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OPA-PA-19-011 & 20-003: E-Filing: Basil Foods Industrial Services Response to Purchasing Agency's Notice of Supplemental Authority

Davina Sayama <dsayama@icclawgroup.com>

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Cc: "Geri E. Diaz" <gdiaz@icclawgroup.com>

Dear All:

Please find the attached for E-Filing of *Basil Foods Industrial Services Response to Purchasing Agency's Notice of Supplemental Authority*. Thank you.

Best Regards,

DAVINA A. SAYAMA

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[356 E. Marine Corps Drive, Suite 201](#)[Hagatna, Guam 96910](#)**Tel:** 671.472.6813 **Fax:** 671.477.4375dsayama@camachocalvo.lawwww.camachocalvo.law**IMPORTANT/CONFIDENTIAL:**

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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-19-011

Appeal No. OPA-PA-20-003

CONSOLIDATED

**BASIL FOODS INDUSTRIAL
SERVICES RESPONSE TO
PURCHASING AGENCY'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

COMES NOW Basil Foods Industrial Service (“Basil”) with its Response to General Services Agency’s (“GSA”) Notice of Supplemental Authority filed on September 23, 2020 which discusses the recent the opinion issued by the Supreme Court of Guam in DFS Guam L.P. v. The A.B. Won Pat International Airport Authority, Guam, 2020 Guam 14, and its effect on the timeliness of Basil’s appeal.

I. Basil’s First Protest of GSA-056-19 is Timely

In its brief, GSA refers to Basil’s protest in the singular. However, Basil has filed two separate protests, both of which have been appealed to the Office of Public Accountability

(“OPA”). Basil first protested the recommendation of award in favor of SH Enterprises, Inc. for Bid No. GSA-056-19 issued by GSA for Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home Delivered Meals Components on November 22, 2019. This protest, which was denied by GSA, was based on SH Enterprises’ failure to meet the standards of a responsible bidder. Basil filed a Notice of Procurement Appeal with the OPA on December 16, 2019 and was given Docket No. OPA-PA-19-011. It is this protest which Basil believes is addressed in the GSA’s Notice of Supplemental Authority.

Pursuant to section 5425(a), the timeframe to protest a procurement runs from when “such aggrieved person knows or should know of the facts giving rise thereto.” 5 G.C.A. § 5425(a); DFS Guam L.P., 2020 Guam 14 ¶ 2. Further, “the 14-day window of section 5425(a) begins to run...when the protester knew, or should have known, facts *establishing the essential elements of that protest claim.*” DFS Guam L.P., 2020 Guam 14 ¶ 88. Emphasis added.

In the present case, Basil did not have all the essential elements required to file its protest until GSA issued a Bid Status to Basil on November 8, 2019 advising that its bid was rejected due to a “high price” and that the bid was to be awarded to SH Enterprises. See Exhibit 8 of Basil’s Exhibit Binder filed on July 31, 2020.

In its Notice of Supplemental Authority, GSA argues that the protest is untimely because it was filed more than fourteen days after it knew or should have known that SH Enterprises was one of the bidders to the IFB and not within 14 days after the public bid opening date of October 24, 2019. However, this argument fails as all the essential elements needed for Basil to be aggrieved, which would then allow it to protest the GSA-056-19 award, was not yet available on

this date. Specifically, under Guam Procurement Law, GSA was legally required to evaluate the bid materials after the bid opening date to ensure that the procurement contract would be awarded to the “lowest *responsible* bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids...” 5 G.C.A. § 5211(g). Emphasis added. Since the bid opening did not result in the award of the contract to a particular bidder and GSA still had to conduct its analysis on whether SH Enterprises’ met the requirements for a responsible bidder, Basil was neither aggrieved nor entitled to a remedy at that point in time.

Indeed, a party becomes aggrieved when they become aware of a violation of one of the procurement law’s substantive provisions or the terms of the RFP.” DFS Guam L.P., 2020 Guam 14 ¶ 84. Further, as a general proposition, when alleged misconduct forms the basis of a procurement protest, the time runs from the date on which the protesting party first learned of the purported misconduct. DFS Guam L.P., 2020 Guam 14 ¶ 89. This catalyst occurred on November 8, 2019 when GSA advised Basil that its bid was rejected and that it would award the contract to SH Enterprises. It should be noted that the Invitation for Bid for GSA-056-19 specifically required that it be awarded to the lowest responsible bidder. GSA violated this substantive provision of the contract when it failed to find that SH Enterprises’ was not a responsible bidder due to its prior termination from an April 2019 contract, which was also with GSA. Upon learning of GSA’s misconduct, Basil now had all the essential elements and information in which to file a protest.

The OPA must consider the timeliness issue “in relation to the underlying facts,” Guam Imaging Consultants, Inc. v. Guam Mem’l Hosp. Auth., 2004 Guam 15 ¶ 24. There is a complete distinction between this case and the facts in DFS Guam L.P. as DFS should have issued its protest in October 30, 2012 after it learned of the Guam Visitors Bureau Delegation trip to South Korea. At that time, it is noted that “DFS knew GIAA board members had accepted gifts from Lotte before

bids were even submitted and that Lotte was in consideration for the award throughout the bidding process.” DFS Guam L.P. 2020 Guam 14 ¶ 101. DFS, however, waited and did not file its protest until approximately 6 months later. Basil’s case is the complete opposite as it filed its protest within 14 days of knowledge of GSA’s failure to correctly find that SH Enterprises was not a responsible bidder due to its prior terminated contract, and it furthered that error by awarding the contract to SH Enterprises, which was in complete contravention to a substantive provision of the IFB. Further, this is significant because immediately upon learning of GSA’s action on November 8, 2019, which was an essential element for the protest, Basil then filed its protest within the required timelines of Guam Procurement Law. Accordingly, when viewed in the light most favorable to the non-moving party, the evidence is clear that Basil’s protest was timely.

II. Basil’s Second Protest of GSA-056-19 is Timely

Basil’s filed a second protest to GSA-056-19 on February 7, 2020 which was solely based on SH Enterprises’ ethical violations in the procurement process. This protest was also denied by GSA, and upon Basil’s filing of its Notice of Appeal with the OPA, it was given docket No. OPA-PA-20-003.

Notably, there has never been an issue regarding the timeliness of this second protest. Specifically, Basil’s learned on January 24, 2020 that SH Enterprises had donated the Hakubotan building to the government for use as the new site for the War Claims Processing Center, which was in complete contravention to Guam’s Procurement Laws prohibiting ethical violations. Thereafter, Basil filed its protest on February 6, 2020, which was within fourteen (14) days of learning of SH Enterprises’ actions. Accordingly, this protest is timely and the OPA has jurisdiction to hear this this matter.

III. Conclusion

Barring any delays due to COVID-19 and Guam's PCOR status, a Formal Hearing on this matter is set to commence on October 5, 2020. Based on the above, Basil's protest is not only timely, its appeals are also viable and must be addressed by the OPA.

DATED: Hagåtña, GU, September 30, 2020.

CAMACHO CALVO LAW GROUP LLC



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