



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

**PROCUREMENT APPEALS**

IN THE APPEAL OF,

BASIL FOOD INDUSTRIAL SERVICES  
CORPORATION,

Appellant

**APPEAL NO: OPA-PA-16-006**  
**OPA-PA-16-008**

**DECISION**

**I. INTRODUCTION**

This is the Decision of the Public Auditor for appeal number OPA-PA-16-006/OPA-PA-16-008. In OPA-PA-16-006, Appellant BASIL FOOD INDUSTRIAL SERVICES CORPORATION, (Hereafter Referred to as "BASIL") filed its appeal on June 7, 2016 regarding the GENERAL SERVICES AGENCY, DEPARTMENT OF ADMINISTRATION, GOVERNMENT OF GUAM's (Hereafter Referred to as "GSA") June 3, 2016 Decision denying BASIL's June 2, 2016 request to rescind GSA's June 1, 2016 termination of BASIL's contracts for GSA-IFB-010-14 (Nutrition Services for the Comprehensive Management, Operations, & Maintenance of the Elderly Nutrition Program, Congregate Meals Component) and GSA-IFB-011-14 (Nutrition Services for the Comprehensive Management, Operations, & Maintenance of the Elderly Nutrition Program, Home-Delivered Meals Component). On June 6, 2016, GSA responded to BASIL's June 3, 2016 letter and confirmed that GSA's June 3, 2016 memorandum was a final decision. In OPA-PA-16-008, BASIL filed its appeal on June 28, 2016 regarding GSA's June 22, 2016 denial of BASIL's June 14, 2016 Protest regarding GSA's award of Emergency Procurement Requisition No. Q161730066 to Interested Party SH ENTERPRISES, INC., (Hereafter Referred to as "SH"). On July 7, 2016 the OPA consolidated OPA-PA-16-006 and OPA-PA-16-008 because both appeals involved the same parties and had similar issues. The Public Auditor holds that: (1) GSA's June 6, 2016 final decision to terminate BASIL's contracts

Decision - 1

1 for GSA-IFB-010-14 and GSA-IFB-011-14 was a proper and the correct resolution of the  
2 contract controversy; (2) GSA award of the Emergency Procurement Contract to SH violated 2  
3 G.A.R., Div. 4, Chap. 3, §3113. Accordingly, BASIL's appeal in OPA-PA-16-006 is hereby  
4 DENIED and BASIL's appeal in OPA-PA-16-008 is hereby GRANTED.

## 6 II. FINDINGS OF FACT

7 The Public Auditor in reaching this Decision has considered and incorporates herein the  
8 procurement record and all documents submitted by the parties, except for those excluded by the  
9 Hearing Officer at the hearings for the Appellant's Appeal, and all arguments made during the  
10 hearings which were held on August 15, 22, 23, and 24, 2016. Based on the aforementioned record  
11 in this matter, the Public Auditor makes the following findings of fact:  
12

13 1. On or about January 24, 2014, GSA issued two solicitations, GSA-IFB-010-14  
14 (Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the  
15 Elderly Nutrition Program, Congregate Meals Component), and GSA-IFB-011-14 (Nutrition  
16 Services for the Comprehensive Management, Operations, and Maintenance of the Elderly  
17 Nutrition Program, Home-Delivered Meals Component.)<sup>1</sup>

18 2. On February 14, 2014, GSA received four bids in response to GSA-IFB-010-14.  
19 KALS CORPORATION bid \$6.10 per congregate meal, BASIL bid \$3.27 per congregate meal,  
20 LC ENTERPRISES bid \$3.96 per congregate meal, and SH bid \$6.35 per congregate meal.<sup>2</sup>

21 3. On February 14, 2014, GSA received four bids in response to GSA-IFB-011-14.  
22 KALS CORPORATION bid \$7.60 per home delivered meal, LC ENTERPRISES bid \$5.43 per  
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25 <sup>1</sup> Advertisement in Marianas Variety Guam Edition dated January 24, 2014, TAB  
26 18, Procurement Record for GSA-IFB-010-14, and TAB 18, Procurement Record for  
27 GSA-IFB-011-14, both Procurement Records were filed on June 15, 2016 in OPA-  
28 PA-16-006.

<sup>2</sup> Abstract of Bids for GSA-IFB-010-14, TAB 8, Id. NOTE: The Appellant was  
known as LI QUN CORPORATION at the time it submitted its bid and subsequently  
changed its corporate name to "BASIL FOOD INDUSTRIAL SERVICES". For  
consistency, this Decision will use the later name or "BASIL" to identify the  
Appellant.

1 home delivered meal, SH bid \$7.75 per home delivered meal, and BASIL bid \$5.07 per home  
2 delivered meal.<sup>3</sup>

3 4. On July 3, 2014, GSA issued a Notice of Intent to Award both GSA-IFB-010-14 and  
4 GSA-IFB-011-14 to BASIL.<sup>4</sup>

5 5. On August 4, 2014 GSA analyzed the bids submitted in response to GSA-IFB-010-14  
6 and determined that BASIL submitted the lowest responsive and responsible bid and determined,  
7 that with the IFB's contract term of one year with an option to renew for two additional years,  
8 that BASIL's \$3.27 price per meal multiplied by 780 meals, the average number of congregate  
9 meals per day, would cost approximately, \$2,496 per day, \$54,912 per month, \$658,944 per year,  
10 and a total of \$1,976,832 for the entire possible contract term of three years.<sup>5</sup>

11 6. That same day, GSA analyzed the bids submitted in response to GSA-IFB-011-14 and  
12 determined that BASIL submitted the lowest responsive and responsible bid and determined, that  
13 with the IFB's contract term of one year with an option to renew for two additional years, that  
14 BASIL's \$5.07 price per meal multiplied by 1,200 meals, the average number of home delivered  
15 meals per day, would cost approximately, \$6,084 per day, \$133,848 per month, \$1,606,176 per  
16 year, and a total of \$4,818,528 for the entire possible contract term of three years.<sup>6</sup>

17 7. GSA awarded the IFB contracts for GSA-IFB-010-14 and GSA-IFB-011-14 and  
18 BASIL began providing service under the contracts on or about July 2014.<sup>7</sup>

19 8. On November 5, 2014, the Division of Environmental Health, Department of Public  
20 Health and Social Services, Government of Guam (Hereafter Referred to as "DPHSS"),

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22 <sup>3</sup> Abstract of Bids for GSA-IFB-011-14, TAB 8, Id.

23 <sup>4</sup> Notice of Intent to Award dated July 3, 2014, TAB 11, GSA-IFB-010-14, and  
24 TAB 11, GSA-IFB-011-14, Id.

25 <sup>5</sup> GSA Analysis of Bid Invitation No. GSA-010-14 dated August 4, 2014, page 2,  
26 TAB 15, GSA-IFB-010-14, Id. NOTE: OPA discovered a calculation error, which  
27 will be discussed in the Analysis section of this Decision.

28 <sup>6</sup> GSA Analysis of Bid Invitation No. GSA-011-14 dated August 4, 2014, page 2,  
TAB 15, GSA-IFB-011-14, Id.

<sup>7</sup> Page 3, Notice of Appeal filed on June 7, 2016 in OPA-PA-16-006. NOTE: The  
procurement files for GSA-IFB-010-14 and GSA-IFB-011-14 did not have copies  
of the original Purchase Orders issued to BASIL for these solicitations. The  
OPA did not request these documents because there is no question BASIL  
received the contract awards for the solicitations and was providing the  
contract services at the time it was terminated by GSA, and other facts these  
documents could provide would only serve as background information.

1 inspected the food preparation facility BASIL used to prepare the meals required by GSA-IFB-  
2 010-14 and GSA-IFB-011-14 and although it found enough violations to issue BASIL a “D”  
3 rating, which would result in the temporary suspension of BASIL’s Sanitary Permit and the  
4 closure of the facility, DPHSS chose instead to educate BASIL on the Guam Food Code by  
5 advising BASIL’s Program Manager Betty Del Cruz of the deficiencies discovered during the  
6 inspection and by giving BASIL until November 15, 2014 and December 5, 2014 to address  
7 specific violations noted.<sup>8</sup>

8 9. On January 20, 2015, DPHSS inspected BASIL’s food preparation facility and gave it  
9 a “C” rating.<sup>9</sup>

10 10. On January 27, 2015, DPHSS received a complaint that some of the meals provided  
11 by BASIL for GSA-IFB-010-14 and GSA-IFB-011-14 were spoiled. DPHSS inspected BASIL’s  
12 food preparation facility that day and gave it a “B” rating.<sup>10</sup>

13 11. Based on a complaint of a screw found in one of the meals BASIL provided for  
14 GSA-IFB-010-14 and GSA-IFB-011-14, on February 4, 2015, DPHSS inspected BASIL’s food  
15 preparation facility and gave it a “D” rating. DPHSS issued a Notice of Closure and required  
16 BASIL to conduct an in-house training workshop to ensure that its employees properly  
17 understood the Guam Food Code. DPHSS conducted a follow-up inspection on February 5,  
18 2015 and determined that the screw found in the meal came from BASIL’s grinder/puree  
19 machine which BASIL had since repaired, and that BASIL corrected the deficiencies that  
20 resulted in the “D” rating. DPHSS informed BASIL that it was their duty to ensure the food they  
21 prepare is safe from any contaminants and gave BASIL an “A” rating.<sup>11</sup>

22 12. On March 11, 2015, DPHSS sent a letter to BASIL advising BASIL that it was  
23 concerned with BASIL’s inspection history for the preceding 6 months and for BASIL to keep  
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25 <sup>8</sup> DPHSS Food Establishment Inspection Report dated November 5, 2014, page 6,  
26 Exhibit C, and DPHSS Letter to BASIL dated March 11, 2015, page 21, Exhibit  
27 C, GSA & SH Joint Exhibit List filed on August 5, 2016.

<sup>9</sup> DPHSS Food Establishment Inspection Report dated January 20, 2015, page 10,  
28 Exhibit C, Id.

<sup>10</sup> DPHSS Letter to BASIL dated March 11, 2015, page 21, Exhibit C, Id.

<sup>11</sup> DPHSS Food Establishment Inspection Report dated February 4, 2015, page 12,  
Exhibit C, Id.

1 its Sanitary Permit, DPHSS strongly recommended that BASIL: (1) Comply with the Guam  
2 Food Code; (2) Ensure that the person in charge of BASIL's food preparation facility is  
3 knowledgeable of food safety and is able to demonstrate foodborne disease prevention,  
4 application of the Hazard Analysis and Critical Control Point Principles (hereafter referred to as  
5 "HACCP"), and the requirements of the Guam Food Code; and (3) BASIL must develop and  
6 submit to DPHSS a HACCP Plan that was developed or certified by a person who has obtained  
7 HACCP training and credentialing. DPHSS gave BASIL 45 calendar days to submit this plan to  
8 DPHSS.<sup>12</sup>

9 13. On April 3, 2015, BASIL received a letter from DPHSS dated March 26, 2015,  
10 which advised all food establishments that serve to elementary school students and highly  
11 susceptible populations to develop and submit to DPHSS a HACCP within 60 days after it  
12 received the letter.<sup>13</sup>

13 14. On April 7, 2015, a recipient of one of the meals provided by BASIL for GSA-IFB-  
14 010-14 and GSA-IFB-011-14 found a dead fly in the meal and complained to DPHSS.<sup>14</sup>

15 15. On April 9, 2015, a recipient of one of the meals provided by BASIL for GSA-IFB-  
16 010-14 and GSA-IFB-011-14 found a hair in the meal and complained to DPHSS.<sup>15</sup>

17 16. On April 24, 2015, BASIL responded to DPHSS's March 11, 2015 letter by  
18 requesting for an extension to the 45-day deadline to submit a HACCP Plan because BASIL  
19 could not find a person on Guam who has obtained HACCP training and credentialing.<sup>16</sup>

20 17. On April 27, 2015, DPHSS inspected BASIL's food preparation facility because of  
21 the complaints it received on April 7 and 9, 2015 and found that BASIL did not have a HACCP  
22 Plan, but still had until June 3, 2015 to provide one, and that BASIL had undertaken multiple  
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26 <sup>12</sup> DPHSS Letter to BASIL dated March 11, 2015, page 21, Exhibit C, Id.

27 <sup>13</sup> DPHSS Letter dated March 26, 2015, page 29-31, Exhibit C, Id.

28 <sup>14</sup> DPHSS Letter to BASIL dated April 20, 2015, page 39, Exhibit C, Id.

<sup>15</sup> DPHSS Letter to BASIL from April 2015, page 44, Exhibit C, Id. NOTE: OPA could not decipher the numeric date of the letter and can only confirm that it was sometime in April 2015.

<sup>16</sup> BASIL Letter to DPHSS dated April 24, 2015, page 32, Exhibit C, Id.

1 preventative measures to correct the deficiencies indicated by the complaints. As such, they were  
2 not given a new or adverse rating.<sup>17</sup>

3 18. On April 28, 2015, DPHSS responded to BASIL's request for an extension to submit  
4 a HACCP Plan and stated that because DPHSS issued BASIL a letter that BASIL received on  
5 April 3, 2015, that gave BASIL until 60 days to submit a HACCP Plan, and that BASIL already  
6 had an extension which would expire on June 3, 2015 to submit its plan.<sup>18</sup>

7 19. On May 27, 2015, DPHSS personnel contacted BASIL's Program Manager, Betty  
8 Dela Cruz to get an update on BASIL's HACCP Plan, and she stated that she contacted local  
9 vendors, but their response was that they do not provide HACCP Certification or know of  
10 anyone on Guam who can provide such certification, and that she even called the Guam  
11 Community College, who told her that they do not provide HACCP Certification.<sup>19</sup>

12 20. That same day, DPHSS called BASIL to remind it of the June 3, 2015 deadline for  
13 its HACCP Plan.<sup>20</sup>

14 21. On June 4, 2015, DPHSS conducted a routine inspection of BASIL's food  
15 preparation facility and found several violations, to include BASIL not submitting a HACCP  
16 Plan, which resulted in BASIL's rating being reduced from an "A" to a "B" rating, and BASIL  
17 was given until June 14, 2015 to submit its HACCP Plan to DPHSS.<sup>21</sup>

18 22. On June 5, 2015, DPHSS conducted a follow-up inspection of BASIL's food  
19 preparation facility which resulted in BASIL's rating being reduced from a "B" to a "C" rating  
20 for BASIL's failure to provide a HACCP Plan.<sup>22</sup>

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24 <sup>17</sup> DPHSS Food Establishment Inspection Report dated April 27, 2015, page 35, Exhibit C, Id.

25 <sup>18</sup> DPHSS Letter to BASIL dated April 28, 2015, page 54, Exhibit C, Id.

26 <sup>19</sup> Email from JEANETTE GOMEZ to CHARLENE D. SAN NICOLAS dated May 27, 2015 at 10:07 a.m., page 2, Exhibit 5, Appellant's Exhibit List filed on August 5, 2016.

27 <sup>20</sup> Email from CHARLENE D. SAN NICOLAS to ARTHUR U. SAN AGUSTIN dated May 27, 2015, 11:39 a.m., page 1, Exhibit 5, Id.

28 <sup>21</sup> DPHSS Food Establishment Inspection Report dated June 4, 2015, page 56, Exhibit C, GSA & SH's Joint Exhibit List filed on August 5, 2016.

<sup>22</sup> DPHSS Food Establishment Inspection Report dated June 15, 2015, page 58, Exhibit C, Id.

1           23. On June 15, 2015, DPHSS issued BASIL a Letter of Warning wherein it gave  
2 BASIL 10 working days to correct its failure to have a HACCP Plan.<sup>23</sup>

3           24. BASIL retained the services of HACCP Consulting Group, LLC, who assisted them  
4 in developing BASIL's HACCP Plan, which BASIL submitted to DPHSS on June 29, 2015.<sup>24</sup>

5           25. On July 1, 2015, DPHSS notified BASIL that its HACCP Plan had several  
6 deficiencies and it gave BASIL until July 8, 2015 to make corrections and provide it with a final  
7 certified copy of BASIL's HACCP Plan.<sup>25</sup>

8           26. On July 7, 2015, BASIL received a letter from Cathy M. Crawford of HACCP  
9 Consulting Group, LLC., who provided BASIL's corrected HACCP Plan and further stated that,  
10 due to her off-island location, she could not verify whether BASIL's actions match the plan or  
11 whether its records meet requirements and BASIL submitted the revised plan to DPHSS on July  
12 8, 2015.<sup>26</sup>

13           27. Also on July 8, 2015, DPHSS sent GSA a letter stating that they planned to inspect  
14 BASIL's food preparation facility on July 9, 2015 and that DPHSS planned on suspending or  
15 terminating BASIL's sanitary permit if they did not have a certified HACCP Plan, and if that  
16 happened, DPHSS informed GSA that they would need an immediate replacement vendor to  
17 avoid a lapse in meal delivery to the elderly. Further, DPHSS attached documents to this letter  
18 that it anticipated GSA would need to procure the replacement vendor. These documents  
19 included a Memorandum wherein DPHSS formally requested for a replacement vendor that  
20 would begin to provide services on July 10, 2015, and attached to this Memorandum was a cost  
21 estimate wherein DPHSS estimated that it would cost \$385,550 for the replacement vendor to  
22 provide the same services that BASIL was providing pursuant to its contracts for GSA-IFB-010-  
23 14 and GSA-IFB-011-14 from July 10, 2015 to August 21, 2015, and requisitions for the  
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26 <sup>23</sup> DPHSS Letter of Warning dated June 15, 2015, page 59, Exhibit C, Id.

27 <sup>24</sup> Letter from HACCP Consulting Group, LLC to BETTY DELA CRUZ dated July 7,  
2015, page 62, Exhibit C, Id., and Letter from DPHSS to BASIL dated July 1,  
2015, page 60, Exhibit C, Id.

28 <sup>25</sup> Id.

<sup>26</sup> Letter from HACCP Consulting Group, LLC to BETTY DELA CRUZ dated July 7,  
2015, page 62, Exhibit C, Id., and DPHSS Letter to BASIL dated July 9, 2015,  
page 149, Exhibit C, Id.

1 emergency procurement in the amounts of \$128,700 for the congregate meals component,  
2 \$171,110 for the weekday home-delivered meals component, and \$85,550 for the weekend  
3 home-delivered meals component.<sup>27</sup>

4 28. On July 9, 2015, DPHSS conducted a follow-up inspection of BASIL's food  
5 preparation facility and gave it a "D" rating due to its repeated failure to submit a HACCP Plan  
6 and issued BASIL a notice of closure of the facility.<sup>28</sup>

7 29. That same day, DPHSS notified BASIL that it reviewed BASIL's July 8, 2015  
8 HACCP Plan and found it was unacceptable because it still contained several deficiencies.  
9 DPHSS further stated that due to BASIL's repeated inability to submit an acceptable HACCP  
10 Plan, BASIL would receive a "D" rating and its sanitary permit would be suspended.<sup>29</sup>

11 30. On July 9, 2015, GSA issued Purchase Order No. P156E00316 for the amount of  
12 \$171,100 and Purchase Order No. P156E00318 for the amount of \$125,970 to SH to provide the  
13 services BASIL had been providing under GSA-IFB-010-14 and GSA-IFB-011-14 from July 10,  
14 2015 to July 30, 2015.<sup>30</sup>

15 31. On July 14, 2015, GSA issued BASIL a Notice of Default for BASIL's contracts for  
16 GSA-IFB-010-14 and GSA-IFB-011-14 because of BASIL's "D" rating and the Notice of  
17 Closure DPHSS issued to BASIL's food preparation facility, which violated Section 12.9 of the  
18 Special Terms and Conditions of the aforementioned solicitations which stated that in the event  
19 the bidder awarded the IFB is issued a "C" rating from DPHSS it may be terminated, and GSA  
20 gave BASIL 10 days to cure the default or its contracts would be terminated. BASIL received  
21 this Notice on July 15, 2015.<sup>31</sup>

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24 <sup>27</sup> Letter and attachments from DPHSS to GSA dated July 8, 2015, TAB 19,  
25 Procurement Record for GSA-IFB-011-14, and Letter and attachments from DPHSS  
26 to GSA dated July 8, 2015, TAB 19, Procurement Record for GSA-IFB-010-14;  
both Procurement Records were filed on June 15, 2016 in OPA-PA-16-006.

27 <sup>28</sup> DPHSS Food Establishment Inspection Report dated July 9, 2015, pages 145-  
148, Exhibit C, GSA & SH's Joint Exhibit List filed on August 5, 2016.

28 <sup>29</sup> DPHSS Letter to BASIL dated July 9, 2015, pages 149-150, Exhibit C, Id.

<sup>30</sup> GSA Purchase Order Nos. P156E00316 & P156E00318, Exhibit 31, Appellant's  
Exhibit List filed on August 5, 2016.

<sup>31</sup> GSA Memorandum to BASIL dated July 14, 2015, page 152, Exhibit C, GSA &  
SH's Joint Exhibit List filed on August 5, 2016.



1           32. On July 17, 2015, DPHSS sent BASIL a letter clarifying that BASIL’s sanitary  
2 permit was suspended and not revoked and that the suspension would continue as long as BASIL  
3 fails to submit a certified HACCP Plan to DPHSS.<sup>32</sup>

4           33. On July 20, 2015, DPHSS sent BASIL a Notice of Violation with Intent to Revoke as  
5 a result of BASIL not providing DPHSS with a certified HACCP Plan and it gave BASIL 15  
6 days to request a hearing to contest the intended revocation.<sup>33</sup>

7           34. On July 27, 2015, BASIL submitted a certified HACCP Plan that was acceptable to  
8 DPHSS and DPHSS gave BASIL’s food preparation facility an “A” rating, and on July 28, 2015,  
9 GSA reinstated BASIL’s contracts for GSA-IFB-010-14 and GSA-IFB-011-14 and warned  
10 BASIL that in the future, BASIL’s non-compliance with the Guam Food Code may lead to a  
11 determination that it was not a responsive and responsible vendor.<sup>34</sup>

12           35. That same day, GSA gave notice to SH that its two Purchase Orders would cease  
13 after August 7, 2015 for the congregate meals and on August 8, 2015 for the home delivered  
14 meals.<sup>35</sup>

15           36. On July 30, 2015, DPHSS formally notified BASIL that it was rescinding its July 20,  
16 2015 Notice of Violation with Intent to Revoke because of a July 27, 2015 follow-up inspection  
17 on BASIL’s food preparation facility and BASIL’s submission of an acceptable, certified  
18 HACCP Plan.<sup>36</sup>

19           37. On October 28, 2015, DPHSS conducted a regular inspection of BASIL’s food  
20 preparation facility and found several violations, which resulted in BASIL’s rating being reduced  
21 from an “A” to a “C”.<sup>37</sup>

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25 <sup>32</sup> DPHSS Letter to BASIL dated July 17, 2015, page 154, Exhibit C, Id.

26 <sup>33</sup> DPHSS Letter with Attached Notice of Violation to BASIL dated July 20,  
2015, page 155, Exhibit C, Id.

27 <sup>34</sup> GSA Letter to BASIL dated July 28, 2015, page 166, Exhibit C, Id.

28 <sup>35</sup> GSA Letter to SH dated July 28, 2015, page 167, Exhibit C, Id.

<sup>36</sup> DPHSS Letter to BASIL dated July 30, 2015, page 168, Exhibit C, Id.

<sup>37</sup> DPHSS Food Establishment Inspection Report dated October 25, 2015, pages  
208-2011, Exhibit C, Id.

1 38. That same day, DPHSS issued a Letter of Warning to BASIL notifying them that  
2 they would be re-inspected in 10 working days to ensure that the violations DPHSS discovered  
3 during its inspection were corrected.<sup>38</sup>

4 39. On November 6, 2015, DPHSS conducted a follow-up inspection of BASIL's food  
5 preparation facility and found that all the violations discovered in its October 28, 2015 inspection  
6 were corrected and DPHSS upgraded BASIL's rating from a "C" to an "A."<sup>39</sup>

7 40. On February 23, 2016, DPHSS conducted a regular inspection of BASIL's food  
8 preparation facility and discovered several violations that resulted in DPHSS lowering BASIL's  
9 "A" rating to a "C" rating.<sup>40</sup>

10 41. That same day, DPHSS issued a Letter of Warning to BASIL giving them 10  
11 working days to correct the violations discovered during DPHSS's inspection of BASIL's food  
12 preparation facility.<sup>41</sup>

13 42. On March 3, 2016, BASIL requested that DPHSS give them an extension to March  
14 11, 2016 to make the corrections because one of the corrective actions required BASIL to amend  
15 their HACCP Plan and BASIL could not do so without the extension.<sup>42</sup>

16 43. That day, DPHSS granted BASIL's request and extended the deadline for BASIL's  
17 re-inspection to March 11, 2016.<sup>43</sup>

18 44. On March 4, 2016, DPHSS, citing BASIL's repeated violations of the Guam Food  
19 Code, warned BASIL that if it continued to have these repeat violations, DPHSS would have to  
20 pursue administrative action against BASIL to include the suspension of its sanitary permit.<sup>44</sup>

21 45. On March 8, 2016, BASIL requested that DPHSS re-inspect its food preparation  
22 facility and provided DPHSS with a copy of its amended HACCP Plan.<sup>45</sup>

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24 <sup>38</sup> DPHSS Letter of Warning dated October 28, 2015, page 212, Exhibit C, Id.

25 <sup>39</sup> DPHSS Food Establishment Inspection Report dated November 6, 2015, pages  
26 213-214, Exhibit C, Id.

27 <sup>40</sup> DPHSS Food Establishment Inspection Report dated February 23, 2016, pages  
28 215-218, Exhibit C, Id.

<sup>41</sup> DPHSS Letter of Warning dated February 23, 2016, page 219, Exhibit C, Id.

<sup>42</sup> BASIL Letter to DPHSS dated March 3, 2016, page 221, Exhibit C, Id.

<sup>43</sup> Email from JAMES GILLAN to MASATOMO NADEAU dated March 3, 2016, page 220,  
Exhibit C, Id.

<sup>44</sup> DPHSS Letter to BASIL dated March 4, 2016, pages 222-223, Exhibit C, Id.

<sup>45</sup> BASIL Fax to DPHSS dated March 8, 2016, page 225, Exhibit C, Id.

1           46. On March 11, 2016, DPHSS conducted a follow-up inspection of BASIL's food  
2 preparation facility and determined that BASIL had corrected all the violations DPHSS  
3 discovered during its February 23, 2016 inspection and DPHSS upgraded BASIL's rating from a  
4 "C" to an "A" rating.<sup>46</sup>

5           47. On May 27, 2016, DPHSS received complaint about a dead black bug being found in  
6 a vegetarian meal provided by BASIL for its contract for GSA-IFB-010-14.<sup>47</sup>

7           48. As a result of receiving this complaint, on May 31, 2016, DPHSS inspected BASIL's  
8 food preparation facility and discovered several violations which resulted in DPHSS reducing  
9 BASIL's rating from an "A" to a "D" rating.<sup>48</sup>

10           49. That day, DPHSS issued a Notice of Closure to BASIL which notified BASIL that  
11 their food preparation facility would remain closed until they requested for a re-inspection after  
12 they corrected the violations discovered during the May 31, 2016 inspection.<sup>49</sup>

13           50. Also on May 31, 2016, BASIL notified DPHSS that they corrected the violations  
14 discovered during DPHSS's inspection of their food preparation facility.<sup>50</sup>

15           51. Also on that day, DPHSS advised GSA that BASIL's food preparation facility had  
16 been closed and GSA began taking steps, using the emergency procurement procedures, to find  
17 another vendor to provide the services BASIL was providing for its contracts for GSA-IFB-010-  
18 14 and GSA-IFB-011-14. GSA only requested a quotation from one vendor, SH, because it was  
19 the only vendor who provided the same or similar services to the government in the preceding 12  
20 months.<sup>51</sup>

21           52. On June 1, 2016, GSA issued Purchase Order No. P166E00273 to SH for the amount  
22 of \$99,450 for SH to provide the congregate meals to the elderly that BASIL was providing  
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24 <sup>46</sup> DPHSS Food Establishment Inspection Report dated March 11, 2016, pages 229-  
25 230, Exhibit C, Id.

26 <sup>47</sup> Email from JEANETTE GOMEZ to KATHERINE U. DELMUNDO dated May 27, 2016, page  
27 240, Exhibit C, Id.

28 <sup>48</sup> DPHSS Food Establishment Inspection Report dated May 31, 2016, pages 241-  
246, Exhibit C, Id.

<sup>49</sup> DPHSS Notice of Closure dated May 31, 2016, page 247, Exhibit C, Id.

<sup>50</sup> BASIL Letter to DPHSS dated May 31, 2016, pages 250-251, Exhibit C, Id.

<sup>51</sup> GSA Memo to File, undated, TAB 19, Procurement Record for GSA-IFB-010-14,  
filed on June 15, 2016 in OPA-PA-16-006, and GSA Request for Quotation dated  
May 31, 2016, Exhibit 33, Appellant's Exhibit List filed on August 5, 2016.

1 under its contract in GSA-IFB-010-14. GSA also issued Purchase Order No. P166E00274 to SH  
2 for the amount of \$207,680 for SH to provide the home delivered meals to the elderly that  
3 BASIL was providing under its contract in GSA-IFB-011-14. In addition, GSA issued two  
4 Purchase Orders (Nos. P166E00275 for the amount of \$43,517 and P166E00276 for the amount  
5 of \$32,003) to supplement P166E00274 for weekend feeding services. All purchase orders were  
6 for the period June 1 to 24, 2016.<sup>52</sup>

7 53. Also on that date, GSA terminated BASIL's contracts for GSA-IFB-010-14 and  
8 GSA-IFB-011-14 due to the DPHSS's May 31, 2016 closure of BASIL's food preparation  
9 facility, which GSA alleged was a violation of Section 12.9 of said solicitations' Special Terms  
10 and Conditions. This termination was "effective immediately."<sup>53</sup>

11 54. On June 2, 2016, DPHSS conducted a follow-up inspection of BASIL's food  
12 preparation facility and determined that almost all of the violations discovered during the May  
13 31, 2016 inspection had been corrected, and DPHSS upgraded BASIL's rating from a "D" to an  
14 "A" rating and rescinded its Notice of Closure.<sup>54</sup>

15 55. That same day, BASIL sent GSA a notice that it had cured the default cited in GSA's  
16 June 1, 2016 Notice of Termination, and stated that GSA should afford BASIL a 10 day period  
17 to cure defaults pursuant to 2 G.A.R., Div. 4, Chap. 6, §6101(8), and that BASIL was prepared to  
18 recommence the contractual services it was providing for GSA-IFB-010-14 and GSA-IFB-011-  
19 14.<sup>55</sup>

20 56. On June 3, 2016, GSA notified BASIL that pursuant to Section 12.9 of the Special  
21 Terms and Conditions of GSA-IFB-010-14 and GSA-IFB-011-14, it may terminate BASIL's  
22 contracts if BASIL receives a "D" rating. GSA also stated that BASIL received a "D" rating in  
23 July 27, 2015 and GSA chose to give BASIL the opportunity to cure instead of termination, but  
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25 <sup>52</sup> GSA Purchase Order Nos. P16E00273, P166E00274, P166E00275, and P166E00276,  
26 GSA's Addendum to Procurement Record filed on August 15, 2016.

27 <sup>53</sup> GSA Memorandum to BASIL dated June 1, 2016, TAB 19, Procurement Record for  
28 GSA-IFB-010-14 filed on June 15, 2016 in OPA-PA-16-006.

<sup>54</sup> DPHSS Food Establishment Inspection Report dated June 2, 2016, pages 258-  
260, Exhibit C, GSA's and SH's Joint Exhibit List filed on August 5, 2016.

<sup>55</sup> ELYZE IRIARTE, ESQ., letter to GSA dated June 2, 2016, TAB 19, Procurement  
Record for GSA-IFB-011-14 filed on June 15, 2016 in OPA-PA-16-006.

1 that this act did not mean that every time BASIL receives a “D” rating GSA must give it 10 days  
2 to cure, and that GSA chooses to exercise Section 12.9 and terminate BASIL’s contracts because  
3 it received a “D” rating.<sup>56</sup>

4 57. That same day, BASIL requested that GSA clarify if its June 3, 2016 letter was a  
5 final decision under 5 G.C.A. §5427 and that if GSA had not issued a final decision, whether  
6 GSA would take any further action to settle and resolve the controversy arising from GSA’s  
7 termination of BASIL’s contracts for GSA-IFB-010-14 and GSA-IFB-011-14.<sup>57</sup>

8 58. On June 6, 2016, GSA notified BASIL that its June 3, 2016 letter was a final  
9 decision and that BASIL had the right to seek administrative and judicial review of said  
10 decision.<sup>58</sup>

11 59. On June 7, 2016, BASIL filed its appeal in OPA-PA-16-006 requesting that the  
12 GSA’s termination of BASIL’s contracts for GSA-IFB-010-14 and GSA-IFB-011-14 be  
13 rescinded and that it be given an extension of the terms of said contracts to account for the period  
14 it has been unlawfully restrained from performing, and that GSA be prevented from issuing a  
15 new bid for the services BASIL was providing GSA under GSA-IFB-010-14 and GSA-IFB-011-  
16 14.<sup>59</sup>

17 60. On June 14, 2016, BASIL filed a protest alleging that the Emergency Procurement  
18 awarded to SH on May 31, 2016 was improper because: (1) GSA did not obtain at least three  
19 informal price quotations; (2) GSA had previously obtained at least three informal price  
20 quotations in the past for the same services; (3) GSA should have also given notice of the  
21 emergency procurement to BASIL; (4) The Emergency Procurement should be limited to 30  
22 days instead of the 90 day period it was given; (5) The Emergency Procurement did not require  
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27 <sup>56</sup> GSA Memorandum to ELYZE IRIARTE, ESQ., dated June 3, 2016, TAB 2,  
Procurement Record for GSA-IFB-010-14 filed on June 15, 2016 in OPA-PA-16-  
006.

28 <sup>57</sup> ELYZE IRIARTE, ESQ., letter to GSA dated June 3, 2016, TAB 1, Id.

<sup>58</sup> GSA Memorandum to ELYZE IRIARTE, ESQ., dated June 6, 2016, TAB 2, Id.

<sup>59</sup> Page 7, Notice of Appeal filed on June 7, 2016 in OPA-PA-16-006.

1 the vendor awarded the contract comply with HACCP requirements; and (6) GSA awarded the  
2 Emergency Procurement to SH.<sup>60</sup>

3 61. On June 22, 2016, GSA issued its decision on BASIL's June 14, 2016 protest,  
4 denying it after it found that BASIL's allegations had no merit.<sup>61</sup>

5 62. On June 28, 2016, just six days after GSA issued its protest decision, BASIL filed its  
6 appeal in OPA-PA-16-008 requesting that the Emergency Procurement and the contract awarded  
7 to SH be terminated.<sup>62</sup>

### 9 III. ANALYSIS

10 Pursuant to 5 G.C.A. §5706 and 2 G.A.R., Div. 4, Chap. 12, §12301, the Public Auditor  
11 shall review GSA's June 3, 2016 and June 6, 2016 final decision to terminate BASIL's contracts  
12 for GSA-IFB-010-14 and GSA-IFB-011-14 and, pursuant to 5 G.C.A. §5425(e) and 2 G.A.R.,  
13 Div. 4, Chap. 12, §12201, the Public Auditor shall review GSA's June 22, 2016 denial of  
14 BASIL's June 14, 2016 protest. Pursuant to 5 G.C.A. §5703 and 2 G.A.R., Div. 4, Chap. 3,  
15 §12103(a), said reviews shall be *de novo*. As a preliminary matter, the Public Auditor must  
16 decide BASIL's August 11, 2016 Objections to GSA's Witness List and Exhibits.  
17

#### 18 **A. BASIL's Objections to GSA's Witness List & Exhibits is Denied in Part and** 19 **Sustained in Part.**

20 BASIL objects to GSA's proposed witness Joshua J.A. Mafnas, GSA's Supplemental  
21 Exhibit F, and GSA Exhibits B, C, D, and E. BASIL argues that the testimony of Joshua J.A.  
22 Mafnas is irrelevant because it relates to BASIL's contract with the Department of Corrections,  
23 Government of Guam (Hereafter Referred to as "DOC"). In a similar vein, BASIL argues that  
24 GSA's Supplemental Exhibit F should not be admitted because it is not part of the procurement  
25 record, it is untimely because it was filed after the deadline to file exhibits had passed, and  
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27 <sup>60</sup> BASIL's Protest dated June 14, 2016, Exhibit A, Notice of Appeal filed on  
28 June 28, 2016 in OPA-PA-16-008.

<sup>61</sup> GSA Protest Decision dated June 22, 2016, Exhibit B, Id.

<sup>62</sup> Page 6, Notice of Appeal in OPA-PA-16-008 on June 28, 2016.

1 because it is a video recording of Mafnas' impromptu inspection of BASIL's food preparation  
2 facility on or about May 31, 2016 or June 1, 2016.<sup>63</sup> During the hearing in this matter, the  
3 Hearing Officer sustained these objections.<sup>64</sup> Generally, the OPA's Hearing Officer may receive,  
4 rule on, exclude, or limit evidence, and limit lines of questioning or testimony which are  
5 irrelevant, immaterial, or unduly repetitious. 2 G.A.R., Div. 12, §12109(f). Here, GSA's offer of  
6 proof for Mafnas' testimony and the admission of the video footage he took of BASIL's food  
7 preparation facility concerned GSA's allegations that BASIL blatantly breaks Guam laws and  
8 that this illustrates an illegal pattern of behavior that BASIL displayed during the contract term.<sup>65</sup>  
9 However, GSA also admits that Mafnas was employed by DOC and that his investigative  
10 actions, to include taking the video footage, concerned BASIL's contract to supply food to DOC  
11 and not BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14. Further, as set forth  
12 above, there is no mention of BASIL's performance of its contract for DOC in GSA's final  
13 decision to terminate BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14. Hence, the  
14 Public Auditor finds that Mafnas' testimony and the video footage he took of BASIL's food  
15 preparation facility are irrelevant to the issues in this matter. Additionally, to the extent the  
16 video footage shows or may show that BASIL's food preparation facility was not compliant with  
17 the Guam Food Code, as set forth above, none of the parties dispute that DPHSS inspected the  
18 facility on May 31, 2016 and issued a notice of closure because it was not compliant with the  
19 Guam Food Code. Hence, the Public Auditor finds that this video footage would be  
20 unnecessarily cumulative. Therefore, based on the foregoing, the Hearing Officer correctly  
21 excluded Mafnas' testimony and the video footage he took of BASIL's food preparation facility,  
22 and these shall not be part of the record and shall not be considered in deciding OPA-PA-16-006  
23 and OPA-PA-16-008.

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26 <sup>63</sup> Page 1, paragraphs 1 and 2, BASIL's Objections to Witness List and Exhibits  
27 filed on August 11, 2016.

28 <sup>64</sup> August 22, 2016 Formal Hearing in OPA-PA-16-006 and OPA-PA-16-008 (01:01:00  
to 01:04:30).

<sup>65</sup> Page 2, paragraph 1, GSA's Response to BASIL's Objections to Witness List  
and Exhibits filed on August 12, 2016.

1 BASIL argues that GSA's Exhibit B, which is DPHSS's timeline for food establishments  
2 requiring a HACCP Plan, Exhibit C, which is a Chronology of Events with Supporting  
3 Documents; Exhibit D, which are photographs from the May 31, 2016 DPHSS's inspection of  
4 BASIL's food preparation facility; and Exhibit E, which is a February 6, 2015 news story  
5 concerning DPHSS's February 4, 2015 closure of BASIL's food preparation facility, should be  
6 excluded from the record in this matter because they are not contained in the procurement record.  
7 By making this argument, BASIL suggests that the Public Auditor is limited to only considering  
8 the procurement record filed in this matter to decide this appeal. There is no such limitation  
9 imposed by law, and the Public Auditor has broad discretion to review evidence that is not part  
10 of the procurement record. The Public Auditor is not bound by statutory rules of evidence or by  
11 technical or formal rules of procedure, and the testimony presented at appeal hearings shall be  
12 written, oral, or otherwise. 2 G.A.R., Div. 4, Chap. 12, §12108(d). The Public Auditor may take  
13 judicial notice of any fact that may be judicially noticed by the courts of Guam. 2 G.A.R., Div.  
14 4, Chap. 12, §12108(h). The Public Auditor may consider testimony and evidence submitted by  
15 any competing bidder, offeror, or contractor of the Appellant. 5 G.C.A. §5703. Finally, where  
16 not otherwise provided for by the rules, regulations, and statutes governing the OPA's hearings,  
17 and inconsistent herewith, the OPA's hearing shall be conducted in accordance with Guam's  
18 Administrative Adjudication Law. 2 G.A.R., Div. 4, Chap. 12, §12108(d). According to that  
19 law, any relevant evidence shall be admitted if it is the sort of evidence on which responsible  
20 persons are accustomed to rely on the conduct of serious affairs. 5 G.C.A. §9226. Here, despite  
21 BASIL's characterization of Exhibits B, C, D, and E, as being "GSA's Exhibits," all these  
22 exhibits are listed and a part of GSA and SH's Joint Exhibit List and are also being submitted by  
23 SH, which is BASIL's competing bidder and contractor. The Public Auditor may consider them  
24 pursuant to 5 G.C.A. §5703, which allows the Public Auditor to consider such evidence.

25 Further, the Public Auditor finds no merit to BASIL's argument that Exhibit E is not  
26 relevant because it formed no part of GSA's termination decision.<sup>66</sup> As stated above, Exhibit E  
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<sup>66</sup> Page 2, paragraph 4, Id.



1 is a news story concerning DPHSS's February 4, 2015 closure of BASIL's food preparation  
2 facility. As stated above, the facility was closed from February 4, 2015 to February 5, 2015.  
3 BASIL correctly states that this closure is not mentioned in GSA's June 1, 2016 termination of  
4 BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14. However, this fact alone does  
5 not make Exhibit E irrelevant. The Public Auditor finds that these contracts are very important to  
6 the People of Guam for two reasons. The first and lessor reason is their cost, as stated above,  
7 GSA estimated that, for the one year initial term and the two optional years, BASIL's contract  
8 for GSA-IFB-010-14 would cost \$1,976,832, and for the same three years, BASIL's contract for  
9 GSA-IFB-011-14 would cost \$4,818,528. Collectively, BASIL's contracts were estimated to cost  
10 \$6,795,360. However, OPA's analysis discovered errors in GSA's calculation of costs.  
11 Specifically, BASIL's contract for GSA-IFB-010-14 would cost \$2,020,075 (\$3.27 price per  
12 meal multiplied by 780 meals per day, which would cost approximately \$2,551 per day, \$56,113  
13 per month, \$673,358 per year, and \$2,020,075 for the three years). With this correction, the total  
14 cost for BASIL's contracts is estimated at \$6,838,603 for the three years. These contracts are  
15 unique because their purpose is far more important than their cost. BASIL's contract for GSA-  
16 IFB-010-14 makes it responsible for the preparation and delivery of an estimated range of 700 to  
17 800 meals per day, exclusive of weekends, to 14 senior citizens centers or adult day care  
18 centers<sup>67</sup> throughout the island, to feed Guam's elderly who qualify for this program because of  
19 their low incomes, disabilities, or their demonstrated social need for these meals.<sup>68</sup> BASIL's  
20 contract for GSA-IFB-011-14 makes it responsible for the preparation and delivery of an  
21 estimated range of 1,000 to 1,200 meals per day, Monday thru Saturday, to the residences of the  
22 elderly who qualify for this program because of their low income, disabilities, mental

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25 <sup>67</sup> The 12 senior citizen centers are Agana Heights, Agat, Astumbo, Dededo,  
26 Inarajan, Mangilao, Merizo, Santa Rita, Sinajana, Tamuning, Yigo, and  
27 Yona/Talofof. The two Adult Day Care Centers are located at 234 A U.S. Army  
28 Fejeran Street, Lower Barrigada Heights, Barrigada, Guam 96913 and 220 Chalan  
Despaci Street Wusstig Road, Dededo, Guam 96929.

<sup>68</sup> Pages 37-40, Scope of Services: Program Specifications, BASIL's Bid  
Submittal, TAB 3, Procurement Record for GSA-IFB-010-14 filed on June 15,  
2016 in OPA-PA-16-006.

1 impairments, and frail health.<sup>69</sup> Hence, the purpose of these contracts is to provide the  
2 sustenance required for the continued health and safety of these elderly members of our  
3 community, and they deserve the best efforts of the Government of Guam to ensure they receive  
4 these meals. The news story in Exhibit E is relevant because it describes the hardship endured  
5 by these elderly members of our community and the great concern from the Government of  
6 Guam agencies that directly care for them, caused by just a two-day closure of BASIL's food  
7 preparation facility. Accordingly, the Public Auditor finds the news story relevant to the issues in  
8 this appeal and shall make it part of the record in this matter and shall consider it when deciding  
9 this matter.

10           Additionally, the Public Auditor finds that Exhibits B, C, and D are relevant to the issues  
11 presented in this appeal. Specifically, albeit GSA is the purchasing agency for GSA-IFB-010-14  
12 and GSA-IFB-011-14, DPHSS is the affected agency or the using agency because it received the  
13 services provided by BASIL for the aforementioned IFB contracts. 2 G.A.R., Div. 4, Chap. 12,  
14 §12102(e). Exhibits B, C, and D, all concern DPHSS's interactions with BASIL throughout the  
15 contract period, especially the various DPHSS inspections that resulted in the February 4, 2015  
16 and May 31, 2016 closures of BASIL's food preparation facility, which GSA used to justify its  
17 termination of BASIL's contracts. If these exhibits were excluded and the Public Auditor were  
18 limited to a review of the procurement record in GSA-IFB-010-14 and GSA-IFB-011-14, the  
19 Public Auditor would not have the benefit of these documents that shed great light on many  
20 issues in this appeal because almost all of the documents in these exhibits are not part of said  
21 procurement records. GSA had the duty from the time it created and issued GSA-IFB-010-14  
22 and GSA-IFB-011-14 to the present, to maintain a complete record of those procurements. 5  
23 G.C.A. §5249 and 2 G.A.R., Div. 4, Chap. 3, §3129. However, after reviewing the procurement  
24 records for GSA-IFB-010-14 and GSA-IFB-011-14, the Public Auditor finds that GSA  
25 foundered in fulfilling this duty. For example, had GSA kept a proper procurement record, it  
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28 <sup>69</sup> Pages 37-39, Scope of Services: Program Specifications, BASIL Bid  
Submittal, TAB 4, Procurement Record for GSA-IFB-011-14 filed on June 15,  
2016 in OPA-PA-16-006.

1 would have listed, logged, or kept documents concerning the dates, times, subject matter, and  
2 names of participants at any meetings that included government employees that is in any way  
3 related to GSA-IFB-010-14 and GSA-IFB-011-14. This should have included records  
4 documenting the 15 DPHSS inspections of BASIL's food preparation facility that occurred  
5 during the term of BASIL's contracts because the inspections involved DPHSS employees  
6 meeting with BASIL's employees at BASIL's food preparation facility for each of these  
7 inspections. Further, these inspections concerned GSA-IFB-010-14 and GSA-IFB-011-14  
8 because DPHSS was the affected or using agency for those procurements and several of these  
9 inspections were DPHSS's routine, quarterly inspections done solely for fact that BASIL had  
10 these IFB contracts that required serving the elderly, a vulnerable population; several others  
11 involved inspections that resulted from complaints DPHSS received concerning the food that  
12 BASIL served pursuant to the IFB contracts; and various follow-up inspections that arose from  
13 either the quarterly inspections or the complaint inspections.<sup>70</sup> However, only DPHSS's June 2,  
14 2015 follow-up inspection is recorded in the procurement records for GSA-IFB-010-14 and  
15 GSA-IFB-011-14 and only because it was attached to BASIL's June 2, 2016 and June 3, 2016  
16 letters to GSA.<sup>71</sup> Almost all of these DPHSS inspections, and the voluminous correspondence  
17 they generated between DPHSS, BASIL, and GSA, are recorded in Exhibits B, C, and D, and  
18 they shall be entered as part of the record in this matter and considered in deciding it.

19 Finally, the Public Auditor finds that she does not have the jurisdiction to decide  
20 BASIL's objection that Exhibit B, DPHSS's Timeline of Food Establishments Requiring  
21 HACCP Plan, was improperly withheld from the government's responses to BASIL's Freedom  
22 of Information Act (FOIA) requests.<sup>72</sup> The Public Auditor's jurisdiction is limited to matters that  
23 are properly submitted to her. 5 G.C.A. §5703. Here, BASIL's objection concerns its alleged  
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26 <sup>70</sup> Testimony of KATHERINE DEL MUNDO on August 22, 2016 (00:22:00 to 00:27:36).

27 <sup>71</sup> ELYZE IRIARTE, ESQ., letter to GSA dated June 3, 2016, TAB 1, Procurement  
28 Record for GSA-IFB-010-14 and TAB 1, Procurement Record for GSA-IFB-011-14,  
and ELYZE IRIARTE, ESQ., letter to GSA dated June 2, 2016, TAB 19, GSA-IFB-  
011-14; Procurement Records were filed on June 15, 2016 in OPA-PA-16-006.

<sup>72</sup> Page 2, paragraph 2, BASIL's Objections to Witness List and Exhibits filed  
on August 11, 2016.

1 violation of Guam’s FOIA. Generally, if the Government fails to properly comply with FOIA  
2 requests, the persons making the request for public records shall be deemed to have exhausted  
3 their administrative remedies with respect to such requests and may institute proceedings for  
4 injunctive, or declarative relief, or a Writ of Mandate in the Superior Court of Guam to enforce  
5 their right to inspect or receive of copy of such records. 5 G.C.A. §10111(a) and (b). Therefore,  
6 this objection is not properly before the Public Auditor because it is the Superior Court of Guam  
7 that must decide whether the Government violated Guam’s FOIA and what the remedy for such  
8 violation should be.

9 The Public Auditor will now review the issue of whether GSA’s termination of BASIL’s  
10 contracts for GSA-IFB-010-14 and GSA-IFB-011-15 were proper.

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12 **B. GSA Properly Terminated BASIL’s Contracts.**

13 GSA and SH argue that Section 12.9 of the Special Terms and Conditions of GSA-IFB-  
14 010-14 and GSA-IFB-011-14 gave GSA the right to terminate BASIL’s contracts for those  
15 procurements.<sup>73</sup> A contract controversy arises under, or by virtue of a contract between the  
16 Government of Guam and a contractor. 2 G.A.R., Div. 4, Chap. 9, §9103(b). The word  
17 “controversy” as used in that regulation is meant to be broad and all-encompassing, and it  
18 includes the full spectrum of disagreements to include claims of breach of contract. Id. The  
19 Chief Procurement Officer or her designee is authorized, prior to the commencement of an action  
20 in court concerning a contract controversy to resolve such controversy. 5 G.C.A. §5427(b). To  
21 determine whether GSA properly exercised its authority to resolve the contract controversy by  
22 terminating BASIL’s contracts for GSA-IFB-010-14 and GSA-IFB-011-14, the Public Auditor  
23 must first look at the plain language of Section 12.9 of the Special Terms and Conditions of  
24 those contracts because GSA claims that BASIL violated this provision of those contracts.

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28 <sup>73</sup> TAB 1, Agency Report, GSA-IFB-010-14 filed on June 22, 2016 in OPA-PA-16-006, TAB 1, Agency Report, GSA-IFB-011-14 filed on June 22, 2016 in OPA-PA-16-006, and Page 2, SH Hearing Brief filed on August 5, 2016.

1 The plain language of Section 12.9 of the Special Terms and Conditions of BASIL's  
2 contracts for GSA-IFB-010-14 and GSA-IFB-011-14 supports GSA's decision to terminate those  
3 contracts. The language of a contract is to govern its interpretation, if the language is clear and  
4 explicit, and does not involve an absurdity. 18 G.C.A. §87104. In interpreting a clause of a  
5 contract to determine the intent of the contracting parties, whenever possible, the express  
6 language of the contract should control. *Camacho v. Camacho*, 1997 Guam 5, ¶33 (Supreme  
7 Court of Guam). Here, Section 12.9 of the Special Terms and Conditions of those contracts  
8 states, in relevant part, that if BASIL is issued a "C" rating from the Division of Environmental  
9 Health, DPHSS, BASIL's contract may be terminated, and BASIL acknowledged these contract  
10 provisions in its bids for those solicitations.<sup>74</sup> The Public Auditor finds that this language is  
11 clear, explicit, and gives GSA the right to terminate the contracts if DPHSS gives BASIL a "C"  
12 rating.<sup>75</sup> However, GSA did not cite any of DPHSS's four "C" ratings of BASIL's food  
13 preparation facility described above. The Public Auditor must now determine whether the  
14 termination language in Section 12.9 of the Special Terms and Conditions of GSA-IFB-010-14  
15 and GSA-IFB-011-14 applies to "D" ratings.

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19 It can be implied that the termination language in Section 12.9 applies to a "D" rating.  
20 All things that in law or usage are considered as incidental to a contract, or as necessary to carry  
21 it into effect, are implied therefrom, unless some of them are expressly mentioned therein. 18  
22 G.C.A. §87122. Here, the termination language would incidentally apply to a "D" rating because  
23 it is lower and worse than a "C" rating. Further, to give Section 12.9 full effect, it is necessary to  
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27 <sup>74</sup> Paragraph 12.9, Special Terms & Conditions, BASIL's Bid Submittal, TAB 3, Procurement Record for GSA-IFB-010-14, and TAB 4, Procurement Record for GSA-IFB-011-14, filed on June 15, 2016 in OPA-PA-16-006.

28 <sup>75</sup> NOTE: DPHSS inspections of BASIL's food preparation facility described above was conducted and scored, giving a "A," "B," "C", or "D" rating, by DPHSS's Division of Environmental Health.

1 apply Section 12.9's termination language to "D" ratings. To do otherwise would result in the  
2 absurdity of GSA being powerless to terminate the contract if BASIL received a "D" rating.  
3 Accordingly, the Public Auditor finds that the termination language in Section 12.9 of the  
4 Special Terms and Conditions of BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14  
5 applies to a "D" rating given by the DPHSS' Division of Environmental Health. The Public  
6 Auditor will now determine whether BASIL actually breached Section 12.9.  
7

8           The record in this matter shows that BASIL committed many breaches of Section 12.9.  
9 As stated above, DPHSS's inspections gave BASIL's food preparation facility a "C" rating a  
10 total of four times, and these occurred after its inspections on January 20, 2015, June 5, 2015,  
11 October 28, 2015, and February 23, 2016. The Public Auditor finds that each of these "C" ratings  
12 resulted in BASIL breaching Section 12.9 of its contracts for GSA-IFB-010-14 and GSA-IFB-  
13 011-14. Additionally, as a result of its inspections of BASIL's food preparation facility, DPHSS  
14 gave BASIL a "D" rating a total of three times after its inspections on February 4, 2015, July 9,  
15 2015, and May 31, 2016.<sup>76</sup> The Public Auditor finds that each of these "D" ratings breached  
16 Section 12.9 of its contracts for GSA-IFB-010-14 and GSA-IFB-011-14. Despite all these  
17 breaches, GSA only cites the BASIL's May 31, 2016 "D" rating as the justification for its  
18 termination. Based on the foregoing, the Public Auditor finds that GSA properly terminated  
19 BASIL's contracts pursuant to Section 12.9 of the Special Terms and Conditions of GSA-IFB-  
20 010-14 and GSA-IFB-011-14.  
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27 <sup>76</sup> NOTE: DPHSS gave BASIL an "unofficial" "D" rating on November 11, 2014 and  
28 the Public Auditor did not count this as a default because it appears that  
DPHSS waived this rating by not closing BASIL's food preparation facility as  
it did the other three times it received a "D" rating.

1           The Public Auditor finds that BASIL’s argument that GSA wrongfully denied BASIL the  
2 opportunity to cure its May 31, 2016 default has no merit.<sup>77</sup> BASIL relies on a procurement  
3 regulation that states, in relevant part, that if the contractor commits a substantial breach of the  
4 contract, the procurement officer may notify the contractor in writing of the delay or non-  
5 performance and if not cured in 10 days or any longer time specified in writing by the  
6 Procurement Officer, such officer may terminate the contractor’s right to proceed with the  
7 contract or such part of the contract as to which there has been delay or a failure to properly  
8 perform. 2 G.A.R., Div. 4, Chap. 6, §6101(8)(a). If this regulation were applicable, GSA would  
9 have had to give BASIL 10 days to cure its May 31, 2016 default, and GSA would have then  
10 wrongfully terminated BASIL’s contract due to DPHSS’s June 2, 2016 follow-up inspection of  
11 BASIL’s food preparation facility which found that BASIL corrected most of its May 31, 2016  
12 violations. However, the cure provisions BASIL relies upon for this argument are inapplicable to  
13 its contracts for GSA-IFB-010-14 and GSA-IFB-011-14. The regulation’s cure provision is  
14 merely a contract clause, one of many mentioned in that regulation, that the Chief Procurement  
15 Officer or her designee may use at their discretion. 2 G.A.R., Div. 4, Chap. 6, §6101(1). A  
16 review of GSA-IFB-010-14 and GSA-IFB-011-14’s contractual terms reveals that the 10 day  
17 cure language set forth in 2 G.A.R., Div. 4, Chap. 6, §6101(8)(a) is absent. Hence, Guam  
18 procurement regulations did not require GSA to provide BASIL a 10 day cure period after its  
19 May 31, 2016 breach.

20           The Public Auditor finds no merit in BASIL’s argument that GSA did not consider the  
21 fact that BASIL quickly corrected the violations that resulted in its May 31, 2016 “D” rating.<sup>78</sup>  
22 At the heart of this argument is BASIL’s belief that the violations were minor violations that it  
23 quickly corrected. The May 31, 2016 inspection revealed BASIL’s food preparation facility had  
24 a total of 16 violations. Seven of these violations were for improper practices or procedures that  
25 DPHSS identifies as the most prevalent contributing factors for foodborne illness or injury, of  
26 which three were for BASIL’s failure to prevent contamination caused by the hands of its  
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28 <sup>77</sup> Page 3, Appellant’s Hearing Brief filed on August 12, 2016.

<sup>78</sup> Page 4, Id.

1 workers, two were for BASIL's failure to protect food from contamination, and one concerned  
2 potentially hazardous food.<sup>79</sup> These violations are not minor as alleged by BASIL. Instead, they  
3 are serious, critical violations and DPHSS imposes six demerits for each of them.<sup>80</sup> As a result  
4 of these violations, and BASIL's history of getting "C" and "D" ratings, DPHSS advised GSA  
5 that BASIL was placing the elderly population it was feeding at great risk and GSA decided to  
6 terminate BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14.<sup>81</sup> BASIL either knew  
7 or should have known that many, if not most, of the elderly people receiving their meals  
8 constitute the most vulnerable population of the segments of Guam's community that are  
9 susceptible to foodborne illness or injury.<sup>82</sup> GSA simply had to stop, via its termination of  
10 BASIL's contracts, the continued risk BASIL posed to these elderly persons by its repeated  
11 violations of the Guam Food Code.

12         The Public Auditor finds no merit in BASIL's argument that GSA failed to consider the  
13 economic impact of BASIL's termination. Both DPHSS and GSA knew that BASIL's  
14 replacement vendor would be more expensive because it would be difficult to find a replacement  
15 vendor on short notice and because BASIL's bid prices per meal were very low, in fact, DPHSS  
16 and GSA initially believed they were too low.<sup>83</sup> Thus, contrary to BASIL's arguments, both  
17 DPHSS and GSA knew the termination of BASIL's contracts would have an adverse economic  
18 impact. As stated above, BASIL's contract price per meal was \$3.27 for GSA-IFB-010-14 and  
19 \$5.07 per meal for GSA-IFB-011-14. In contrast, SH charges \$8.50 per meal for the services  
20 BASIL provided for GSA-IFB-010-14 and \$9.95 per meal for the services BASIL provided for  
21 GSA-IFB-011-14. The adverse economic impact caused by the termination of BASIL's contract  
22 is profound. BASIL estimates that SH's higher price per meal has cost the Government of Guam  
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25 <sup>79</sup> DPHSS Food Establishment Inspection Report dated May 31, 2016, pages 241-  
246, Exhibit C, GSA & SH's Joint Exhibit List filed on August 5, 2016.

26 <sup>80</sup> Testimony of KATHERINE DEL MUNDO on August 22, 2016 (00:30:28 to 00:31:30).

27 <sup>81</sup> Testimony of JAMES W. GILLAN on August 15, 2016, (Part B; 00:37:10 to  
00:38:00).

28 <sup>82</sup> Id., (1:44:42 to 1:44:56).

<sup>83</sup> Testimony of ROBERT H. KONO, ESQ., on August 23, 2016 (3:28:00 to 3:28:50),  
Testimony of ANITA A. CRUZ on August 22, 2016 (01:25:00 to 01:25:16), and  
Testimony of JAMES W. GILLAN on August 15, 2016 (Part A; 01:55:20 to  
02:01:47).



1 an extra \$800,100 from June to August, 2016.<sup>84</sup> However, cost alone should not be the guiding  
2 factor used to decide whether the termination of BASIL's contracts was proper. Indeed,  
3 weighing this adverse economic impact against the great risk of foodborne illness or injury from  
4 BASIL's repeated violations of Guam's Food Code posed to the vulnerable elderly people it was  
5 serving, the balance heavily favors GSA's termination of BASIL's contracts for GSA-IFB-010-  
6 14 and GSA-IFB-011-14 as being in the best interests of the Government and the People of  
7 Guam.

8 The Public Auditor finds that BASIL's argument that GSA failed to consider allowing  
9 BASIL to provide meals under the emergency menu provisions of its contracts has no merit.  
10 BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14 permit it to serve dry goods, from  
11 an approved emergency menu, to the elderly for a period of one to three days during periods  
12 officially declared emergencies or in preparation to local efforts in response to impending or  
13 actual disasters.<sup>85</sup> DPHSS believes that this section is only meant to be used for exigent  
14 circumstances, i.e., storms or when supplies are not able to be shipped to Guam.<sup>86</sup> The Public  
15 Auditor agrees. By its plain language, this contract provision is only triggered during official  
16 emergencies or in response to expected or existing natural disaster. Further, this contract  
17 provision does not expressly allow BASIL to serve dry goods as a result of its food preparation  
18 facility being closed because it received a "D" rating, nor can such authorization be reasonably  
19 implied. Instead, there is only the precedent of DPHSS allowing BASIL to serve dry goods  
20 when its food preparation facility was closed from February 4 to 5, 2015 as a result of DPHSS  
21 giving it a "D" rating as described above. This resulted in public outcry because the elderly  
22 receiving these dry good substitute meals did not like them and the Government of Guam  
23 agencies directly responsible for their care chose to purchase other meals for their elderly clients  
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25 <sup>84</sup> Price Comparison Chart, BASIL's Exhibit List filed on August 5, 2016.

26 <sup>85</sup> Section 4.10, Elements of ENP Operations Congregate Meals, BASIL's Bid  
27 Submittal, TAB 3, Procurement Record for GSA-IFB-010-14, and Section 4.10,  
28 Elements of ENP Operations Home-Delivered Meals, BASIL's Bid Submittal, TAB  
4, Procurement Record for GSA-IFB-011-14, filed on June 22, 2016 in OPA-PA-  
16-006.

<sup>86</sup> Testimony of JAMES W. GILLAN on August 15, 2016 (Part B; 00:07:20 to  
00:07:30).

1 instead of providing them with the substitute meals.<sup>87</sup> This precedent does not aid BASIL's  
2 argument because, likely due to the public outcry, DPHSS and GSA never allowed BASIL to  
3 provide these substitute meals again. When BASIL's food preparation facility was closed from  
4 July 9 to 17, 2015 as a result of receiving a "D" rating, DPHSS and GSA solicited for and  
5 obtained, via emergency procurement, a replacement vendor as described above. Hence, it is  
6 unreasonable for BASIL to expect that DPHSS or GSA would allow it to serve substitute dry  
7 good meals as a result of its food preparation facility being closed after the DPHSS gave it a "D"  
8 rating on May 31, 2016.

9 The Public Auditor finds that BASIL's argument that GSA failed to consider BASIL's  
10 interests prior to terminating its contracts has no merit.<sup>88</sup> The record does not support this  
11 argument. As stated above, BASIL's food preparation facility received "C" ratings on January  
12 20, 2015, June 15, 2015, October 28, 2015, and February 23, 2016. GSA could have terminated  
13 BASIL's contracts for any one of these incidents; however, it generously allowed BASIL to cure  
14 its violations instead. Further, as stated above, BASIL's food preparation facility received "D"  
15 ratings on February 4, 2015 and July 9, 2015 and in both instances it was closed for extended  
16 periods before it could be brought back into compliance with Guam Food Code. GSA could  
17 have terminated BASIL's contract for the February 4, 2015 incident, but it chose not to and  
18 instead allowed BASIL to serve the substitute dry goods meals that caused great public outcry as  
19 described above. GSA actually threatened to terminate BASIL's contract after the July 9, 2015  
20 incident by issuing BASIL a Notice of Default; however, GSA still gave BASIL 10 days to cure  
21 its infractions of the Guam Food Code and incurred the extra costs of having to hire a substitute  
22 vendor to provide the services required by GSA-IFB-010-14 and GSA-IFB-011-14 while BASIL  
23 brought its food preparation facility into compliance.<sup>89</sup> GSA more than once, indeed, several  
24 times, considered BASIL's interests by giving it all of these chances to comply with the Guam  
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26 <sup>87</sup> Id., (Part B; 00:06:50 to 00:07:18), and KUAM News Article *Mayors concerned*  
27 *about shortage of food for island's elderly*, dated February 6, 2015, Exhibit  
28 E, GSA & SH's Joint Exhibit List filed on August 5, 2016.

<sup>88</sup> Page 5, Appellant's Hearing Brief filed on August 12, 2016.

<sup>89</sup> Testimony of JAMES W. GILLAN on August 15, 2016 (Part B; 00:09:30 to  
00:11:58).

1 Food Code and safely provide the meals to the elderly as required by GSA-IFB-010-14 and  
2 GSA-IFB-011-14. However, each and every chance DPHSS and GSA gave BASIL only  
3 resulted in more violations and it can be said that they were forced to terminate the contracts as a  
4 result of BASIL's repeated violations of Guam Food Code and the risks such violations posed to  
5 the elderly people receiving their meals.<sup>90</sup>

6 Accordingly, the Public Auditor finds that GSA's June 1, 2016 termination of BASIL's  
7 contracts was valid and permissible pursuant to Section 12.9 of the Special Terms and  
8 Conditions of GSA-IFB-010-14 and GSA-IFB-011-14 and that such termination was in the best  
9 interests of the Government of Guam because of severe threat of foodborne illness and injury  
10 from BASIL's repeated violations of Guam's Food Code posed to the elderly people it was  
11 providing food to pursuant to those contracts. Additionally, the Public Auditor finds that on June  
12 6, 2016, GSA's Acting Chief Procurement Officer properly and correctly exercised her authority,  
13 pursuant to 5 G.C.A. §5427(b), when she issued her final decision resolving the contract  
14 controversy between GSA and BASIL by terminating BASIL's contracts for GSA-IFB-010-14  
15 and GSA-IFB-011-14.

16  
17 **C. GSA improperly Solicited and Awarded the Emergency Procurement Contract**  
18 **to SH.**

19 BASIL argues that GSA abused the emergency procurement process to replace BASIL.  
20 Generally, GSA's Chief Procurement Officer may make emergency procurements when there  
21 exists a threat to public health, welfare, or safety under emergency conditions. 5 G.C.A. §5215  
22 and 2 G.A.R., Div. 4, Chap. 3, §3113. Here, for many of the elderly recipients of the meals  
23 BASIL was providing pursuant to GSA-IFB-010-14 and GSA-IFB-011-14, these meals are  
24 usually the only hot meal they receive each day and it is very important they get fed.<sup>91</sup> If this  
25 program stopped, it is unlikely that some of our most vulnerable elderly would receive the  
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27  
28 <sup>90</sup> Id. (Part B; 00:15:06 to 00:18:52).

<sup>91</sup> Testimony of ROBERT H. KONO, ESQ., on August 23, 2016 (03:24:15 to 03:24:40).

1 nutrition they need to survive.<sup>92</sup> Based on the foregoing, the Public Auditor finds that the  
2 DPHSS' May 31, 2016 closure of BASIL's food preparation facility resulted in a threat to the  
3 public health, welfare, and safety because it resulted in the potential loss of at least one-third, if  
4 not more, of the nutrition needs of the 780 or more elderly people who received congregate  
5 meals and the estimated 1,200 elderly people who received the home delivered meals that were  
6 prepared in BASIL's food preparation facility.

7 In addition to an actual emergency condition, a valid Emergency Procurement requires  
8 that the emergency condition justifying the emergency procurement be documented either by:  
9 (1) A written determination of the basis for the emergency and the selection of the particular  
10 contractor which must be included in the contract file; or (2) An Executive Order from the  
11 Governor of Guam which states that an emergency situation exists and that emergency  
12 procurement may be resorted to. 2 G.A.R., Div. 4, Chap. 3, §3113. Here, ANITA A. CRUZ,  
13 Acting Chief Procurement Officer, signed a "Memo To File," stating that on May 31, 2016,  
14 DPHSS informed GSA that BASIL's food preparation facility was closed because it received a  
15 "D" rating and that food services for the elderly clients of GSA-IFB-010-14 and GSA-IFB-011-  
16 14 was at risk, and that a purchase order made under emergency procurement was issued to a  
17 vendor to provide meals to the elderly starting on June 1, 2016.<sup>93</sup> Although titled "Memo to  
18 File" the Public Auditor finds that this document meets the requirements for a written  
19 determination because it properly states the basis for the emergency and, although it fails to  
20 name SH as a vendor, it does record the fact that a vendor was selected and it outlines the  
21 process GSA used to obtain SH as a vendor.

22 A valid Emergency Procurement based on GSA's Chief Procurement Officer's written  
23 determination, requires a certification from the requesting department or agency. Unless  
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26 <sup>92</sup> Testimony of JAMES W. GILLAN on August 15, 2016 (Part B; 01:44:00 to 01:46:25).

27 <sup>93</sup> Undated Memo to File, TAB 19, Procurement Record for GSA-IFB-010-14, and  
28 TAB 19, Procurement Record for GSA-IFB-011-14, filed on June 15, 2016 in OPA-PA-16-006. NOTE: The Memo to File states that there was an Emergency Executive Order from the Governor's Office, however, the Procurement Records are devoid of this document and such an Executive Order is not published on the Governor's Office's website.

1 authorized by an Executive Order declaring an emergency, no emergency procurement may be  
2 made except on a certification made under penalty of perjury by the requesting department or  
3 agency setting forth: (1) A statement of facts giving rise to the emergency; (2) The factual basis  
4 of the determination that an emergency procurement is necessary; and (3) A statement that an  
5 emergency procurement is not being used solely for the purpose of avoidance of Guam's  
6 procurement laws and regulations. 2 G.A.R., Div. 4, Chap. 3, §3113. Additionally, prior to the  
7 award of an emergency procurement contract and as a condition thereof, certified copies of the  
8 certification must be sent to the Governor of Guam and Speaker of the Legislature. Id. As stated  
9 above, DPHSS was the using agency for GSA-IFB-010-14 and GSA-IFB-011-14. As the using  
10 agency, DPHSS was required to submit the certification made under penalty of perjury that  
11 justified GSA's written determination.

12 DPHSS did submit a memorandum to GSA stating that BASIL's food preparation facility  
13 sanitary permit had been suspended, that approximately 780 elderly persons received congregate  
14 meals and that approximately 1,180 elderly persons were receiving home delivered meals  
15 prepared by that facility, and that emergency procurement was necessary to avert a threat to the  
16 health, welfare, and safety of these elderly persons.<sup>94</sup> The Public Auditor finds that this  
17 statement sufficiently provides a statement of facts giving rise to the emergency, and the factual  
18 basis of the determination that an emergency procurement is necessary. However, none of the  
19 statements made in that memorandum were made under penalty of perjury nor is there a  
20 statement that an emergency procurement is not being used solely for the purpose of avoidance  
21 of Guam's procurement laws and regulations. Therefore, the Public Auditor finds that DPHSS'  
22 May 31, 2016 memorandum does not meet the 2 G.A.R., Div. 4, Chap. 3, §3113's certification  
23 requirements.

24 GSA also drafted a Memorandum on May 31, 2016 to the Governor of Guam repeating  
25 the statements in DPHSS' memorandum but further stating, under penalty of perjury, that the  
26 emergency procurement was not being used for the purpose of avoidance of the Guam  
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28 <sup>94</sup> DPHSS Memorandum dated May 31, 2016, TAB 10, Procurement Record in OPA-PA-16-008 filed on July 6, 2016.

1 Procurement Law.<sup>95</sup> The Public Auditor finds that GSA’s memorandum, when combined with  
2 DPHSS’ memorandum meets 2 G.A.R., Div. 4, Chap. 3, §3113’s certification requirements.

3 The GSA’s Memo to File states that there was an “emergency executive order” that GSA  
4 sent to the Legislature prior to its issuance of a purchase order for the emergency procurement  
5 contract to SH. However, other than this statement, there is no evidence of this executive order  
6 in the procurement record submitted by GSA. If there was an executive order authorizing GSA  
7 to use the emergency procurement process, then DPHSS would be exempted from the  
8 requirement that it submit the certification required by 2 G.A.R., Div. 4, Chap. 3, §3113. GSA  
9 filed its procurement records for GSA-IFB-010-14 and GSA-IFB-011-14 on June 15, 2016.  
10 However, as stated above, these records were far from being complete. During the hearing in  
11 this matter on August 15, 2016, the Hearing Officer ordered GSA to produce the purchase orders  
12 that were issued to SH for the emergency procurement because they were absent from the  
13 procurement record.<sup>96</sup> GSA subsequently filed its Addendum to the Procurement Record that  
14 day, which contained the purchase orders and their amendments. Despite having two  
15 opportunities to produce a complete procurement record, GSA has failed to do so. Further,  
16 although the Governor of Guam did sign GSA’s May 31, 2016 Memorandum requesting for the  
17 emergency procurement, this, by itself does not constitute an executive order. Accordingly, the  
18 Public Auditor finds that there is insufficient evidence to support the existence of an executive  
19 order that exempts DPHSS from the requirement of submitting the certification required by 2  
20 G.A.R., Div. 4, Chap. 3, §3113.

21 A valid emergency procurement also requires that the procuring agency must solicit at  
22 least three informal price quotations. Emergency procurement must be made with such  
23 competition as is practicable under the circumstances and the purchasing agency must solicit at  
24 least three informal price quotations and, if time allows, it must give notice to all contractors  
25 from the qualified bidder’s list who have provided the needed supplies and services to the  
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27 <sup>95</sup> GSA Memorandum dated May 31, 2016, TAB 10, Id.

28 <sup>96</sup> August 15, 2016 Formal Hearing (Part A; 02:07:48 to 02:09:20).

1 Government of Guam within the preceding 12 months and it must award the procurement to the  
2 firm with the best offer, as determined by evaluating cost and delivery time. 2 G.A.R., Div. 4,  
3 Chap. 3, §3113. Here, as stated above, GSA contacted SH and only SH, asked them if they  
4 could do it, and when SH replied affirmatively, GSA sent them a Request for Quotation and  
5 proceeded to prepare the purchase order for issuance to SH the next day.<sup>97</sup> This falls far short of  
6 the requirement that the purchasing agency make the emergency procurement as competitive as  
7 possible by soliciting at least three price quotations. Accordingly, the Public Auditor finds that  
8 the award of the emergency procurement contract to SH violated 2 G.A.R., Div. 4, Chap. 3,  
9 §3113 because GSA failed to foster sufficient competition by soliciting at least three informal  
10 price quotations as required by that regulation.

11 Finally, for an emergency procurement to be valid, the Governor of Guam must approve  
12 in writing, all authorizations for emergency procurement. 2 G.A.R., Div. 4, Chap. 3, §3113.  
13 Here, GSA complied with this requirement because the Governor of Guam approved, in writing,  
14 GSA's May 31, 2016 Memorandum.<sup>98</sup>

15 Based on the foregoing, the Public Auditor holds that the May 31, 2016 purchase orders  
16 awarded to SH under the GSA's emergency procurement are invalid because they violate 2  
17 G.A.R., Div. 4, Chap. 3, §3113 as a result of GSA's failure to obtain a certification from DPHSS,  
18 and as a result of GSA's failure to foster practicable competition by obtaining at least three  
19 informal price quotations.

20 The Public Auditor also finds that GSA has remedied these errors. If after an award it is  
21 determined that a solicitation or award of a contract is in violation of the law, then, if the person  
22 awarded the contract has not acted fraudulently or in bad faith, the contract may be ratified and  
23 affirmed, provided that it is determined that doing so is in the best interests of the Government of  
24 Guam, or the contract may be terminated and the person awarded the contract shall be

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27 <sup>97</sup> Undated Memo to File, TAB 19, Procurement Record for GSA-IFB-010-14 and TAB  
28 19, Procurement Record for GSA-IFB-011-14, filed on June 15, 2016 in OPA-PA-  
16-006 and Testimony of ANITA A. CRUZ on August 22, 2016 (01:26:45 to  
01:27:40).

<sup>98</sup> GSA Memorandum dated May 31, 2016, TAB 10, Procurement Record in OPA-PA-16-  
008 filed on July 6, 2016.

1 compensated for the actual expenses reasonably incurred under the contract, plus a reasonable  
2 profit, prior to termination. 5 G.C.A §5452(a)(1) and 2 G.A.R., Div. 4, Chap. 9, §9106(1)(a).  
3 Here, as stated above, the Public Auditor found that GSA violated 2 G.A.R., Div. 4, Chap. 3,  
4 §3113 as a result of its failure to obtain a certification from DPHSS, and as a result of GSA's  
5 failure to foster practicable competition by obtaining at least three informal price quotations.  
6 Further, the Public Auditor finds that there is no evidence that SH acted fraudulently or in bad  
7 faith. Albeit there was an allegation that SH was "tipped" off about the closure of BASIL's food  
8 preparation facility and took advantage of this information by ordering food prior to the GSA  
9 starting the emergency procurement process.<sup>99</sup> The Public Auditor finds that this allegation has  
10 no merit because HUI SOOK MIN, the owner of SH, testified that she did not know of the  
11 emergency procurement GSA notified her and that she did not order the food until after GSA  
12 awarded her the emergency procurement contract.<sup>100</sup> Further, as stated above, BASIL filed its  
13 appeal in OPA-PA-16-008 on June 28, 2016. This appeal concerned GSA's denial of BASIL's  
14 June 14, 2016 protest of GSA's May 31, 2016 award of the Emergency Procurement Contract to  
15 SH. Further, in OPA-PA-16-008, BASIL requested for the termination of SH's Emergency  
16 Procurement Contract. On September 7, 2016, BASIL filed a notice stating that its appeal in  
17 OPA-PA-16-008 is now moot because GSA voluntarily terminated SH's Emergency  
18 Procurement Contract and issued a new emergency procurement on August 31, 2016 which was  
19 awarded to BASIL. Accordingly, the Public Auditor finds that GSA has sufficiently remedied its  
20 errors in awarding the emergency procurement to SH. Therefore, the Public Auditor accepts  
21 GSA's voluntary termination of SH's emergency procurement contract and the Public Auditor  
22 finds that GSA must compensate SH for the actual expenses it reasonably incurred under the  
23 contract, plus a reasonable profit, prior to termination.

#### IV. CONCLUSION

Based on the foregoing the Public Auditor hereby determines the following:

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<sup>99</sup> Testimony of BETTY DELA CRUZ on August 22, 2016 (02:18:30 to 02:19:40).  
<sup>100</sup> Testimony of HUI SOOK MIN on August 23, 2016 (03:57:44 to 03:58:15).



1           1. BASIL's Objections to GSA and SH's Witness List and Exhibits is hereby  
2 GRANTED in part and DENIED in part as set forth above.

3           2. The Public Auditor finds that GSA's June 1, 2016 termination of BASIL's contracts  
4 was valid and permissible pursuant to Section 12.9 of the Special Terms and Conditions of GSA-  
5 IFB-010-14 and GSA-IFB-011-14 and that such termination was in the best interests of the  
6 Government of Guam because of severe threat of foodborne illness and injury from BASIL's  
7 repeated violations of Guam's Food Code posed to the elderly people it was providing food for  
8 under those contracts.

9           3. The Public Auditor holds that on June 6, 2016, GSA's Acting Chief Procurement  
10 Officer properly and correctly exercised her authority, pursuant to 5 G.C.A. §5427(b), when she  
11 issued her final decision resolving the contract controversy between GSA and BASIL by  
12 terminating BASIL's contracts for GSA-IFB-010-14 and GSA-IFB-011-14.

13           4. The Public Auditor holds that the May 31, 2016 purchase orders awarded to SH under  
14 the GSA's emergency procurement are invalid because they violate 2 G.A.R., Div. 4, Chap. 3,  
15 §3113 as a result of GSA's failure to foster practicable competition by obtaining at least three  
16 informal price quotations.

17           5. The Public Auditor finds that GSA has sufficiently remedied its errors in awarding the  
18 emergency procurement pursuant to 5 G.C.A §5452(a)(1) and 2 G.A.R., Div. 4, Chap. 9,  
19 §9106(1)(a), by GSA's voluntary termination of SH's emergency procurement contracts. The  
20 Public Auditor also finds that GSA must compensate SH for the actual expenses it reasonably  
21 incurred under the contract, plus a reasonable profit, prior to termination, if GSA has not made  
22 such payment already.

23           6. BASIL's appeal in OPA-PA-16-006 is hereby DENIED.

24           7. BASIL's appeal in OPA-PA-16-008 is hereby GRANTED.

25           8. The Public Auditor finds that BASIL is entitled to its reasonable costs incurred in  
26 connection with its protest of the emergency procurement, excluding attorney's fees, pursuant to  
27 5 G.C.A. §5425(h), because there was a reasonable likelihood that BASIL may have been  
28

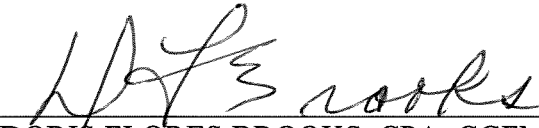
1 awarded the emergency procurement contract but for GSA's violations of 2 G.A.R., Div. 4,  
2 Chap. 3, §3113.

3 9. SH's request for its attorney fees and costs is hereby DENIED.<sup>101</sup> SH is not entitled to  
4 its reasonable costs because it is not the party who submitted the protest that resulted in OPA-  
5 PA-16-008. 5 G.C.A. §5425(h). Further, that statute does not allow either the protesting party or  
6 an interested party to recover its reasonable attorney fees. Id.

7 This is a Final Administrative Decision. The Parties are hereby informed of their right to  
8 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with  
9 Part D of Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative  
10 Decision. 5 G.C.A. §5481(a).

11 A copy of this Decision shall be provided to the parties and their respective attorneys, in  
12 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA website  
13 [www.opaguam.org](http://www.opaguam.org).

14  
15 **DATED** this 27<sup>th</sup> day of October, 2016.

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<sup>101</sup> Page 1, SH's Remedies Brief filed on August 26, 2016.