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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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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.

APPEAL NO. OPA-PA-16-006

**MOTION TO STRIKE THE
APPEARANCE OF SH ENTERPRISES**

I. INTRODUCTION.

Appellant Basil Food Industrial Services Corporation ("Basil") moves to strike the appearance of SH Enterprises, Inc. and SH's request for a hearing on the merits. The only parties with an interest in the contract at issue are Basil and the General Services Agency ("GSA"). SH Enterprises, Inc. is not a party to the contract and is not allowed enter an appearance in this appeal.

II. RELEVANT FACTUAL BACKGROUND.

On January 24, 2014, GSA issued an Invitation for GSA Bid Nos. 010-14 and 011-14, for nutrition services for the Elderly Nutrition Program. Basil was selected as the lowest responsible bidder for both solicitations and has been providing services under the Contracts since July 2014, until GSA terminated the Contracts on June 1, 2016. While a bidder to the procurements, SH is a separate and unrelated entity, and not a party to either contract.

III. ARGUMENT.

Guam's Procurement Law governs controversies between the Government of Guam and a contractor which arise under a contract between them. 5 GCA § 5427(a). If a contract controversy is not resolved, then the matter may be appealed to the Office of Public Accountability. 5 GCA § 5427(a). Furthermore, Guam Procurement Law states that the aggrieved contractor may file an appeal and the Public Auditor will decide the contract controversy. Guam Procurement Law is clear that disputes between the Government of Guam and a contractor are between those two parties. The statutes do not allow third parties that are not privy to the underlying contract to be involved in the appeal for a contract dispute.

The underlying procurement appeal concerns a contract between GSA and Basil; thus, they are the only two parties in privity with each other. SH is not listed in the contract and does not have any third-party beneficiary rights under the contract. While SH was awarded the post-termination emergency procurement referenced in Basil's Notice of Procurement Appeal, a challenge to that emergency procurement has its own procurement appeal process and is not before the OPA in this proceeding.

In other words, SH is not an interested party in this case. An interested party is defined as an actual or prospective bidder, offeror, or contractor who appears to have a substantial and reasonable prospect of receiving an award if the Appeal is denied. 2 GAR Div. 4 § 12102(b). Here, SH does not have any prospect of receiving an award of the contract at issue if the appeal is denied. Instead, if the termination is affirmed, whether by the OPA or by a court of law, then the Contracts between GSA

and Basil are cancelled and the underlying services for the Elderly Nutrition Program will be solicited in a new procurement.

It should be noted that pre-award procurement appeals generally allow for the inclusion of interested parties because there are numerous bidders who have a substantial and reasonable prospect of receiving an award if an appeal is denied. See 5 GCA § 5425(a). On the other hand, 5 GCA § 5427(a) specifically limits the controversy to the Government of Guam and the contractor awarded the bid. The legislature distinguished who can be involved in a procurement protest in pre-award appeals and post-award contract disputes. This logic by the Guam Legislature is sound because in pre-award appeals there are numerous parties that have an interest in the outcome of the procurement appeal. However, in post-award contract disputes there are generally only two parties involved, the Government of Guam and the vendor awarded the contract.

IV. CONCLUSION

In this case, the contract dispute is between General Services Agency for Department of Public Health and Social Services and Basil. SH should not be allowed to enter an appearance in this case and its request for a hearing should also be stricken.

DATED: Hagåtña, Guam, 11th day of July, 2016.

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