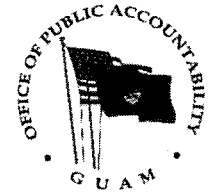


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238 Archbishop Flores St.
Hagåtña, Guam 96910



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
	Pages: 12 (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: February 14, 2019
	Phone: (671) 475-0390 x. 208 Fax: (671) 472-7951

Re: OPA-PA-19-002 Notice of Receipt of Appeal

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OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910
Phone: (671) 475-0390 / FAX: (671) 472-7951

February 14, 2019

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-19-002

Dear Ms. Acfalle,

Please be advised that Basil Food Industrial Services Corporation (hereinafter referred to as “Basil Food”) filed an appeal with the Office of Public Accountability (OPA) on February 13, 2019, regarding the General Services Agency’s response to Basil Food’s protest of the contract awarded for food services provided to the inmates and detainees at the Department of Corrections and the Hagåtña Facility. OPA has assigned this appeal case number OPA-PA-19-002.

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 first six pages of 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.

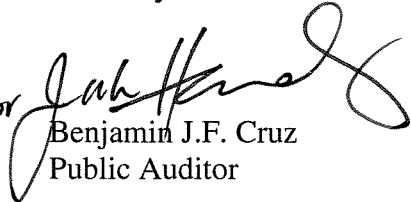
Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Thursday, February 21, 2019**, five work days following this Notice of Receipt of Appeal. We also request 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 **Thursday, February 28, 2019**, ten work days following receipt of this notice.

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. Although the Guam Procurement Law and

Regulations require only one copy of the procurement record, OPA respectfully asks that GSA provide one original and two copies of the said record, which will be 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,

For 
Benjamin J.F. Cruz
Public Auditor

Enclosure: First Nine Pages of the Notice of Appeal – OPA-PA-19-002

Cc: Geri E. Diaz, Attorney for Basil Food

CAMACHO CALVO LAW GROUP LLC

GERI E. DIAZ
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134 W Soledad Ave., Suite 401
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Tel No. 671.472.6813
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Attorney for Appellant
BASIL FOOD INDUSTRIAL SERVICES CORPORATION

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Docket No. OPA-PA- 19-002

NOTICE OF PROCUREMENT APPEAL

Basil Food Industrial Services Corporation ("Basil") bring this appeal of a procurement controversy against the General Services Agency of the Department of Administration.

APPELLANT INFORMATION

Name: Basil Food Industrial Services Corporation, herein referred to as "Basil."

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

Business Address: 530 West O'Brien Drive, Hagåtña, Guam 96910

Email Address: gdiaz@camachocalvo.law

Contact No.: 671.472.6813

Fax No.: 671.477.4375

APPEAL INFORMATION

- A) PURCHASING AGENCY:** General Services Agency
- B) IDENTIFICATION OF CONTRACT:** Purchase Order Number P196800232
- C) DECISION DATE:** The Decision being appealed was made on January 29, 2019 by the Chief Procurement Officer Claudia S. Acfalle.
- D) APPEAL ORIGIN:** This Appeal is made from the Decision denying Basil's protest of the contract awarded for food services provided to the inmates and detainees at the Department of Corrections ("DOC") and the Hagåtña Facility based on the failure to issue an IFB or to meet the mandated requirements for Emergency Procurement for the period of January 2019.
- E) NAMES OF COMPETING BIDDERS, OFFERORS, OR CONTRACTORS KNOWN TO APPELLANT:**
California Mart / S.H. Enterprises

STATEMENT SUPPORTING THE APPEAL

Under Guam Procurement Law, the Office of Public Accountability has jurisdiction over appeals from decisions rendered by the Chief Procurement Officer on protests of method of source selection, solicitation or award of a contract. 5 G.C.A. § 5425(e). At issue is General Services Agency's ("GSA") issuance of a procurement award for food services for the inmates and detainees at the DOC facilities in Mangilao and Hagåtña for the period of January 2019 as it failed to meet the threshold requirements for an emergency procurement pursuant to 5 G.C.A. § 5215.

By way of background, GSA has solicited and secured food services for the inmates and detainees at DOC through the emergency procurement process since June 2016. Accordingly, every three (3) months, GSA would seek the Governor's declaration of an emergency by Executive Order, and then it would carry out the requirements indicated in 5 G.C.A. § 5215 before awarding the emergency procurement contract to the bidder with the best offer.

On September 28, 2018, then Acting Governor of Guam, Raymond Tenorio approved GSA's Request for Emergency Procurement for food services at the DOC effective for ninety (90) days commencing on October 1, 2018. **Exhibit A.** Accordingly, the emergency period was set to expire at the end of December 2018.

On December 29, 2018, Basil issued a letter to GSA requesting status of the Request for Bid for food services for DOC (**Exhibit B**), and in response, GSA advised on January 3, 2019 that it was currently awaiting approval from the DOC and the Office of Attorney General before it could proceed with a bid (**Exhibit C**).

Basil issued a Freedom of Information Act (FOIA) request to GSA on January 8, 2019 for the following:

Any and all notices, documents, correspondence and communications issued by or received by GSA concerning or relating to the provision of food services for the inmates and detainees at the Department of Corrections and the Hagåtña Facility for the period of January 2019. **Exhibit D.**

Two days later, on January 11, 2019, Basil received an email correspondence from Roberta Castro, Management Analyst II of GSA, regarding the status of the FOIA request. **Exhibit E.** Attached to the email was correspondence from Claudia Acfalle dated January 10, 2019 advising that a total of 114 pages of documents were available in response to the FOIA request. **Exhibit F.** Basil obtained the FOIA documents that afternoon on January 11, 2019.

Surprisingly, the FOIA documents did not contain any information that was remotely related to the procurement of food services for DOC for the period of January 2019. Specifically, there were no documents evidencing the Governor's declaration of an emergency for January 2019, no requests for quotations issued by GSA to prospective bidders, no quotations submitted by any bidders, and no purchase order for food services for January 2019. This lack of information

prompted Basil to issue a second FOIA request on January 23, 2019 for the same documents, but it reworded its solicitation as follows:

The full, complete and entire procurement file for food and nutrition services for the inmates and detainees at the Department of Corrections and the Hagåtña Facility for the period of January 2019, including but not limited to price quotations, executive branch approvals, contracts, purchase orders, minutes of agency meetings, and communications with prospective vendors. Also requested are all notices, documents, correspondence and communications issued by or received by GSA concerning or relating to the provision of food services to the inmates and detainees at the Department of Corrections and the Hagåtña Facility for the period of January 2019. **Exhibit G.**

Thereafter, within the time prescribed by 5 G.C.A. § 5245(a), Basil filed its timely protest of the procurement of food services to the DOC on January 25, 2019. **Exhibit H.**

On January 29, 2019, Basil received an array of documents from GSA, signed by Robert Kono, GSA's legal counsel.

In the first set of documents, GSA provided Basil with the declaration signed by former Governor Eddie Calvo on December 21, 2018 declaring an emergency for procurement services starting on January 1, 2019 and lasting for a period of up to ninety (90) days. **Exhibit I.**

In the second set, GSA provided the December 26, 2018 Purchase Order for the cost for food services for the DOC (Purchase Order No. P196800232) for January 2019. **Exhibit J.**

The third set of documents contained GSA's denial of Basil's protest. **Exhibit K¹.**

GSA files this appeal within fifteen (15) days of GSA's January 29, 2019 decision denying its protest. In support of this appeal, Basil proffers that it submitted a timely protest of the procurement award to the Chief Procurement Officer on January 25, 2019. Basil further argues

¹ In GSA's January 29, 2019 denial letter, it refers to Basil's December 28, 2018 request in the second to the last paragraph. This may be a typographical error as the correspondence is actually dated December 29, 2018 and it is attached as **Exhibit B.** The other document referred to in that paragraph is GSA's response dated January 3, 2019, which is attached as **Exhibit C.**

that GSA failed to abide by the requirements of an emergency procurement as stated in 5 G.C.A. § 5215.

LEGAL ARGUMENT

1. Basil's Protest to GSA was Timely.

Basil filed a timely protest to the procurement of food services for the DOC for the period of January 2019. The Guam Procurement Law provides,

- (a) Right to Protest. Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation, or award of a contract, may protest to the chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.

5 G.C.A. § 5245(a).

In interpreting this code section, the courts have held that an aggrieved party must have knowledge of some action made by the purchasing agency that could form the basis of a protest in order for the fourteen-day clock to begin. Guam Imaging Consultants, Inc. v. Guam Memorial Hosp. Auth., 2004 Guam 15 ¶ 33. It is this knowledge that triggers the time in which to file a protest. Moreover, while an actual bidder may be aware of possible facts that could form the basis of a protest, the time for filing a protest does not begin until the bidder has sufficient knowledge that it has been aggrieved. Id. ¶ 36.

In Guam Imaging, RADS and Guam Imaging Consultants, Inc. (GIC) filed a protest two days after receiving a Guam Memorial Hospital Authority (GMH) memorandum stating that GMH was finalizing an exclusive contract with another bidding entity. Id. ¶¶6-7. GMH argued that RADS and GIC knew of the facts supporting their protest long before it was formally filed. Id., ¶36. The Supreme Court of Guam, however, agreed with RADS and GIC's position that even if they were aware that GMH might have negotiated an exclusive contract, they did not have

knowledge of the specific circumstances surrounding the negotiations or contract until GMH issued its memorandum. Id. The Court held that RADS and GIC's protest was timely because they based their protest on the specific circumstances of the negotiations and contract that they discovered only after GMH issued its memorandum. Id.

In GSA's denial of the protest, it argues that since the contracts were continuing, Basil should have filed its protest within fourteen (14) days after either January 3, 2019 or January 8, 2019. Specifically, GSA refers to Basil's January 8, 2019 FOIA request to support its allegation that Basil was aware that the government was continuing to provide food services to the DOC. However, GSA's argument does not carry any weight as the mere knowledge that food services were continuing is not the triggering factor for a protest. Every inmate has the right to humane facilities and conditions, including the right to be fed, so it was reasonable to believe that food services were being provided. This general assumption of the continuation of food services does not equate to the specific knowledge of facts that would form the basis for Basil's right to protest.

Further, in support of the argument that Basil did not have specific knowledge that it had been aggrieved on January 8, 2019, it is especially important to consider the fact that five days earlier, on January 3, 2019, GSA informed Basil that it was still awaiting approval from DOC and the Office of Attorney General before it could proceed with a bid. Accordingly, Basil was still in the dark regarding any of the steps, or lack thereof, taken by GSA to procure food services for January 2019.

The law is clear that the time to file a protest begins when the aggrieved bidder knows or should know of facts that form the basis to protest. The turning point in this case occurred when Basil received GSA's response to its January 8, 2019 FOIA request. The documents provided did not include the Governor's declaration of an emergency for January 2019, requests for quotations

issued by GSA to prospective bidders, quotations submitted by any bidders, or a purchase order for food services for January 2019. Upon realization that GSA failed to issue a bid or meet the requirements of an emergency procurement, Basil now had sufficient facts to file a protest.

Based on the foregoing, January 11, 2019 is the date upon which Basil's right to protest was solidified. Since it filed its protest on January 25, 2019, which is within 14 days of its right to do so, the protest is timely.

2. GSA failed to issue an Invitation for Bid or satisfy the requirements for an Emergency Procurement.

Basil's protest of the current procurement is based on numerous violations² of the Guam Procurement Code.

First, GSA did not issue an Invitation for Bid ("IFB") as required by 5 G.C.A. § 5211(b) or fulfill the requirements of an Emergency Procurement as required by 5 G.C.A. § 5215 for food services for the DOC in January 2019.

Second, GSA did not meet a basic requirement of 5 G.C.A. § 5215 which was to give notice to those vendors on the qualified bidders list of the existence of an emergency procurement for January 2019.

Third, as a result of its failure to notify the vendors, GSA did not solicit at least three (3) informal price quotations for food services, which is also in contravention of 5 G.C.A. § 5215.

Fourth, a significant effect of GSA's failure to notify the vendors and solicit price quotations was that it was prevented from awarding the procurement contract to the vendor with the best offer, which is also a requirement of 5 G.C.A. § 5215.

² In its January 25, 2019 protest, Basil argued that GSA failed to secure an Executive Order from the Governor of Guam declaring an emergency pursuant to 5 G.C.A. § 5215. It was not until Basil took the extra step of issuing a second FOIA request (**Exhibit G**) that it was provided with the Executive Order signed by former Governor Eddie Calvo on December 21, 2018 declaring an emergency for procurement services starting on January 1, 2019 (**Exhibit I**) and the Purchase Order dated December 26, 2018 for the cost for food services for the DOC (Purchase Order No. P196800232) for January 2019 (**Exhibit J**).

Most notably, the emergency procurement procedure to secure food services for the DOC is not a new concept to GSA as it has been engaged in this process for over two and a half years, beginning in June 2016. The fact that it was awaiting approval from the DOC and the Office of Attorney General before it could proceed with a bid does not excuse it from continuing to meet the requirements of 5 G.C.A. § 5215. This code section mandates that emergency procurements be made with such competition as is practical under the circumstances. GSA's intentional and deliberate act of forgoing the competitive process and casually extending the procurement award to the current vendor is in clear violation of Guam law.

Further, from a policy standpoint, Guam's Procurement Laws were enacted not only to simplify, clarify and modernize the procurement process, but also to provide increased public confidence in the process, to ensure the fair and equitable treatment of all persons involved in this process, to foster effective competition, and most importantly, to provide safeguards to maintain the quality and integrity of the procurement system. 5 G.C.A. § 5001. GSA's failure to abide by the requirements of 5 G.C.A. § 5215 was done in utter and complete disregard of these underlying policies such that it seriously calls into question GSA's reliability, authenticity, good faith and integrity in carrying out procedures laid out in Guam's Procurement Laws.

REQUESTED RELIEF

Basil requests a finding by the Office of Public Accountability that GSA failed to meet the requirements identified in Guam's Procurement Laws for an emergency procurement. Further, Basil requests the cancellation of the award for food services that were provided to the inmates and detainees at the DOC (Purchase Order No. P196800232) in January 2019. Assuming that the procurement award extends into February and March 2019, Basil also request that those contracts

be cancelled. Basil further requests an award of reasonable attorney's fees and costs incurred in raising this appeal.

DECLARATION REGARDING COURT ACTION

Pursuant to 5 G.C.A. 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 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, February 13, 2019.

CAMACHO CALVO LAW GROUP LLC



GERI E. DIAZ
Attorney for Appellant
BASIL FOOD INDUSTRIAL SERVICES
CORPORATION

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		Pages:	12 (including cover page)
CC:	Geri E. Diaz, Esq. (Attorney for Appellant Basil Food) Cumacho Calvo Law Group LLC 134 W Soledad Ave., Suite 401 Hagatna, Guam 96910 Phone: (671) 472-6813 Fax: (671) 477-4375	Date:	February 14, 2019
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