMERGENCY**
17 **PROCUREMENT**

18 As the various witnesses for the Guam International Airport Authority (the “GIAA”)
19 explained during the October 12, 2023 hearing, no other forms of procurement were available to
20 GIAA. GIAA could not engage in sole source procurement, because they knew at least two parties
21 could perform baggage handling services⁴. GIAA could not issue an IFB because this type of
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24 ³ Decision and Order re Purchasing Agency’s Motion to Dismiss Appeal OPA-PA-19-002, June 11, 2019
(Available at: <https://www.opaguam.org/sites/default/files/opa-pa-19-002- decision.pdf>).

25 ⁴ To this point, JMI has consistently repeated the lie that a determination has been made by the Guam
26 Contractors License Board (the “CLB”) as to whether Menzies is required to hold a CLB license to perform baggage
27 handling services at GIAA. This is not true. A mere citation was issued by the CLB without any opportunity for a
28 hearing or for Menzies to be heard in any meaningful way. Menzies appealed that citation. No final determination has
been made by the CLB. This was corroborated by all CLB witnesses who testified at the October 12, 2023 hearing in
in this matter. After having failed to convince the OPA that the fraudulent decision signed by disgraced former

1 procurement depends on the capability of the parties who bid and thus an IFB (which seeks the
2 lowest price only) is inappropriate for this type of service. GIAA could not issue an RFP, because
3 the terms of the RFP were and are currently on appeal. Had GIAA issued another RFP and
4 maintained the same language it used in the original RFP (which it still maintains was appropriate),
5 then it would have just resulted in another protest by JMI. This left emergency procurement as the
6 only type of procurement left to GIAA.
7

8 **C. IF GIAA IS NOT ALLOWED TO USE EMERGENCY PROCUREMENT, THEN THERE WILL BE**
9 **NO BAGGAGE HANDLING SERVICES AND NO COMMERCIAL TRAVEL TO AND FROM**
10 **GUAM WHICH IS AN ABSURD AND DANGEROUS RESULT**

11 Regardless of the cause of the emergency (natural or human-caused), the fact remains that
12 without an operable baggage handling system, GIAA cannot function.

13 If GIAA cannot function, then no doctors or emergency personnel (e.g. FEMA employees)
14 would be able to travel to Guam. If a typhoon were to strike, then on emergency personnel would
15 be able to arrive on the island. Additionally, medical treatment in Guam is limited and so residents
16 are often required to travel off island for medical services. This would not be able to happen if
17 GIAA did not function. Aside from these direct impacts on safety and welfare, Guam would suffer
18 economically without a functioning airport, because tourism is Guam's primary industry. If
19 tourists (and their bags) cannot be processed through GIAA, then the thousands of employees who
20 work in Guam's tourism industry will not be able to work and feed their families.

21 GIAA was rendered inoperable due to a "natural" emergency in 2020 when the COVID
22 pandemic happened. The results have been catastrophic for Guam and its economy.
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27 Executive Director of the CLB Cecil Orsini was a credible decision, JMI now appears insistent in simply lying to the
28 OPA with its claim that the CLB has reached a decision on a matter that it clearly has not.

1 Unemployment rates skyrocketed immediately following the start of the pandemic and many if not
2 all tourist businesses were faced with furloughing or terminating employees.

3 In the end, it does not matter why GIAA is rendered unable to operate, whether due to the
4 lack of a baggage handling contract or a typhoon or a pandemic, the fact remains that if GIAA
5 does not operate, the safety, health, and welfare of Guam will suffer. As a result, emergency
6 procurement is appropriate.

7
8 **D. THE PUPOSES AND POLICIES UNDERLYING THE GUAM PROCUREMENT LAW DICTATE
9 THAT THE EMERGENCY PROCUREMENT PROVISION BE INTERPRETED IN SUCH A WAY
10 AS TO PERMIT EMERGENCY PROCUREMENT EVEN DUE TO HUMAN-CAUSED
11 EMERGENCIES**

12 Pursuant to 5 GCA § 5001(a), Guam procurement law shall be construed and applied to
13 promote the underlying purposes and policies of the procurement law, which include “to ensure
14 the fair and equitable treatment of all persons who deal with the procurement system of Guam.” 5
15 GCA § 5001(b)(4).

16 While the procurement law does require that an emergency can be only something that
17 “could not have been foreseen through the use of reasonable and prudent management
18 procedures”, there is nothing in the definition of an “emergency” found at 5 GCA § 5030(x) or in
19 the section relative to emergency procurement which makes any distinction between “natural” and
20 “human-caused” emergencies.

21 To interpret the procurement law in such a way as to prevent GIAA from issuing any type
22 of procurement at all would be contrary to 5 GCA § 5001(b)(4), because such an interpretation
23 would involve construing Guam’s procurement law in such a way as to ignore the fair and equitable
24 treatment of the most important people who deal with the procurement system of Guam: the
25 citizens of Guam.

26 If the law is interpreted so rigidly as to preclude the use of any sort of procurement in
27 current situation, then the biggest victim of this will be the people of Guam. They are the ones who
28

1 will go without a functioning airport, without access to off-island medical treatment, without
2 access to expertise and personnel that can only come from people being able to enter and work in
3 Guam through a functioning airport, and without the basic infrastructure required for tourists (the
4 primary source of income on the island) to visit. Therefore, if there is any question as to how the
5 terms of the statute should be construed, it is paramount that those terms be construed in such a
6 manner as to ensure the fair and equitable treatment of the people of Guam.
7

8 **DATED** this 26th day of October, 2023.

9 **BLAIR STERLING JOHNSON & MARTINEZ**
10 A PROFESSIONAL CORPORATION

11 BY: 

12 **R. MARSIL JOHNSON**
13 *Attorneys for Party in Interest*
14 *Aircraft Service International, Inc.*
15 *dba Menzies Aviation*

Exhibit “A”

GOVERNMENT OF GUAM
OFFICE OF THE GOVERNOR
AGANA, GUAM

EXECUTIVE ORDER NO. 84-20

DECLARATION OF EMERGENCY
FOR PROCUREMENT OF SCHOOL BUSES
BY THE DEPARTMENT OF PUBLIC WORKS

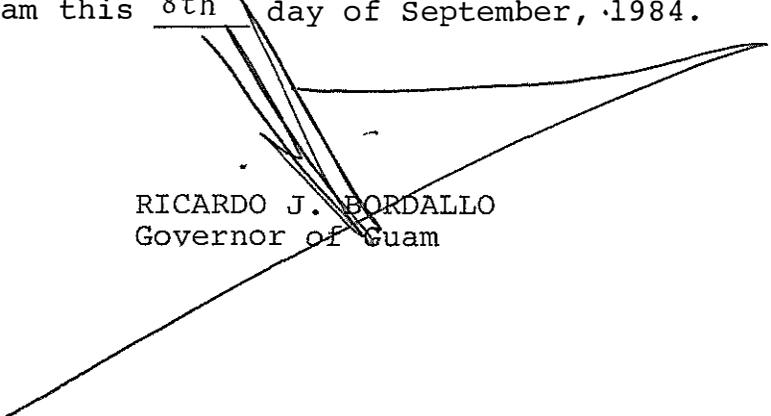
WHEREAS, the rejection of all bids submitted for the purchase of up to thirty school buses for FY 1984 and an additional ten school buses for FY 1985 has resulted in a serious delay in the procurement of the much needed buses, an emergency situation now exists that threatens the safety of the territory's school children and the government's ability to efficiently administer our island-wide school bus transportation system. The last procurement of school buses occurred in 1980 when twenty-nine "conventional" buses were purchased. The present demand requires 157 daily operational buses, with 25 buses in reserve. At this point in time, there are 147 buses available for use. The average useful life of a school bus on Guam is seven years. Currently, approximately 100 of the operational buses are ten or more years old. Thirty-two buses are presently designated for retirement, with safety of the passengers on the vehicles as one of the primary considerations for retirement.

WHEREAS, the existence of this emergency situation creates an immediate and serious need for new school buses that cannot be met through normal procurement methods, the lack of new buses seriously threatens the welfare and safety of the territory's school children; and time and other circumstances will not permit the delay required to resolicit competitive sealed bidding;

THEREFORE, I, RICARDO J. BORDALLO, Governor of Guam, hereby declare that an emergency situation exists and

to assure that the required school buses are procured in time to meet the emergency, the Director of Public Works is directed to make an emergency procurement of school buses by such competitive method as is practicable under the present circumstances.

Dated at Agana, Guam this 8th day of September, 1984.



RICARDO J. BORDALLO
Governor of Guam

COUNTERSIGNED:



EDWARD D. REYES
Lieutenant Governor of Guam

Exhibit “B”



JON J. P. FERNANDEZ
Superintendent of Education

DEPARTMENT OF EDUCATION PUBLIC INFORMATION OFFICER

www.gdoe.net
501 Mariner Avenue
Barrigada, Guam 96913
Telephone: (671) 300-1677 • Fax: (671) 472-5001
Email: ijbbaza@gdoe.net



ISA J. B. BAZA
Public Information Officer

September 26, 2018

FOR IMMEDIATE RELEASE

SUPERINTENDENT REQUESTS EMERGENCY PROCUREMENT FOR CUSTODIAL SERVICES

The Superintendent of Education is requesting that Governor Eddie Baza Calvo approve an emergency procurement for custodial services at Guam Department of Education (GDOE) schools.

The current GDOE custodial services contract expires on September 30, 2018. In June, the procurement for new custodial services was initiated. However, a protest was filed and subsequently appealed to the Office of Public Accountability (OPA), resulting in a stay of the procurement process.

The current appeal leaves the department in jeopardy of not having a custodial services contract in place by October 1, 2018.

In response to this situation, Superintendent Jon Fernandez is requesting for an emergency procurement of custodial services, and sent a letter to Governor Calvo along with a certification of emergency, seeking the Governor's approval.

Upon the Governor's approval, the emergency procurement will allow GDOE to solicit custodial services for a 30-day period in the interim, until the OPA addresses the current appeal.

Additionally, several schools have opted to provide in-house custodial services, including Astumbo Elementary School, Merizo Martyrs' Memorial Elementary School, and Daniel L. Perez Elementary School.

As these schools work to provide in-house services, each will receive custodial supplies as well as additional funding to be used by the schools to purchase instructional equipment and supplies.

"I want to thank our schools that have taken the initiative to maintain their school environments, however many of our schools, especially our larger campuses, are in need of significant support in order to maintain a healthy and safe environment for our children," Fernandez said. "Unless we were able to obtain these interim services, we do believe the health and safety of our students will be put at risk."

---END OF STATEMENT---

Exhibit “C”

Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Ms. Claudia S. Acfalle Chief Procurement Officer General Services Agency Department of Administration 148 Route 1 Marine Drive Piti, Guam 96915 Phone: (671) 475-1707 Fax: (671) 475-1727/472-4217	From:	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability
	Matthew E. Wolff, Esq. Assistant Attorney General Office of the Attorney General of Guam 590 S. Marine Corps Drive, Suite 706 Tamuning, Guam, 96913 Fax: (671) 472-2493	Pages:	5 (including cover page)
CC:	Geri E. Diaz, Esq. (Attorney for Appellant Basil Food) Camacho Calvo Law Group LLC 134 W Soledad Ave., Suite 401 Hagatna, Guam 96910 Phone: (671) 472-6813 Fax: (671) 477-4375	Date:	June 11, 2019
		Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-19-002 Decision

For Review
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 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,
 Jerrick Hernandez, Auditor
jhernandez@guamopa.com

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**BEFORE THE PUBLIC AUDITOR
PROCUREMENT APPEALS
TERRITORY OF GUAM**

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In the Appeal of)
Basil Food Industrial Services,)
Appellant.)

Appeal No: OPA-PA-19-002

**DECISION AND ORDER RE
PURCHASING AGENCY'S
MOTION TO DISMISS AN APPEAL**

To: **Purchasing Agency:**
General Services Agency
C/O Matthew E. Wolff, Esq.
Assistant Attorney General
Office of the Attorney General of Guam
590 S. Marine Corps Drive, Suite 706
Tamuning, Guam, 96913
Facsimile: (671) 472-2493

Appellant:
Basil Food Industrial Services
C/O Geri E. Diaz, Esq.
Camacho Calvo Law Group LLC
134 W Soledad Ave., Suite 401
Hagatna, Guam 96910
Phone: (671) 472-6813
Fax: (671) 477-4375

THIS MATTER came before the Public Auditor on April 10, 2019, for a hearing on Purchasing Agency GENERAL SERVICES AGENCY's (Hereafter Referred to as "GSA") Motion to Dismiss filed in this matter on March 15, 2019. Appellant BASIL FOOD INDUSTRIAL SERVICES (Hereafter Referred to as "BASIL") was represented by its Counsel of Record, Geri E. Diaz, Esq. Robert Kono appeared on behalf of GSA and was represented by GSA's Counsel of Record, Matthew E. Wolff, Esq.

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BACKGROUND

In October 2018, GSA issued an emergency procurement for food services for inmates and detainees at the Department of Corrections (“DOC”) for a period of up to ninety (90) days, in thirty (30) day periods utilizing a September 25, 2018 Request for Quotations (“RFQ”) that had a section indicating prices would be good for one hundred eighty (180) days. GSA awarded the emergency procurement to California Mart.

On December 29, 2018, BASIL wrote to GSA asking the status of the new Invitation for Bid (“IFB”). On January 3, 2019, GSA responded to BASIL’s December 29, 2018 memorandum indicating they are awaiting approval on the bid from DOC and the Office of the Attorney General, which they hoped would be done soon. There was no indication that GSA would be requesting an Emergency Procurement declaration for a new 90-day period beginning January 2019. BASIL only became aware of this after submitting several Freedom of Information Act (FOIA) requests.

According to GSA’s Motion to Dismiss and Rebuttal to Comments on the Agency Report, GSA asked the Governor in December 2018 for another three (3) month emergency procurement because DOC had not finalized its long-term services IFB. The Governor granted another three (3) month emergency procurement.

GSA did not issue another RFQ for the new three (3) month emergency procurement beginning January 2019, but instead used the quotes from the September 2018 RFQ, as they considered it still valid because the prices were good for a period of one hundred eighty (180) days.

DISCUSSION

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BASIL is protesting that a contract was awarded to the same vendor without going through the procurement process. They argue that it was expected GSA would issue a new RFQ for the

1 January 2019 emergency procurement, which they became aware that GSA did not do after
2 submitting FOIA requests in January 2019.

3
4 GSA alleged that the Office of Public Accountability (“OPA”) has no jurisdiction over this
5 appeal because it was untimely and based on an insufficient, improper protest. Further, if the merits
6 were reached, BASIL has not alleged any facts that, when the law is applied, amount to wrongdoing.
7 Moreover, the substantive portion of BASIL’s prayer was already been granted by GSA, rendering
8 the appeal moot.

9
10 The fact that GSA has been utilizing emergency procurement for food services for the past
11 three years shows their inability to work within the procurement system, which is unconscionable.
12 A new IFB still has yet to be issued, which would further continue this cycle of utilizing emergency
13 procurement. At this point, it cannot be determined whether the actions of GSA are due to
14 incompetence, ineptitude, or are intentional.

15
16 The procurement record filed by GSA did not indicate any emergency procurement
17 declaration signed by the Governor in December 2018 or any new purchase order for the new 90-
18 day period beginning January 2019, which shows that there is an incomplete procurement record.

19
20 Because the contract has already been completed, there is no option to cancel the contract as
21 a remedy for BASIL. BASIL is instead requesting OPA acknowledge that the actions by GSA in
22 awarding the contracts were improper and contrary to law, and grant Attorney’s fees for filing
23 motions and the appeal.

24 **CONCLUSION**

25
26 Based on the foregoing, the Public Auditor hereby GRANTS the GSA’s Motion to Dismiss
27 the Appeal. However, GSA is admonished for its actions in continuously using emergency
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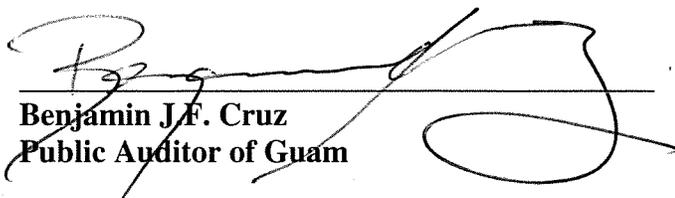
1 procurement for three years. GSA should issue the new IFB for services immediately. The Hearing
2 scheduled for June 13, 2019, is hereby vacated.

3
4 Although the Public Auditor would like to grant Attorney's fees to BASIL due to the
5 government's actions, he can only award reasonable costs, excluding Attorney's fees, pursuant to 5
6 G.C.A. §5425(h). Therefore, BASIL's request for Attorney's fees is hereby denied.

7 This is a Final Administrative Decision. The Parties are hereby informed of their right to
8 appeal from a Decision by the OPA to the Superior Court of Guam, in accordance with Part D of
9 Article 9, of 5 G.C.A. §5481(a) within fourteen (14) days after receipt of a Final Administrative
10 Decision.

11
12 A copy of this Decision shall be provided to the parties and their respective attorneys, in
13 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
14 www.opaguam.org.

15
16 **SO ORDERED** this 11th day of June 2019 by:

17
18
19 
20 **Benjamin J.F. Cruz**
21 **Public Auditor of Guam**