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**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 MOTION FOR  
SUMMARY JUDGMENT; MEMORANDUM  
OF POINTS AND AUTHORITIES**

**MOTION**

Interested Party SH Enterprises moves the Hearing Officer for an order granting summary judgment on issues raised by Appellant Basil Food Industrial Services Corporation in its Notice of Appeal, filed on December 16, 2019. This Motion is made pursuant to 5 GCA § 5425(g), and 2 GAR Div. 4 §§ 9101(e), 12104 (c)(9) and 12109 (b), and is supported by the Memorandum of Points and Authorities filed concurrently herewith, all matters on which the Hearing Officer may take judicial notice, the record in this Appeal, and evidence which may be adduced at a hearing hereon.

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**ORIGINAL**

## MEMORANDUM OF POINTS AND AUTHORITIES

Appellant Basil Food Industrial Services Corporation (“Basil”) has appealed a November 30, 2019 decision issued by the General Services Agency (“GSA”) denying Basil’s Protest filed on November 22, 2019 (“Protest”) of the November 8, 2019 award of GSA Bid No. GSA-056-19 to Interested Party SH Enterprises (“SH”). Basil has identified three issues on appeal in its Notice of Appeal:

1. SH is not a responsive bidder and should be disqualified;
2. GSA violated Guam Procurement Law for failing to give Basil two days’ notice prior to commencement of the contract; and
3. GSA did not properly respond to Basil’s protest and created an unfair procurement environment.

*Notice of Appeal* at 3-10. SH moves for summary judgment on all issues raised in Basil’s Appeal.

### I. RELEVANT 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. *IFB*, Procurement Record (“PR”) I-04 at 3. 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. *Id.* 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. *See Bid Abstract*, PRI-06 at 2. 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. *See Notice of Appeal*, **Ex. B** (SH B-4 Certification).

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*, PRI-09 at 1. GSA also issued Purchase Order Number P206A00841 to SH on November 8, 2019. *See Purchase Order for GSA-056-19*, PRII-14 at 5. On November 22, 2019, Basil filed its Protest challenging GSA’s award of the contract to SH. *See Notice of Appeal*, **Ex. I** (Protest). Basil raised three arguments.

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.” *Id.* 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 Patter and Position Description of all positions for the Elderly Nutrition Program.

*Id.* at 2.

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 to the Declaration of Leslie Travis ("Travis Decl."), filed contemporaneously herewith. 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.

The GSA issued a decision denying Basil's Protest on November 30, 2019 ("GSA Decision"). See *Notice of Appeal*, Ex. G (GSA Decision) at 1. The GSA Decision explained SH was not terminated, but, rather, voluntarily withdrew from the award:

- a. You indicated that SH Ent. Was terminated or canceled contract awarded for 3/28/19

Response: S.H. Enterprise Inc. withdrew from the emergency award and was not terminated.

*Id.*

SH began delivering meals on December 1, 2019. See *Purchase Order*, PR11-14 at 5. On December 16, 2019, Basil appealed the GSA Decision denying its Protest.

## II. ARGUMENT

Guam Procurement regulations authorize the Public Auditor to consider motions in procurement appeals under specific circumstances. Specifically, and at issue in this Appeal, the parties may file a motion, or the Hearing Officer may *sua sponte* raise the issue, of the Public Auditor's jurisdiction. *See* 2 GAR Div. 4 § 12104(c)(9). Further, the Hearing Officer may "hold informal conferences to settle, simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceeding either by consent of the parties or upon such officer's own motion," and "[r]ule on motions, and other procedural items on matters pending before such officer." 2 GAR Div. 4 § 12109(a) and (c).

SH requests that the Hearing Officer issue an order finding that (1) Basil failed to file a timely protest, and therefore the Public Auditor does not have jurisdiction of the consequent Appeal; (2) SH was a responsive bidder within the meaning of 5 GCA 5201(f); and (3) the GSA properly responded to the issues in Basil's protest and did not create an unfair procurement environment.

### 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). "Protests filed after the 14 day period shall not be considered." 2 GAR Div. 4 § 9101(c)(1). 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 OPA therefore lacks subject matter jurisdiction over the Appeal, and the Appeal should be dismissed.

**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 from its bid information that it had been "terminated" in an April 2019 government procurement, 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. *See Notice of Appeal, Ex. I* (Protest) at 3. 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 "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." *Id.*

In its Protest, Basil admits that it was aware of these "facts" as of September 25, 2019, when the GSA issued its bid<sup>1</sup>:

**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

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<sup>1</sup> In its Protest, Basil incorrectly states that "GSA issued Bid Invitation No. GSA-056-19 on October 10, 2019." *Protest* at 1. However, the IFB was issued on September 25, 2019. *See IFB*, Procurement Record Vol. I – 04 at 3. The original bid opening date was scheduled for October 10, 2019. *Id.*

previous three years.

*Id.* at 1 (emphasis added).

Basil claims in its Protest, however, that Basil became aware of facts that form the basis of its Protest on November 8, 2019, when GSA provided Basil with a Bid Status declaring that SH had been awarded the contract. *See Protest* at 2. Basil was aware of the “facts” surrounding SH’s termination of the March 2019 Emergency Procurement which give rise to Basil’s protest much earlier. SH contends that Basil knew or should have known of the facts giving rise to its protest at the bid opening for the IFB, which took place at the GSA conference room on October 24, 2019 at 2:00 p.m. *See Bid Abstract*, PRI-06 at 2.

The bid opening for this IFB occurred in the presence of representatives of GSA, Basil and SH. 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.* GSA representatives, Buyer Arlene Cruz and Management Analyst Joyce Castro, the tabulator on the bid, were also present. *Id.* There were a total of two (2) bids submitted, one for SH and the other from Basil. *Id.* The bid opening was recorded by the GSA.<sup>2</sup> *Travis Decl.* at **Ex. B**.

It is clear from the recording of the bid opening that the bid packets were opened one at a time, beginning with Basil’s bid packet, followed by SH’s bid packet. *Id.* Ms. Cruz confirmed that each packet contained all of the required documents and line items, and announced the bid price for each bidder. *Id.* Basil was therefore 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

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<sup>2</sup> SH obtained a copy of the bid opening recording pursuant to a Sunshine Act request dated December 26, 2019.

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.

Basil's protest was not timely filed and the Appeal should be dismissed.

**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 September 25, 2019 IFB at issue in this Appeal and the underlying Protest). *See Notice of Appeal* at 10. Basil argues that the specifications previously required that a Vendor who received a "C" rating "shall be terminated as a Vendor for the Contract." *Id.* 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. *See* 2 GAR Div. 4 § 9101(c)(1).

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. THE GSA DID NOT VIOLATE GUAM PROCUREMENT LAW BECAUSE THE TWO-DAY NOTICE REQUIREMENT OF 5 GCA § 5425(G)(2) DOES NOT APPLY IN POST-AWARD PROTESTS**

In its Notice of Appeal, Basil also raised the issue that the GSA proceeded with the award of the contract to SH on December 1, 2019, the day after GSA issued its November 30, 2019 Agency Decision denying Basil's November 22, 2019 Protest. Basil claims that the GSA's "action to move forward with the contract must be found void" because "any action to proceed with the award of the contract *is void* unless the government complies with Section 5425(g)(1)-(3)," including the requirement that the GSA give the protestant two (2) days notice prior to proceeding with the award. Basil's analysis is flawed.

5 GCA § 5425 (g) provides in relevant part as follows:

(g) **In the event of a timely protest** under Subsection (a) of this Section or under Subsection (a) of § 5480 of this Chapter, the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is void, unless:

(2) Absent a declaration of emergency by the Governor, the protestant has been given at least two (2) days notice (exclusive of territorial holidays)[.]

(emphasis added).

2 GAR Div 4 § 9101(e) further provides in relevant part as follows:

(e) Stay of Procurement During Protest. **When a protest has been filed within 14 days and before an award has been made**, the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency **shall make no award of the contract prior to final resolution of such protest**, and any such further action is void, unless:

2. Absent a declaration of emergency by the Governor, the protestor has been given at least two-days notice (exclusive of government of Guam holidays)[.]

(emphasis added).

Both 5 GCA 5425(g)(2) and 2 GAR Div 4 § 9101(e) prohibit the award of a contract after a timely protest is filed, unless the purchasing agency meets several requirements, including providing two-days notice to the protestant. However, this prohibition applies only if the protest was filed *before an award has been made*, as plainly stated in 2 GAR Div 4 § 9101(e). *See TLK Marketing Co., Ltd., v. GVB, et al*, CV0914-16 at 10 (Decision and Order, November 13, 2018) (holding that the automatic stay in 5 GCA § 5425(g) only applies to pre-award protests) (citing *Guam Imaging Consultants, Inc. v. Guam Memorial Hospital Association*, 2004 Guam 15 ¶ 24 (holding that an automatic stay is triggered only when protest is “factually timely and filed before the award is made)).

In this case, Basil claims it was entitled to 2-days notice before the GSA could proceed with awarding the contract to SH on December 1, 2019. However, December 1st was the date *services* were scheduled to commence under the contract. The *award* of the contract took place *before* Basil filed its November 22, 2019 Protest, when GSA issued Purchase Order Number

P206A00841 on November 8, 2019. Basil was aware that the Purchase Order had been issued, and in fact references it in its Notice of Appeal. *See Notice of Appeal* at 7.

Because Basil filed its Protest on November 22, 2019, after the November 8, 2019 award of the contract to SH, the stay prohibiting award of the contract had not been triggered as of the date of the award. Accordingly, the 5 GCA § 5425 (g) and 2 GAR Div 4 § 9101(e) requirement that the GSA provide 2-days notice to Basil before awarding the contract to SH did not apply, and the GSA did not violate Guam Procurement Law. The Hearing Officer should therefore grant summary judgment against Basil on this issue.

### **C. SH WAS A RESPONSIVE BIDDER**

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”; and (3) SH received a “C” rating on a facility inspection on April 3, 2019 and was terminated by the GSA. *Notice of Appeal* at 5. 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 issued a decision denying Basil’s Protest on November 30, 2019 (“GSA Decision”). *See Notice of Appeal, Ex. G* (GSA Decision) at 1. The GSA Decision explained that SH was not terminated, but, rather, it voluntarily withdrew from the award:

- a. You indicated that SH Ent. Was terminated or canceled contract awarded for 3/28/19

Response: S.H. Enterprise Inc. withdrew from the emergency award and was not terminated.

*Id.* Basil was told that SH had withdrawn and was not terminated, but Basil deliberately disregarded the facts regarding the circumstances surrounding SH's withdrawal when it filed its Appeal. Basil's argument that SH's B-4 certification omitted certain "facts" i.e., that SH was terminated in the March 28, 2019 Emergency Procurement was based on information that Basil knew was false at the time it filed the Notice of Appeal. *Id.* Knowing the true circumstances surrounding SH's withdrawal, Basil further argues based on information Basil knew was false (that SH was not terminated but had, in fact, withdrawn), that SH willfully misrepresented its past performance, and therefore submitted a non-responsive bid. *Notice of Appeal* at 6.

The claim that SH's was a non-responsive bidder is based on a false premise, which Basil knew was false. Basil's claim was not made in good faith because it knowingly filed an Appeal based on information that was false. On this basis alone, the OPA should dismiss Basil's claim that SH was not a responsive bidder.

Related to this issue of whether SH was a responsive bidder, Basil also argues that "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.

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, the Hearing Officer should grant summary judgment against Basil on the issue and find that SH was a responsive bidder.

**D. 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 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). As discussed above, 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. The GSA properly addressed Basil’s Protest, and the Hearing Officer should grant partial summary judgment on this issue and deny Basil’s Appeal on this basis.

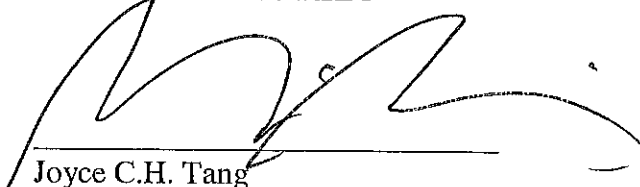
**III. CONCLUSION**

For the foregoing reasons, the Hearing Officer should grant summary judgment against

Basil, finding that (1) the Public Auditor does not have jurisdiction over Basil's untimely Protests, (2) that Basil's Protest was post-award and the 2-day notice provision in 5 GCA § 5425(g) did not apply, (3) that SH was a responsive bidder, and (4) that the GSA properly responded to Basil's Protest.

Respectfully submitted this 31st day of January, 2020.

CIVILLE & TANG PLLC

A handwritten signature in black ink, appearing to read 'Joyce C.H. Tang', written over a horizontal line.

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