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**Appeal of Basil Food Industrial Services Corporation OPA-PA-20-003**

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Hafa Adai,

Attached for filing, please find Appellant Basil Food Industrial Services Corporation's Hearing Brief.

Kindly confirm receipt of the attached. Should you have any questions, please do not hesitate to give us a call. Thank you.

**ALICE B. MENDOZA****Legal Secretary | CC Law Group LLC**[356 E. Marine Corps Drive, Suite 201](#)[Hagatna, GU 96910](#)**Tel:** 671.472.6813 **Fax:** 671.477.4375[amendoza@camachocalvo.law](mailto:amendoza@camachocalvo.law)[www.camachocalvo.law](http://www.camachocalvo.law)**IMPORTANT/CONFIDENTIAL:**

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 **Appellant's Hearing Brief.pdf**  
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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.

Docket No. OPA-PA-20-003

**APPELLANT’S HEARING BRIEF IN  
SUPPORT OF THE DEBARMENT OF  
SH ENTERPRISES FOR BREACH OF  
THE ETHICAL STANDARDS OF  
GUAM’S PROCUREMENT LAW**

COMES NOW Appellant Basil Foods Industrial Service Corporation (“Basil”), by and through its undersigned counsel, with its Hearing Brief in Support of the Debarment of SH Enterprises for Breach of the Ethical Standards of Guam’s Procurement Law.

**I. INTRODUCTION**

At the heart of this case is Invitation for Bid (IFB) No. GSA-056-19, the Department of Public Health and Social Services (“DPHSS”) procurement of meals services for the elderly (hereinafter referred to as the “Manâmkok’ meals IFB”). Basil filed two separate protests related to this IFB, and when they were denied by the Chief Procurement Officer (“CPO”), it filed separate appeals with the Office of Public Accountability (“OPA”). The first appeal was filed on December

16, 2019 wherein Basil argued that SH Enterprises was ineligible to receive the award of the Manâmkô' meals IFB, and the second was filed on February 27, 2020 on the basis that SH Enterprises provided a favor the Government of Guam which violated 5 G.C.A. § 5630(d) and 2 G.A.R., Div. 4, § 11107(4)<sup>1</sup>.

Both appeals were consolidated and, after a hearing on the merits of the case, the Public Auditor issued his Decision on December 11, 2020 finding that the first appeal was warranted on the basis that the CPO abused her discretion by granting a waiver of the requirements related to food establishment grades because she applied the requirement unequally, which prejudiced Basil. As a result of this finding, the Public Auditor terminated SH Enterprise's food services contract to the manâmkô. SH Enterprises has since filed an appeal of this matter in the Superior Court of Guam.

As for the second appeal, the Public Auditor found that SH Enterprises had, in fact, breached the ethical standards set out in Guam's Procurement Laws which prohibit favors to the government. This matter has not yet been completely decided as an Order to Show Cause Hearing is set for February 8, 2021 to determine whether SH Enterprises should be suspended or debarred for breach of the ethical standards set out in Guam's Procurement Laws and Regulations.

## **II. STATEMENT OF FACTS**

On September 25, 2019, General Services Agency ("GSA") issued the Manâmkô' meals IFB. Under the terms of this IFB, the bidder was to provide an estimated seven hundred (700) to eight hundred (800) congregate meals to the manâmkô' at designated sites, plus an additional one thousand (1,000) to one thousand two hundred (1,200) home delivered meals. The term of this

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<sup>1</sup> 5 G.C.A. § 5630(d) and 2 G.A.R., Div. 4, § 11107(4) prohibits favors to the government.

contract was for three (3) years with the option to renew for two (2) additional years, and the total amount to be awarded under this contract was \$3,789,211.00.

Both Basil and SH Enterprises submitted bid packets for this IFB and, on November 8, 2019, GSA awarded the contract to SH Enterprises. The provision of meals commenced on December 1, 2019.

On January 24, 2020, Basil learned through the news media that the owner of the Hakubotan building donated space in the building to be used as the government's new site for the War Claims Processing Center. The building's fixtures and utilities were also donated. In response to a FOIA request to the Governor's Office, Basil further learned that SH Enterprises issued a letter to Governor Leon Guerrero on January 22, 2020 indicating that it was donating "the temporary utilization of approximately +/- 5,000 square feet of commercial space located on the first floor, utilities, and access to the building's parking lot for the Guam War Claims Center."

Seven days later, on January 29, 2020, SH Enterprises submitted a bid for IFB No. GSA-001-20, which was to provide meals to the inmates and detainees at the Department of Corrections (hereinafter the "DOC meals IFB"). Basil also issued a bid for this IFB.

Basil's filed a timely protest to the Manâmkô' meals IFB to GSA on February 7, 2020 and argued that SH Enterprises, as a government contractor, violated the ethical restrictions indicated in 5 G.C.A. § 5630 and 2 GAR Div. 4 § 11107(4) when it provided use of the Hakubotan building as a favor to the government. The very next day, the CPO denied the protest.

On February 17, 2020, GSA issued a Bid Status Notice awarding the DOC meals IFB contract totaling \$5,978,700.00 to SH Enterprises. This contract was set to last for three years with an option to renew for two additional years. Basil learned of this award on February 25, 2020.

Basil appealed the CPO's denial of its protest relating to SH Enterprises' ethical violations with the Office of Public Administration ("OPA") on February 27, 2020.

After a hearing on the merits held on October 5, 6 and 7, 2020, the Public Auditor found that SH Enterprises had, in fact, provided a favor to the Territory, which violated Guam Procurement Law's ethical standards. A final decision on this issue is pending and an Order to Show Cause Hearing as to why SH Enterprises should or should not be disbarred or suspended for its ethical violations has been set.

### **III. LEGAL ARGUMENT**

It is necessary to examine both 5 G.C.A. § 5426 and § 5651, which provide remedies for the breach of ethical standards stated in Guam Procurement Laws and Regulations. Based on the following analysis, it will be evident that the appropriate remedy is that SH Enterprises be debarred from being a government contractor.

#### **A. 5 G.C.A. § 5426**

5 G.C.A. § 5426(b) addresses several causes for debarment or suspension. The relevant sections include the following:

- (4) violation of contract provisions, as set forth below, of a character which is regarded by the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency to be so serious as to justify debarment action:
  - (A) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract
- (5) any other cause the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency determines to be so serious and compelling as to affect responsibility as a territorial contractor, including debarment by another governmental entity for any cause listed in regulations of the Policy Office;
- (6) for violation of the ethical standards set forth in Article 11 of this Chapter.

5 G.C.A. §§ 5426(b)(4)(A), (b)(5) and (b)(6).

The facts of this case that must be carefully scrutinized when determining that debarment is an appropriate remedy for SH Enterprises' violations. Specifically, SH Enterprises' favor to the government was far from nominal as it involved approximately 5,000+ square feet of commercial space within the Hakubotan building, including fixtures, utilities and access to the parking lot. Further, this significant favor was provided by SH Enterprises during three critical and impressionable events occurring during the procurement process, and it causes immediate concern because its action explicitly and strictly violated the policies and purpose of the procurement laws as stated in 5 GCA § 5001<sup>2</sup>. Notably, the favor occurred just two and a half (2 ½) months after SH Enterprises was awarded the \$3,789,211.00 Manāmkō' meals IFB contract; second, Basil's appeal of the award of the Manāmkō' meals IFB contract was still pending before the Office of Public Accountability and had not yet resolved; and lastly, the favor occurred twenty-six (26) days before SH Enterprises was awarded the even more illustrious \$5,978,700.00 DOC meals IFB contract.

Emphasis should be placed on the fact that SH Enterprises' violation of the ethical standards was done knowingly, willfully, and intentionally. In fact, during the hearings held on October 5, 6, and 7, 2020 before the Public Auditor, both Mr. Tae Hong Min, SH Enterprises' President, and Mrs. Hui Sook Min, SH Enterprises' Vice President, testified that they read and fully understood the terms and conditions of the Manāmkō' meals IFB. They completed the bid

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<sup>2</sup> 5 GCA § 5001. Purposes, Rules of Construction.

(a) Interpretation. This Chapter shall be construed and applied to promote its underlying purposes and policies.

(b) Purposes and Policies. The underlying purposes and policies of this Chapter are:

- (1) to simplify, clarify, and modernize the law governing procurement by this Territory;
- (2) to permit the continued development of procurement policies and practices;
- (3) to provide for increased public confidence in the procedures followed in public procurement;
- (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;
- (5) to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory;
- (6) to foster effective broad-based competition within the free enterprise system;
- (7) to provide safeguards for the maintenance of a procurement system of quality and integrity; and
- (8) to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process. Emphasis added.

packet together and did not need assistance in doing so as they had applied for and had been awarded other food services contracts with the government in the past sixteen (16) years (since 2004). Accordingly, they acknowledged that they were quite familiar with the procurement process, including the contract specifications prohibiting ethical violations.

As further evidence of SH Enterprises' knowledge of the ethical requirements, the Manãenko' meals IFB is replete with information, requirements and prohibitions related to maintaining ethical standards and ensuring the integrity of the procurement process. The relevant sections of the Manãenko' meals IFB include the following:

**General Terms and Conditions**

6. COMPLIANCE WITH SPECIFICATIONS AND OTHER SOLICITATION REQUIREMENTS: Bidders shall comply with all specifications and other requirements of the Solicitation.

**General Terms and Conditions**

31. REPRESENTATION REGARDING ETHICS IN PUBLIC PROCUREMENT: The bidder or contractor represents that it has not knowingly influenced and promises that it will not knowingly influence a Government employee to breach any of the ethical standards and represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in Chapter 11 (Ethics in Public Contracting) of the Guam Procurement Act and Chapter 11 of the Guam Procurement Regulations.

**Section 16.8 Debarment (Guam and Federal) of the General Specification on Item 16.0 Contract Clauses Required by 2 Code of Federal Regulations (CFR) Part 200**

A. Guam Debarment and Suspension. Contractor warrants that it will comply with the provisions of 5 GCA Chapter 5 Articles 9 and 11, subject to debarment or suspension.

**ADDITIONAL CONTRACT TERMS AND CONDITIONS**

22.1 Ethical Standards. With respect to this Agreement and any other contract that the Bidder may have, or wish to enter into, with any government of Guam agency, the Bidder represents that it has not knowingly influenced, and promises that it will not knowingly influence, any government employee to breach any of the ethical



standards set forth in the Guam Procurement Law and in any of the Guam Procurement Regulations.

22.2 Prohibition Against Gratuities and Kickbacks. With respect to this Agreement and any other contract that the Bidder may have, or wish to enter into, with any government of Guam agency, the Bidder represents that he has not violated, is not violating, and promises that it will not violate, the prohibition against gratuities and kickbacks set forth in the Guam Procurement Regulations.

Moreover, Mrs. Min signed two separate affidavits<sup>3</sup> for the Manãmko' meals IFB, the first entitled, "Affidavit Regarding No Gratuities and Kickbacks," wherein she acknowledged that SH Enterprises has not and would not violate the prohibition against gratuities and kickbacks set forth in 2 GAR Div. 4, § 11107(e), and the second entitled, "Affidavit Regarding Ethical Standards," acknowledging that SH Enterprises has not and would not knowingly influence any government of Guam employee to breach any ethical standards set forth in 5 GCA Chapter 5, Article 11.

These ethical standards are found throughout the Manãmko' meals IFB to not only reinforce Guam's Procurement Laws and Regulations on this matter, but to also ensure compliance as these standards serve to promote the purpose and policies of Guam's Procurement law, which is to facilitate the fair and equitable treatment of all those who participate in the procurement system, to increase the public's confidence in the procurement process, to encourage healthy competition, and to ensure the quality and integrity of the procurement system, etc.

By providing the free use of the Hakubotan building to the Governor of Guam, SH Enterprises knowingly and willfully violated the terms of its contract and breached its ethical requirements as a government contractor.

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<sup>3</sup> The DOC meals IFB also required all offerors and bidders to certify to and sign the very same affidavits required by the Manãmko' meals IFB dealing with the prohibitions of ethical violations pursuant to the Procurement Law and Regulations. Mrs. Min attested to and signed these same affidavits as part of SH Enterprises' bid packet for the DOC meals IFB.

**B. 5 G.C.A. § 5651**

Guam Procurement Law also includes 5 G.C.A. § 5651 which provides remedies for non-governmental employees who breach ethical standards. The relevant subsections of that statute state as follows:

(b) Supplemental Remedies. In addition to existing remedies for breach of the ethical standards of this Chapter or regulations promulgated hereunder, the Procurement Policy Office, in connection with non-employees, may impose any one or more of the following:

- (1) written warnings or reprimands;
- (2) termination of transactions; and
- (3) debarment or suspension from being a contractor or subcontractor under territorial contracts.

(d) Right of the Territory to Debar or Suspend. Debarment or suspension may be imposed by the Procurement Policy Office in accordance with the procedures set forth in § 5426 of this Chapter for breach of the ethical standards of this Chapter, provided that such action may not be taken without the concurrence of the Attorney General.

(e) Due Process. All procedures under this Section shall be in accordance with the Administrative Adjudication Law.

5 GCA § 5651(b), (d) and (3).

As noted in 5 G.C.A. § 5651(b), the Procurement Policy Office has the discretion to impose any or all of the 3 stated options, including a written warning or reprimand, termination of the transaction, or debarment or suspension from being a contractor or subcontractor under territorial contracts.

The Public Auditor has already terminated the Manãmko' meals IFB contract on different grounds. However, the gravity of SH Enterprises' actions, which exponentially increased due the environment in which it occurred, reached a level warranting not only SH Enterprises' suspension, but more so its debarment as a government contractor.

#### IV. CONCLUSION

Any ethical violation rooted in Guam's Procurement Rules and Regulations goes to the heart of the public trust, which is woven into the fabric of our procurement rules and regulations. These violations chip away at the integrity of the government's contracting system and they undermine the public's confidence in a fair and impartial procurement process. The significant value of SH Enterprises' favor, when viewed in conjunction with the recent award of the Manãmko' meals IFB and the DOC meals IFB, plus the ongoing and unresolved nature of Basil's appeal filed with the OPA, catapults SH Enterprises' actions to an egregious level and immediately casts an enormous distrust in the procurement process. The events which occurred in this case are so serious and so compelling such that the only appropriate remedy warranted to prevent this type of behavior and to restore confidence in the procurement process is for SH Enterprises to be debarred from being a government contractor.

DATED: Hagåtña, GU, January 25, 2021.

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