



Office of the Attorney General

Elizabeth Barrett-Anderson

Attorney General of Guam

Solicitor Division

590 S. Marine Corps Drive

ITC Bldg., Ste. 706

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: 08-12-16

TIME: 4:07 AM PM BY: JW

FILE NO OPA-PA: 16-006, 16-008

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

IN THE APPEAL OF:

) DOCKET NO. OPA-PA 16-006

) DOCKET NO. OPA-PA 16-008

)

**BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,**

)

GENERAL SERVICES AGENCY

)

HEARING BRIEF

)

Appellant.

)

)

I. INTRODUCTION

GSA concurs with and adopts the facts and timeline of S.H. Enterprises's Hearing Brief

Introduction and incorporates them by reference herein.

II. ISSUES

OPA-PA-16-006 - The Right to Terminate the Contract

It is critical to understand at the outset that the 10-day period referred to by Appellant is a contract provision, not a statute. Under 2 GAR Div. 4 §6101, all of the Chapter 6 sections are contract clauses available for use in contracts. This is an important distinction because specific

clauses in contracts prevail over general clauses. “Under well-settled contract principles, specific provisions control over more general terms.” *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997)(citing to *Brinderson-Newberg Joint Venture v. Pacific Erectors, Inc.*, 971 F.2d 272, 279 (9th Cir.1992) (citing Restatement (Second) of Contracts § 236(c) (1932))). However, as seen below, there are multiple reasons why the 10-day period under General Term #38 is not binding upon the government.

General Term #38 refers to the Termination For Default Clause, listed under 2 GAR Div.4 §6101(8), a provision regarding the timely satisfaction of the contract provisions. But this contract was not terminated as a result of untimeliness, it was terminated for the violation of Special Term 12.9, which required Appellant to maintain a rating higher than “C” from the Division of Environmental Health, DPHSS. As mentioned, when there is a conflict, specific clauses in contracts prevail. But even assuming General Term #38 prevails, the termination is still valid. First, the Procurement Officer under §6101(8) is not mandatorily required to provide 10 days to cure. It is permissive, as seen in the language: “...the Procurement Officer **may** notify the contractor in writing of the delay... such officer **may** terminate the contractor’s right to proceed with the contract...”. Similarly, Special Term 12.9 is permissive, giving the Procurement Officer discretion as to whether to terminate the contract if a “C” grade or lower is given.

And even if the termination was erroneous, §6101(8)(e), also incorporated into the contract by General Term #38, provides that if it is determined for any reason that the contractor was not in default and that the Government did not comply with §6101(8), if the contract contains a clause providing for termination for convenience of the territory, it is the same as if the notice of termination had been issued pursuant to such clause. The bid does contain that clause, under General Term #37.

The contract is obviously intended to protect the interest in public health. Mandating that a bidder have a 10-day grace period every time it creates hazardous conditions that jeopardize the health of Guam's senior citizens is not the intention of the contract. Under 18 G.C.A. §87119, words in a contract which are wholly inconsistent with its nature, or with the main intention of the parties are to be rejected.

OPA-PA-16-008 - The Emergency Procurement

At the outset, if there is a finding that GSA was entitled to terminate the contract, Appellant has no standing to challenge the Emergency Procurement, as it is no longer an interested party, as it would not qualify under 5 G.C.A. §5215 to be on the qualified bid list.

The Emergency Procurement statute, 5 G.C.A. §5215, provides flexibility to the government to operate decisively in a time of crisis. Competition is only "as is practicable under the circumstances". Notice is to be given to contractors from the qualified bid list "if time allows". To say the circumstances were exigent is an understatement. GSA was notified in the early afternoon of the closure of Appellant's facility. It immediately notified the Governor's office of the situation and prepared for an emergency request. Department of Public Health and Social Services submitted the memorandum requesting an emergency, which was transmitted to the Governor's office. The Governor's office approved the emergency request at 5 P.M. that evening, and the request for quotations was sent out at 6 P.M. The quotation required food preparation for over 1,800 senior citizens, which needed to be accomplished before 6 A.M. the next day. S.H. Enterprises was the only company on the bidders' list that met the requirements to respond to GSA's inquiry that evening.

GSA concurs with S.H. Enterprises' analysis of the requirement for a HAACP plan. Both S.H. Enterprises and Appellant were treated equally with regards to the permit requirement.

Lastly, even if S.H. Enterprises had been hired to a contract longer than 30 days, which it wasn't, §5215 does not prohibit it. It only sets a 30 day limit on procurements of goods or supplies, not services. Any extensions to the emergency contract are caused by the need to resolve Appellant's protest before issuing any new bids.

Respectfully submitted this 12th day of August, 2016.

OFFICE OF THE ATTORNEY GENERAL
Elizabeth Barrett-Anderson, Attorney General

By:



NICOLAS TOFT
Assistant Attorney General