

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	From:	Doris Flores Brooks Guam Public Auditor Office of Public Accountability
	Phone: (671) 475-1707 Fax: (671) 475-1727/472-4217	Pages:	11 (including cover page)
CC:	Elyze Iriarte, Esq. Iriarte Camacho Calvo Law Group LLC 334 W Soledad Ave., Suite 401 Hagatna, Guam 96910	Date:	June 8, 2016
	Phone: (671) 472-6813 Fax: (671) 477-6813 4375	Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-16-006 Notice of Receipt of Appeal

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Thank you,
 Jerrick Hernandez
 Auditor
jhernandez@guamopa.com

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OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

June 8, 2016

Ms. Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

VIA FACSIMILE: (671) 475-1727

Re: Notice of Receipt of Appeal – OPA-PA-16-006

Dear Ms. Acfalle,

Please be advised that Basil Food Industrial Services Corporation (Basil Food) filed an appeal with the Office of Public Accountability (OPA) on June 7, 2016 regarding breach of contract controversy against the General Services Agency (GSA) relative to GSA Bid No. 010-14 & GSA Bid No. 011-14; Nutrition Services for the Comprehensive Management, Operations & Maintenance of the Elderly Nutrition Program. OPA has assigned this appeal case number OPA-PA-16-006.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Wednesday, June 15, 2016**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Wednesday, June 22, 2016**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Basil Food. In addition, OPA respectfully asks that GSA provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208, or jhernandez@guamopa.com, should you have any questions regarding this notice.

Sincerely,


Rodalyn Gerardo
Audit Supervisor

Enclosure: First eight pages of Notice of Appeal – OPA-PA-16-006

Cc: Elyze Iriarte, Attorney for Basil Food

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PROCUREMENT APPEALS

DATE: 06/07/16

TIME: 2:32 AM PM BY: C. Roque

FILE NO OPA-PA: 16-006

IRIARTE CAMACHO CALVO LAW GROUP LLC

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Attorneys for Appellant
BASIL FOOD INDUSTRIAL SERVICES CORPORATION

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Docket No. OPA-PA_____

NOTICE OF PROCUREMENT APPEAL

Basil Food Industrial Services Corporation brings this appeal of a breach of contract controversy against the General Services Agency of the Department of Administration.

Appellant Information:

Name: Basil Food Industrial Services Corporation (formerly known as Li Qun Corporation).

Mailing Address: 530 West O'Brien Drive, Hagåtña, GU 96910. For the purposes of this Appeal, please direct filings and correspondence to Basil's legal counsel: Iriarte Camacho Calvo Law Group LLC, Attn: Elyze Iriarte, Esq., 134 W Soledad Ave Ste 401, Hagåtña, GU 96910.

Business Address: 530 West O'Brien Drive, Hagåtña, GU 9691

Email Address: eiriarte@icclawgroup.com

Daytime Contact No.: 472-6813

Fax No.: 477-4375

Appeal Information

Purchasing Agency: General Services Agency for Department of Public Health and Social Services (DPHSS)

Identification of Contract: GSA Bid No. 010-14 & GSA Bid No. 011-14 (referenced herein as "Contracts").

Decision being appealed was made on June 3, 2016 by the Acting Chief Procurement Officer, Anita Cruz. See Exs. I and K.

Appeal is made from a Decision on Contract or Breach of Contract Controversy, specifically, GSA's decision to terminate the Contracts.

Names of Competing Bidders, Offerors, or Contractors known to Appellant: SH Enterprises; Kals Corporation; L C Enterprises.

Statement Supporting the Appeal

The Office of Public Accountability has jurisdiction over breach of contract controversies, including the present dispute. 5 GCA §§ 5427, 5706.

On January 24, 2014, GSA issued an Invitation for GSA Bid No. 010-14, "Nutrition Services for the Comprehensive Management, Operations & Maintenance of the Elderly Nutrition Program, Congregate Meals Component." On the same day, GSA issued an Invitation for GSA Bid No. 011-14, "Nutrition Services for the Comprehensive Management, Operations & Maintenance of the Elderly Nutrition Program, Home-Delivered Meals Component." The Contracts' terms were for one

year, with an option to renew for two additional years. See Exs. A & B.

Basil was selected as the lowest responsible bidder and has been providing service under the Contracts since July 2014. The prior provider for elderly meal services was SH Enterprises. Basil retained many of SH Enterprises' employees working under the elderly nutrition program ("ENP").

Basil's Performance under the Contracts

Basil has earnestly tried to comply with DPHSS' requirements throughout the term of the Contracts, despite being treated unfairly by DPHSS.

In 2013, Guam passed a new Food Code, which requires a Hazard Analysis and Critical Control Point ("HACCP") Plan under certain circumstances, including for elderly nutrition services. According to Food Code § 8-201.14(F), an "HACCP Plan required for submission to the regulatory authority shall be developed or certified by a person who has obtained a training and credentialing on HACCP from a program that has been evaluated and listed by the Regulatory Authority." To comply with the new Food Code, Basil inquired with DPHSS, the regulatory authority, on how it can locate a person on island with the requisite training and credentialing to assist in developing and certifying Basil's HACCP Plan. DPHSS advised Basil that it would not divulge the identity of any person with such qualifications because it did not want to act biased.

Basil spent months trying to locate a local HACCP certifier, but was unsuccessful. Basil sought extensions from DPHSS, noting that it was unable to find a qualified person on island. Again, DPHSS did not provide the identity of any person qualified to develop an HACCP Plan on-island. Therefore, Basil was required

to retain an off-island provider, HACCP Consulting Group, LLC. Basil's consultant developed Basil's plan which was submitted originally on June 29, 2015. After being informed of corrections it needed to make to the HACCP Plan, Basil again worked with HACCP Consulting Group to submit a revised plan on July 7, 2015.

On July 9, 2015, Basil's Anigua facility (where it cooks meals for the program) was inspected by DPHSS. It was given a demerit for not having an acceptable HACCP plan, and was issued a notice of closure specifically because of the lack of a certified HACCP Plan. Ex. C. As a result, Basil was unable to meet its commitment under the Contracts. It was only upon the closure of Basil's facility that DPHSS was willing to inform them of a local person (Barry Mead) qualified to develop and certify their HACCP Plan. On July 18, 2015, Mr. Mead certified Basil's HACCP Plan, and the Plan was submitted to DPHSS. Ex. D. DPHSS restored Basil to an "A" rating.

Meanwhile, on July 14, 2015, DPHSS informed Basil that it was under default and had ten days to cure the default. Ex. E. On July 28, 2015, GSA acknowledged that Basil had cured any default when its "A" rating was restored. Ex. F.

Basil had learned that, during the period that Basil was suspended for not having a HACCP Plan, the vendor chosen by GSA (SH Enterprises) under the emergency procurement did **not** have a certified HACCP Plan. Ex. G. Therefore, the vendor chosen by GSA was not certified or properly licensed to prepare food under the ENP program. Basil also suspects underhanded activity occurred with respect to the emergency procurement, because days before Basil was inspected, on July 6, 2015, Basil received a call from an employee of SH Enterprises, wishing to contact a former SH Enterprises employee now employed with Basil. Basil was informed

that "something was happening this week," that SH "took the contract," and that the employee needed to get in touch with SH.

Months later, on May 31, 2016, Basil underwent another inspection.¹ The inspection report indicated violations of the Guam Food Code. As a result of the inspection, DPHSS removed the "A" placard and replaced it with a "D" placard. DPHSS also issued a notice of closure and re-inspection request. The inspection report allowed the violations to be corrected by either June 10, 2016 or June 30, 2016.

Within two days, on June 2, 2016, Basil corrected all violations and received an "A" rating. Ex. H.

However, on June 1, 2016, GSA informed Basil that the contracts were immediately terminated pursuant to section 12.9 of the Contracts' Special Terms and Conditions. Ex. I. Basil informed GSA that it had cured any default within the ten days allotted by 2 GAR Div. 4 § 6101(8) and that the Contracts must be reinstated. Ex. J. However, GSA refused to rescind the termination. Ex. K.

In the meantime, according to news reports, GSA has issued an emergency procurement to provide meal service to the elderly, and has awarded the emergency procurement again to SH Enterprises. Basil has received evidence that SH Enterprises is not complying with health regulations in the transport of the ENP food.

¹ The inspection was allegedly incited by a complaint filed with the DPHSS that a small bug was found in a meal tray. Basil disputes that the bug came from its Anigua facility.

Legal Argument

The Contracts specify they are governed under the Guam Procurement Act (5 GCA Ch. 5) and Guam Procurement Regulations. Ex. L. The purpose of the Procurement Regulations "is to provide standard policies and procedures governing the procurement, management, control and disposal of supplies, services, and construction for the territory in conformity" with the Guam Procurement Law. 2 GAR Div. 4 § 1101.

Furthermore, under the Contracts' General Terms and Conditions (Ex. L), if the contractor fails to perform any of the provisions of the contract, then the contractor's "Defaults will be treated subject to and in accordance with the provisions of 2 GAR Div. 4 § 6101(8)." Section 6101(8) states:

(8) Termination for Default Clause.

TERMINATION FOR DEFAULTS

(a) Default. If the contractor refuses or fails to perform any of the provisions of this contract with such diligence as will ensure its completion within the time specified in this contract, or any extension thereof, otherwise fails to timely satisfy the contract provisions, or commits any other substantial breach of this contract, the Procurement Officer may notify the contractor in writing of the delay or non-performance and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such part of the contract as to which there has been delay or a failure to properly perform.

As section 6101(8) indicates, Basil should have been afforded a ten day period to cure. In fact, Basil did cure any default within two days.

GSA has refused to rescind the termination of the Contracts and relies upon

Section 12.9 of the Special Terms and Conditions, which states:

In the event the Bidder who is awarded this IFB for the provision of ENP Nutrition Services is issued a 'C' rating from the Division of Environmental Health, DPH&SS or is issued a 'Stop Order' by the Guam Fire Department, the awarded Vendor may be terminated as the Vendor of the ENP Nutrition Services.

Even if section 12.9 permits termination, termination must occur through section 6101(8), as incorporated by the Contracts' General Terms and Conditions. Section 6101(8) permits a termination only after the contractor fails to cure within ten days. Contrary to GSA's analysis, there is no ability to opt out of this ten day cure period, just because of a separate and earlier contract default.

GSA is bound to follow both the law and the Contracts which allow the contractor an opportunity to cure a default. As Basil has done so, GSA must be ordered to immediately reinstate the contract.

Relief Requested

Basil requests that the terminations be rescinded and that it be permitted to perform under the remaining term of the Contracts, and also that it be given an extension of the Contracts' terms to account for the period it has been unlawfully restrained from performing.

Basil further requests that GSA be prevented from issuing a new bid for the ENP services.

Declaration re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the

protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

DATED: Hagåtña, GU, 7, June, 2016.

IRIARTE CAMACHO CALVO LAW
GROUP LLC



ELYZE MCDONALD IRIARTE

Attorneys for Appellant
BASIL FOOD INDUSTRIAL SERVICES
CORPORATION

TRANSACTION REPORT

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Jerrick Hernandez
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001	JUN/10	01:54PM	4774375	0:03:37	11	MEMORY OK	G3 7283

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