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FILE NO. OPA-PA: 19-011

**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES  
CORPORATION,

Appellant.

**DOCKET NO. OPA-PA-19-011**

**SH ENTERPRISES, INC.'S RESPONSE TO  
AGENCY REPORT**

**I. INTRODUCTION**

Appellant Basil Food Industrial Services Corporation (“Basil”) has appealed a decision issued by the General Services Agency (“GSA”) denying its protest filed on November 22, 2019 (“Protest”) regarding the award of GSA Bid No. GSA-056-19 to Interested Party SH Enterprises (“SH”). GSA denied Basil’s protest on November 8, 2019. Basil filed its Notice of Appeal on December 16, 2019, and the expedited hearing is scheduled for March 9, 2020.

SH, by and through counsel, submits its response to the GSA’s *Agency Report for OPA-PA-19-011*, filed on January 6, 2020. This Response is limited to SH’s comments to the Agency Report. Full analysis of the issues raised in Basil’s Notice of Appeal will be addressed in due course in future filings.

**ORIGINAL**

## II. RELEVANT FACTS

On October 10, 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. The term for the contract was three (3) years with the option to renew for two (2) additional one fiscal-year terms at the Department of Health and Social Services’ (DPHSS) discretion. *IFB* at 53.

Section 2.5(f) of the IFB required bidders who had been awarded a government contract in the preceding three (3) years, to “list citations in the areas of procurement, questioned costs, material weaknesses and [the bidder’s] organization’s non-compliance with contract provisions.” *IFB* at 56. The IFB further required bidders to complete and include mandatory federal program forms, including a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion (“B-4 Certification”). *Id.* at 34. The B-4 Certification includes a certification by the bidder that it “[had] not within a three year period preceding [the] application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.” *Id.* at 38. If a bidder was unable to certify as provided, the bidder was required to attach an explanation to its proposal, which would be considered in determining bidder responsibility. *Id.*

On October 24, 2019, representatives from Basil and SH submitted their bids for this IFB procurement and attended the bid opening. The B-4 certification submitted with SH’s bid certified that SH had not been terminated for cause or default in the preceding three year period. *SH Bid* at 38.

On November 8, 2019, GSA served SH with its Notice of Intent of Possible Award (“NOI”) of the contract for the IFB to SH. *NOI* at 1. On the same day, GSA also awarded the contract to SH by issuing Purchase Order Number P206A00841, effective immediately, with the

first meal to be delivered on December 1, 2019.

On November 22, 2019, Basil filed its Protest challenging GSA's award of the contract to SH. Basil raised three arguments. First, Basil challenged the award to SH on the basis that SH was not eligible because it was "neither a responsive nor responsible bidder" because Basil incorrectly assumed that SH "failed to disclose highly pertinent, available information clearly required by the IFB and knowingly provided misrepresentations in its bid." *Protest* at 2. Basil argued that:

[u]nder the Bidder Assurances required by Sections 2.4 and 2.5(f), each bidder is required to provide a list of citations in the areas of procurement, material weaknesses, and non-compliance with contract provisions if such bidder was awarded a government contract during the previous three years. Specifically, bidders are provided a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion form (page 38 of the IFB) wherein each bidder certifies, among other things, that its organization has not had a government contract terminated for cause within the last three years. Additionally, Section 7.2 of the IFB's Program Specifications demanded that each bidder submit a Staffing Pattern and Position Description of all positions for the Elderly Nutrition Program.<sup>1</sup>

*Protest* at 2.

In its Protest, Basil incorrectly assumed that SH was terminated for cause by DPHSS in a prior Emergency Procurement SH received on March 28, 2019, resulting in a subsequent award to Basil on April 5, 2019 of the remaining services on the March 28th Emergency Procurement. *Id.* Basil erroneously assumed that SH's B-4 certification omitted certain "facts," specifically, SH's alleged termination for cause in the March 28th Emergency Procurement. *Id.* at 3. Basil further argues – albeit incorrectly – that SH willfully misrepresented its past performance, and therefore submitted a non-responsive bid. *Id.*

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<sup>1</sup> Although Basil's Protest raised the issue of SH's alleged failure to disclose staffing patterns in its bid, which Basil claimed was required under the IFB, Basil has not raised this issue in this Appeal. Accordingly, Basil has abandoned this issue in its Appeal, and its merits are not addressed further herein.

The GSA issued a decision denying Basil's Protest on November 30, 2019 ("GSA Decision"). *GSA Decision* at 1. The GSA Decision noted that the factual basis for Basil's allegations of SH's purported failure to disclose required information and willful misrepresentations related to the March 28th procurement was not accurate because SH was not in fact terminated, but rather voluntarily withdrew from the award. *Id.* The GSA Decision further states that, to the extent Basil was alleging that SH should have disclosed inspection reports identified by Basil in its Protest, Basil similarly did not disclose any such reports, and any such requirements were waived as minor informalities. *Id.* at 2.

In accordance with the Nov. 8th award, SH began delivering meals on December 1, 2019. On December 16, 2019, Basil appealed the GSA Decision denying its Protest.

### III. ARGUMENT

#### A. BASIL'S PROTEST WAS UNTIMELY

5 GCA § 5425 provides in relevant part that "[a]ny actual...bidder who may be aggrieved...in connection with the...solicitation or award of a contract, may protest to the Chief procurement Officer []. The protest shall be submitted in writing **within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.**" (emphasis added). Basil's Appeal was untimely because it failed to file a protest within fourteen (14) days after it knew or should have known of the facts giving rise to its protest. The Appeal should therefore be dismissed in its entirety.

#### 1. BASIL FAILED TO TIMELY RAISE ITS CLAIM THAT SH'S BID WAS NON-RESPONSIVE

Basil's first issue on appeal is that SH purportedly withheld information regarding having been "terminated" in April 2019, and that such information was required to be disclosed in the B-4 certification attached to SH's bid. This issue was not timely protested. According to Basil,

on April 3, 2019, an inspection was conducted of SH's facilities, resulting in a "C" rating from the Division of Environmental Health, after which Basil incorrectly assumed, SH was terminated for cause. Basil's incorrect assumption that SH was terminated for cause is based on Basil's reading of Section 12.8 of the Program Specifications of the Emergency Procurement contract, which "clearly states that in the event the vendor is issued a 'C' rating from the Division of Environmental Health, DPS&HH, the vender (sic) shall be terminated as the vendor of the ENP Nutrition Services." *Protest* at 3.

In its Protest, Basil states that it was aware of these "facts" as of October 10, 2019, when the GSA issued its bid:

**At the time GSA issued the present bid, Basil was aware of certain facts related to [SH] previous operations. Primarily, Basil was awarded a similar contract after GSA terminated a contract with SH as a result of SH failing to maintain the proper sanitary rating from the Department of Public Health and Social Services (DPHSS). This contract with SH was terminated for cause.** Throughout this IFB, GSA clearly requires all bidders to disclose whether they have had a public contract terminated for cause in the last three years. Additionally, each bidder is to disclose citations related to government contracts in the previous three years.

*Protest* at 1 (emphasis added).

The bid opening for the IFB took place on October 24, 2019 at 2:00 p.m. *See Bid Abstract* at 2. Present at the bid opening on behalf of Basil were its program manager Betty Dela Cruz, and directors Michael Zhou, Jerry Li and Guo Qiang Zheng. *Id.* During the bid opening, GSA representatives opened the packets submitted by each bidder, performed an initial evaluation of each bid for completeness according to the IFB checklist, and then announced the amount of each bid. The review for completeness of the bid included confirming the B-4 Certification was included, in which bidders certified that they had not been terminated for cause

in the three-year period preceding the IFB. The GSA Representatives then conditionally accepted the bids as complete.

Basil admits in its Protest that it was aware of the “facts” relating to SH’s purported termination as of October 10, 2019, the date the IFB was issued. Basil was also made aware during the bid opening on October 24, 2019, that SH had submitted its B-4 Certification, certifying that it had not been terminated for cause in the preceding three-year period. It is undisputed that, at the time of the bid opening, Basil was aware of: (1) the “facts” related to SH’s purported termination; (2) that SH did not disclose the purported termination, and filed a B-4 certification, certifying it had not been terminated the prior three years; (3) that the GSA accepted SH’s bid; and (4) that SH’s price was the lowest price and that SH was the presumptive successful bidder for the IFB.

As of October 24, 2019, Basil knew or should have known of the “facts” giving rise to its Protest, and the clock began to run on the time within which it was required to file its Protest. Pursuant to 5 GCA § 5425, Basil was required to file its Protest within 14 days of the bid opening date, or by no later than November 7, 2019. Basil filed its Protest on November 22, 2019, fifteen (15) days after the deadline for raising this claim.

**2. BASIL’S NEW CLAIM REGARDING THE GSA’S CHANGES TO TERMS OF THE APRIL AND MAY 2019 EMERGENCY PROCUREMENTS IS UNTIMELY.**

In its Notice of Appeal, Basil raised for the first time a new claim alleging that the GSA changed terms in the earlier April 1 – April 30, 2019 Emergency Procurement for Elderly Nutritional Services (which is a separate and distinct procurement from the October 10, 2019 IFB at issue in this Appeal and the underlying Protest). Basil argues that the specifications previously required that a Vendor who received a “C” rating “shall be terminated as a Vendor for

the Contract.” *Notice of Appeal* at 10. Basil then argues that the next Emergency Procurement for Elderly Nutritional Services for the period of May 1 – May 31, 2019 supposedly reduced the standards in the April procurement, providing that a vendor whose sanitary permit is suspended shall be terminated. *See id.* Basil concludes that the changes were made to accommodate SH, and created an unfair procurement environment in violation of the Procurement law.

This issue involves two other distinct procurements that predate the IFB involved in this case. Basil’s Notice of Appeal in this matter was filed on December 16, 2019, at least seven (7) months after the procurements in question. Any challenge to the solicitations for these prior procurements are clearly untimely pursuant to 5 GCA §5425(a), which provides that “[t]he protest shall be submitted within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.” To the extent Basil objected to the language shift between the April and May 2019 solicitations, it was required to raise them at that time, not seven months later in its Appeal from an agency decision in a completely different procurement.

Finally, Basil also did not raise this issue in its November 22, 2019 Protest, and it should not be considered for the first time in this Appeal. This claim should be dismissed.

**B. BASIL’S CLAIM THAT SH IS NOT A NON-RESPONSIVE BIDDER IS UNSUPPORTED AND BASED ON FALSE ASSUMPTIONS**

Guam Procurement Law provides that a “Responsive Bidder means a person who has submitted a bid which conforms in all material respects to the Invitation for Bids.” 5 GCA 5201(f). Basil argued that SH is a non-responsive bidder because: (1) SH had been awarded a contract for an emergency procurement for the provision of services for the Elderly Nutrition Program on March 28, 2019; (2) the program specifications for the emergency procurement provided that if the vendor is issued a “C” rating from DPHSS, the Vendor “shall be terminated”; (3) SH received a “C” rating on a facility inspection on April 3, 2019; and (4) the Government

subsequently awarded the remainder of the March 28th Emergency Procurement to Basil. *Notice of Appeal* at 5. Based on these “facts,” Basil incorrectly concluded that “the only logical explanation is that SH was terminated for cause as the Vendor, the exact prescribed consequence under the Program Specifications.” *Notice of Appeal* at 6. The GSA has repeatedly stated in both the GSA Decision denying Basil’s Protest and GSA’s Agency Report that SH was not terminated in the emergency procurement, but rather voluntarily withdrew from the solicitation before any action by the Government. *See, GSA Decision* at 1; *Agency Report* at 1. Basil refuses to accept that its assumptions were wrong and there is no merit to this claim.

On April 5, 2019, Tae Hong Min, President of SH, submitted to the GSA SH’s *Withdrawal of Purchase Order for Home Delivery of Elderly Food Services under the Department of Public Health and Social Services* (“SH Withdrawal”). *See, Ex. A* attached hereto. In its Withdrawal, SH informed the GSA that it had an insufficient number of drivers to provide the services required in the emergency procurement in a timely manner. *Id.* SH was not terminated for a “C” rating in the March 28th Emergency Procurement. SH’s B-4 certification for this IFB, stating that it had not been terminated in any other Government solicitation in the three-year period preceding the IFB, was true at the time it was submitted and is true today. This claim is based on pure conjecture and should be dismissed.

Basil also argues “a withdrawal or termination for cause was required to be disclosed in the bid,” and “[r]egardless of the true manner in which SH was removed from the April 1, 2019 Emergency Procurement contract, the fact of the matter is that SH did not disclose its removal.” *Notice of Appeal* at 6-7. There is no legal authority supporting this position. Nowhere in the IFB or the Guam Procurement law does it require voluntary withdrawals to be disclosed. Section 2.5(f) of the IFB instructs bidders awarded a government contract in the preceding three (3) years



to “list citations in the areas of procurement, questioned costs, material weaknesses and your organization’s non-compliance with contract provisions,” and to “[i]nclude the status or resolution of each listed.” *Id.* at 56. While SH agrees that a termination for cause should be disclosed, there is no authority for Basil’s proposition that a voluntary withdrawal is the equivalent of a citation requiring disclosure.<sup>2</sup>

In light of the clear evidence that SH was not terminated from the Emergency Procurement, but rather voluntarily withdrew, its withdrawal does not constitute a “citation” such that SH was required to disclose its withdrawal in its bid documents, and its B-4 Certification was correct. SH was a responsive bidder. Accordingly, Basil’s appeal should be dismissed.

**C. THE GSA FULLY ADDRESSED BASIL’S PROTEST AND DID NOT  
“CREATE AN UNFAIR PROCUREMENT ENVIRONMENT”**

Basil’s final issue on Appeal is that the GSA “did not render a full decision on Basil’s protest.” *Notice of Appeal* at 8. Basil’s chief argument on this issue appears to be that the GSA admonished Basil for the deficiencies in its own bid, which, while understandably embarrassing to Basil, does not constitute proper basis to disqualify SH and cancel the award for the IFB. This argument is premised on Basil’s allegation that the GSA failed to properly respond to Basil’s Protest of SH’s alleged failure to provide a list of citations, as discussed above in Section II(A). The GSA clearly responded to this issue, noting that SH had voluntarily withdrawn from the March 28th Emergency Procurement, and had not been terminated, which was the factual premise for Basil’s claim that SH had failed to disclose its purported termination. This issue was squarely addressed in the GSA Decision.

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<sup>2</sup> In its Notice of Appeal, Basil contests the GSA’s statements in the GSA decision that disclosure of negative inspection ratings, including Basil’s own ratings, was required under the IFB. Accordingly, this issue does not require resolution in this Appeal, and is not further addressed herein.

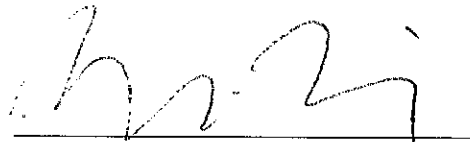
### III. CONCLUSION

SH requests a ruling from the OPA as follows:

1. That Basil's Protest on the basis of SH's purported non-responsiveness was untimely and should be dismissed;
2. That Basil's issues on appeal regarding an alleged shift of language between solicitations in April and May 2019 was untimely, not raised in Basil's underlying Protest, is not properly before the OPA, and should be dismissed;
3. That the GSA fully responded to Basil's Protest;
4. That Basil's Appeal is denied in its entirety;
5. For an award of reasonable attorney's fees and costs of Basil's Protest and Appeal; and
6. For such other relief that the OPA may determine is just and proper.

Respectfully submitted this 16th day of January, 2020.

CIVILLE & TANG PLLC



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*Attorneys for Interested Party  
SH Enterprises, Inc.*

# **EXHIBIT A**

April 5, 2019

Memorandum

To: Claudia S. Acfalle  
Chief Procurement Officer  
General Services Agency

From: Mr. and Ms. Min  
California Mart d/b/a SH Enterprises


Subject: Withdrawal of Purchase Order for Home Delivery of Elderly Food Services under the  
Department of Public Health and Social Services

Dear Ms. Acfalle:

This is to inform you that we have decided to withdrawal our current purchase order for home delivery of the elderly food services under the Department of Public Heal and Social Services' Division of Senior Citizen's program. The reason for the withdrawal is the inability to provide enough drivers to ensure that the food is provided in a timely manner for the home bound citizens. We erroneously assumed that more drivers would come over from the previous vendor to allow us to continue the services uninterrupted. However, this was not the case, and the fact that we were not able to obtain other drivers in a timely manner, caused us to miss providing food services in a timely manner. As such, as we cannot guarantee timely, we would rather turn back the purchase order in order to allow the seniors to get their food timely.

As such, we will withdrawal from the current purchase order and work to provide better quality services when the next round appears. Again, we apologize for the additional work that comes up.

  
Mr. Tae Hong Min

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