

Eddie Baza Calvo
Governor



GENERAL SERVICES AGENCY

(Ahensian Setbision Hinirat)

Ray Tenorio
Lieutenant Governor

Department of Administration

148 Route 1 Marine Corps Drive, Piti, Guam 96915

Tel: (671) 475-1707 Fax Nos: (671) 475-1727 / 472-4217

Christine W. Baletto
Director
Dept. of Administration

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

DATE: 7/11/16

TIME: 9:32 AM AM PM BY: EMD

FILE NO OPA-PA: 16-006

IN THE MATTER OF:) OPA-PA-16-006
)
BASIL FOOD INDUSTRIAL) REBUTTAL TO COMMENTS
SERVICES CORPORATION)
)
ON AGENCY REPORT
)

On July 5, 2016, Basil filed comments to the Agency Report on OPA-16-006. After review of the comments the General Services Agency has the following responses to what was stated.

I. SPECIFIC PROVISION OF THE CONTRACT CONTROLS

Special Term and Condition for both the GSA Bid Nos. 10-14 and 11-14 states: Termination for Non Compliance with Regulatory Requirements: In the event the Bidder was is awarded this IFB ...is issued a "C" rating from the Division of Environmental Health, DPHSS or is issued a "Stop Order" by the Guam Fire Department, the awarded Vendor may be terminated as the Vendor for (both) .

Clearly, this condition states the action that the government may take if the winning bidder was to receive a "C" or lower rating: a termination of their contract. This provision does not provide that it may "cure" their action. It provides for termination.

Section 2 GAR Division 4, Section 6101(8) "Default" states in pertinent part:

Default: If the contractor refuses or fails to perform any of the provisions of the 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....(emphasis added).

Basil is misinterpreting the language of the Procurement Rule. The Default section allows for the Procurement Officer the discretion to allow a contractor to "cure" In this case, when Basil received its first "D" rating the government chose to allow them ten (10) days to cure. On its second "D" rating, the government chose not to use this section, as it is permissive, not mandatory as Basil is claiming. As such, going to the specific provision of termination was proper, which is why it is stated in the special provisions area.

Further, if the government was to follow Basil's logic, Basil may continue to receive "C" or "D" ratings and if that was to happen, the government would continue to suspended from providing services until they cure. This leads not only to unreasonable situation were Basil could continually be placed on a suspension and the government would constantly be placed in the position of declaring an emergency to ensure continued uninterrupted service to the seniors. Furthermore, the impact on those who provide the delivery to the home bound services going back and forth between different companies has not been taken into account.

11. BASIL IS COMPLAINING OF THE EMERGENCY PROCUREMENT

This argument was not raised in OPA –PA-16-006, but in OPA-PA-16-008, and since there was no request for consolidation of the cases, it is irrelevant to discuss this point here.

III BASIL IS COMPLAINING ABOUT ITS PREVIOUS DEFAULT AND THAT IT IS BEING TREATED UNFAIRLY

Special Bid Terms and Conditions 12.9 does not distinguish what type of "C" or lower rating is received that would subject the bidder to a termination, only that it has received one. Upon the first "D" rating that Basil received, the government chose to give them a chance to cure. The second "D" rating caused the government to terminate.

Basil further charges that it has been unfairly treated by the Department of Public Health and Social Services Division of Environmental Heath in being punished for failing to have a HACCP while others were allowed to continue service. However, the facts provided by Basil itself, points out the long delay to implement a HACCP plan before receiving its first "D" rating was due to its own inaction despite numerous extensions that they received. Second, as to the SH not having a HACCP plan and being allowed to operate, the same exhibit that shows the failure to have a HACCP, also shows that it was allowed to proceed until a date that they had to obtain a HACCP. Finally, Basil complaint about food being delivered, the Department of Public Health and Social Services did inspect upon notification and found no violation.

CONCLUSION

Based upon the above facts stated in the Procurement and Agency Report, the government's action to terminate this contract was proper, and its action should upheld by the Public Auditor. Furthermore, GSA reserves the right to discuss compensation pursuant to 2 GARR Division 4 Section 6101(8).


ANITA CRUZ, Acting