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PROCUREMENT APPEALS

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Attorney for Appellant

BASIL FOOD INDUSTRIAL SERVICES CORPORATION

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Docket No. OPA-PA-19-011

**APPELLANT BASIL FOOD
INDUSTRIAL SERVICES
CORPORATION'S OPPOSITION TO
SH ENTERPRISES, INC.'S MOTION
FOR SUMMARY JUDGMENT**

COMES NOW, Appellant Basil Food Industrial Services Corporation, by and through its undersigned counsel, with its Opposition to SH Enterprises, Inc.'s Motion for Summary Judgment.

I. Introduction

Appellant Basil Food Industrial Services Corporation ("Basil") opposes SH Enterprises, Inc.'s ("SH") Motion for Summary Judgment. Based on case law in this jurisdiction, Basil maintains that its Protest is timely. Further, Basil still contends that GSA failed to properly address the issues Basil raised in its appeal and created an unfair procurement environment. In its Motion for Summary Judgment, SH fails to demonstrate that there are no material facts in dispute such that SH is entitled to judgment as a matter of law. Basil posits that there are questions of fact yet to be properly resolved and that summary judgment at this juncture is inappropriate under the

circumstances of this matter.

II. Facts

On September 25, 2019, GSA issued GSA Bid No. GSA-056-19 (the “IFB”) for Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Meals Components.¹ The IFB called for numerous types of information, including a certification that the bidder had not had a government contract terminated for cause in the preceding three years, and if it had, an explanation of that termination, and a list of citations relevant to contract performance history. Both SH and Basil submitted bids in response to the IFB.

On November 8, 2019, GSA issued a Notice of Intent of Possible Award to SH. On November 12, 2019, Basil submitted a Freedom of Information Act (“FOIA”) Request under the Sunshine Act, requesting GSA to produce any and all documents issued or received by GSA in connection with Purchase Order Number P196E00314. That Purchase Order Number refers to a procurement contract for the same services for the period of April 1, 2019 through and including April 30, 2019. The Purchase Order was issued on March 28, 2019. Through its FOIA Request, Basil did not receive any documents detailing SH’s termination or withdrawal from that contract.

On November 22, 2019, fourteen days after Basil learned of GSA’s decision to award the contract to SH, Basil submitted a written protest. Basil raised the issue that SH should not have been awarded the contract because it should have been disqualified as a nonresponsive bidder. On November 30, 2019, GSA issued its decision denying Basil’s protest. On Monday, December 16, 2019, Basil filed its Notice of Appeal.

¹ In its Notice of Appeal, Basil noted that the IFB was issued on October 10, 2019. This was in error. As corrected by SH, GSA issued the IFB on September 25, 2019.

III. Discussion

A. Basil's Protest was Timely

Contrary to SH's assertion, Basil's November 8, 2019 protest was timely. SH argues that because Basil was aware of the fact that SH received a C rating from the Department of Public Health and Social Services ("DPHSS") on the Bid Opening on October 24, 2019, Basil's protest is untimely. However, Basil was not aware and could not have been aware that it had been aggrieved until GSA served its written decision in its Notice of Intent of Possible Award on SH and Basil on November 8, 2019.

The Guam Procurement Law provides that an actual or prospective bidder who may be aggrieved in connection with the method of source selection, solicitation or award of a contract may protest within fourteen (14) days after the protestor knows or should know of the facts giving rise thereto. 5 G.C.A. § 5425(a). This fourteen (14) day clock begins to run only when the purchasing agency takes action upon which the protestor can be made aware of the facts to support its protest. Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth., 2004 Guam 15 ¶¶ 30-31, 33-34. Following the reasoning of the Guam Imaging court, Basil could not have been made aware of facts to support a protest until November 8, 2019 when GSA took official action in awarding the contract to SH.

To be clear, Basil's protest was prompted by GSA's decision to award the contract to SH. Neither Basil's knowledge of SH's C rating from DPHSS nor SH's submission of a bid serves to aggrieve Basil. These events were not official actions taken by the government purchasing agency. GSA's written decision to award the contract to SH is the first point at which Basil was put on notice of facts that aggrieved Basil and began the fourteen (14) day timeframe in which Basil could submit a protest.

SH also takes issue with Basil's comment on the suspect behavior of GSA in related procurement matters. SH argues that Basil raises issues in GSA's solicitations in April and May 2019 procurement for the first time on appeal and that raising them now is untimely. Basil makes no protest with respect to GSA's shifting language in its solicitations. Basil merely raised this trend to support its argument that GSA is not operating in tandem with the underlying purposes of the Guam Procurement Law. GSA's gradual efforts to make the requirements for a contract less strict to potentially accommodate other vendors emphasizes GSA's questionable practices, especially when these contracts provide for the care of one of the island's most vulnerable populations. GSA's suspect behavior notwithstanding, Basil does not protest GSA's tactics, but only raised them to demonstrate the type of environment GSA has created.

B. SH Enterprises, Inc. is Not a Responsive Bidder

SH argues that Basil's claim that SH is not a responsive bidder and should be disqualified is based on a false premise that Basil knew to be false, and that dismissal of that claim is appropriate. Basil contends that a determination of this issue on the merits is warranted because SH did not disclose pertinent information as required by the IFB.

In its Protest, Basil asserted that SH is not a responsive bidder because it failed to disclose the fact that it had a previous government contract terminated for cause in the last three years. That contract plainly stated that upon a vendor's receipt of a C rating or worse from the DPHSS, that vendor "shall be terminated." Basil's interpretation of this clause is that termination is automatically required if a vendor receives an unsatisfactory safety inspection rating. GSA responded that SH was not terminated, but voluntarily withdrew from the contract.

Under Guam Procurement Law, a withdrawal of an inadvertently erroneous bid or cancellation of award or contract based on that bid is permitted, provided that the withdrawal or

cancellation is supported by a written determination made by the Chief Procurement Officer or head of the purchasing agency. 5 G.C.A. S. 5211(f). On November 12, 2019, Basil requested that GSA provide it any and all communications issued by or received by GSA concerning Purchase Order Number P196E00431, the contract for Nutrition Services for the DPHSS Elderly Nutrition Home Delivered Meals Program issued to SH on March 28, 2019. GSA produced neither SH's withdrawal nor the required determination supporting SH's withdrawal or the cancellation of the contract awarded to SH. Thus, the withdrawal was improper.

Moreover, the withdrawal and cancellation of contract are suspicious. The March 28, 2019 contract mandated that the awarded vendor would be terminated if it received a rating of C or lower from the DPHSS. The contract was awarded on March 28, 2019, for the period of April 1, 2019 through and including April 30, 2019. The DPHSS inspected SH's facility on April 3, 2019 – six days after the contract was awarded and two days after SH's services had commenced. As such, while the contract was in effect, SH received an unsatisfactory rating that triggered automatic termination. This is the important information Basil contends is required to be disclosed by bidders to allow the purchasing agency to conduct a thorough, proper review of each bidder's contract performance history. Instead of following the plain language of the solicitation, GSA informed Basil that SH merely withdrew. The convenience of improperly withdrawing from a contract when termination is mandated to escape a negative mark cannot be understated and should be viewed with much suspicion.

GSA's failure to follow the statutory requirements for a withdrawal and cancellation notwithstanding, Basil maintains its argument that SH is not a responsive bidder. The information called for in the IFB is primarily for the purchasing agency's ability to conduct a deliberate review and evaluation of a potential vendor's contract performance history. Termination for cause is

directly related to such a review. Additionally, a vendor's withdrawal for its inability to perform a contract is just as important. As such, Basil posits that SH's failure to disclose that (i) it received an unsatisfactory safety inspection rating that required its termination and (ii) that it withdrew from a contract because it was unable to fully perform are pertinent facts that were required to be disclosed in its bid. Accordingly, SH's failure to disclose these facts make it an unresponsive bidder who should be disqualified.

C. GSA Failed to Properly Address Issues Raised in Basil's Protest

Interestingly, SH seems to misread Basil's Protest in the same way GSA did. With respect to Basil's protest that SH did not properly respond to the requirements of the IFB because SH did not include a list of citations regarding its contract performance history, GSA responded that SH was not required to submit "inspection reports for the previous three (3) years," clearly referring to the requirement that potential vendors submit their safety and sanitary inspection records. The issue Basil raised had nothing to do with safety inspection records – the issue was citations relevant to contract performance history. GSA's response did not address the issue raised by Basil, just as GSA's admonishment of Basil served no appropriate role in the protest.

Similarly, SH's contention that GSA properly addressed Basil's protest by stating that SH withdrew from the March 28, 2019 contract misses the mark. Basil simply protested SH's failure to provide pertinent information regarding its contract performance history. Contract performance history includes much more than an improper withdrawal; it includes all citations or marks relevant to a proper evaluation of a potential vendor's performance history. Further, as stressed above, SH failed to disclose the fact that its inability to perform a contract caused it to withdraw.

D. GSA Created an Unfair Procurement Environment

Without question, GSA's conduct must be reviewed. Instead of following the plain language of a contract and terminating a defaulting vendor, it improperly created a safe harbor for that vendor and allowed it to withdraw without complying with Guam law. Additionally, GSA has continuously failed to properly disclose public records at the request of Basil. In instances where Basil requests specific documents, GSA fails to produce them. Particularly, Basil requested the production of any and all documents issued or received by GSA in connection with the March 28, 2019 contract. GSA failed to produce SH's April 5, 2019 Memorandum stating that it would withdraw from the March 28, 2019 contract. It was not until SH disclosed it to Basil that Basil first obtained the document.

Further, GSA's blatant disregard for formalities should also be reviewed. In initial filings with GSA, Basil specifically requested that all communications be sent to Basil's counsel, Ms. Geri Diaz. In contravention of this simple request, GSA submitted important, time-sensitive documents to a legal secretary at Ms. Diaz's office and not directly to Ms. Diaz. Moreover, instead of filing documents during normal business hours, GSA submitted to Basil important documents on a non-business day.

The Guam Procurement Law was implemented in part to foster confidence and competition in the Guam procurement system. GSA's conduct is detrimental to this goal and must be addressed.

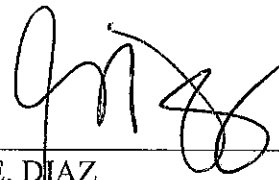
IV. Conclusion

Based on the foregoing, summary judgment at this point is inappropriate. There are many material facts in dispute, such as whether SH's failure to disclose information relevant to its contract performance history should have disqualified it from being awarded the contract. Further,

whether GSA properly addressed the issues raised by Basil's protest is still disputed. Under these circumstances, a thorough determination on the merits is warranted.

DATED: Hagåtña, GU, February 1, 2020.

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