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PROCUREMENT APPEALS
DATE: 2/19/20
TIME: 4:53 PM BY: Cms
FILE NO. OPA-PA-19-011

8 *Attorney for Interested Party SH Enterprises, Inc.*

9 **BEFORE THE PUBLIC AUDITOR**

10 **PROCUREMENT APPEALS**

11 IN THE APPEAL OF:

12 BASIL FOOD INDUSTRIAL SERVICES
13 CORPORATION,

14 Appellant.

DOCKET NO. OPA-PA-19-011

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

15 Appellant Basil Food Industrial Service Corporation's ("Basil") opposition to SH's
16 Motion for Summary Judgment ("Opposition") contains misstatements of facts and asserts several
17 arguments that are not supported by evidence or are otherwise irrelevant. The Opposition also
18 does not raise any genuine issues of material fact warranting denial of SH's Motion for Summary
19 Judgment ("MSJ").

20 First, Basil's Opposition does not address SH's argument that the GSA did not violate the
21 Guam Procurement Law when it did not give the two-day notice under 5 GCA §5425(G)(2),
22 because this requirement applies only to post-award protests. It is undisputed that this is a post-
23 award protest. Therefore, Basil has conceded this argument and summary judgment should be
24 granted on this issue.

25 Basil's remaining arguments are summarized as follows: (1) its Protest was timely
26 because it did not become aware of the facts giving rise to the appeal and was not aggrieved until
27 November 8, 2019 when the Notice of Intent to Award was issued; (2) SH is not a Responsive
28 Bidder because its voluntary withdrawal in April 2019 ("April 2019 conduct") from an earlier

1 Certification, certifying that it had not been terminated for cause in the preceding three-year
2 period; and, it was present when SH's bid was accepted. *See Travis Decl.* at **Ex. B.** In other words,
3 on October 24, 2019 —the day the bid was opened – Basil was aware of the facts giving rise to
4 this appeal, and had fourteen days from October 24, 2019, to submit its protest.

5 Notwithstanding this knowledge, Basil argues that it was not until it received the notice
6 of intent to award on November 8, 2019 that it became an aggrieved party subject to the fourteen-
7 day deadline to submit a protest. *Opposition* at 3. The record does not support Basil's argument.
8 Tellingly, Basil does not dispute that it had knowledge of the alleged contract termination, that it
9 was present when the GSA accepted SH's bid, and that it knew that SH was the presumptive low
10 bidder. Basil tries to circumvent these facts by arguing that the 14 day clock was not triggered
11 until "the purchasing agency takes action upon which the protestor can be made aware of the facts
12 to support its protect ... when GSA took official action in awarding the contract to SH." *Id.* This
13 argument completely ignores the fact that Basil had the knowledge of the facts underlying its
14 claim on bid opening day, thus triggering the 14-day clock. Moreover, Basil's argument should
15 be rejected because it requires an interpretation that no bidder is aggrieved until the purchasing
16 agency has awarded a contract and therefore, there could be no appeal prior to the award of a
17 contract.

18 The Guam Supreme Court has stated that in connection with 5 GCA § 5425, "[a]n
19 aggrieved party is '[a] party entitled to a remedy.'" *Teleguam Holdings LLC v. Guam*, 2018 Guam
20 5 ¶ 37. In reviewing the language of § 5425, a party "may be aggrieved in connection with the
21 method of source selection, solicitation or award of a contract." Therefore, it is clear that a party
22 is not aggrieved only once it has lost the contract bid but can also be aggrieved during the
23 solicitation of a contract, which would include the process of accepting of bids.

24 Because Basil does not dispute and in fact affirmatively claims that it knew about the
25 alleged April 2019 conduct at the time GSA issued the present bid, and because Basil was present
26 at the bid opening on October 24, 2019, at which the GSA confirmed that SH had submitted all
27 the required documentation, which Basil knew included the B-4 Certification, it was aware of all
28 facts giving rise to this protest on the day of the bid opening. Assuming *arguendo* that Basil's

1 allegations about the April 2019 termination were true, Basil should have known it was entitled
2 to relief upon GSA's acceptance of SH's bid as responsive and complete. Therefore, the fourteen-
3 day deadline within which Basil was required to submit a protest began on this date – October
4 24, 2019 – and Basil's submission of its protest on November 22, 2019 was untimely. These facts
5 are not in dispute, and summary judgment in favor of SH should be granted on this basis.

6 **B. SH WAS A RESPONSIVE BIDDER**

7 Basil argues that SH was required to but failed to disclose (1) that it voluntarily but
8 improperly withdrew from a contract because of an inability to perform the contract, and (2) that
9 because its withdrawal was improper, it received an unsatisfactory inspection rating from DPHSS
10 while the contract was still in effect, which triggered an automatic contract termination.
11 *Appellant's Opp'n to Mot. for Summ. J.* at 4-6. On these grounds, Basil argues that SH should be
12 disqualified as a nonresponsive bidder for failing to disclose the rating that led to the termination.
13 *Id.* at 4. Basil's argument is that regardless of whether SH effectively withdrew from the contract,
14 because the contract was "automatically terminated," SH was required to disclose. These
15 arguments are legally unfounded and do not defeat summary judgment.

16 First, the OPA should reject Basil's speculation that SH's withdrawal is "suspicious" and
17 should have been disclosed in order for the "purchasing agency to conduct a thorough, proper
18 review of each bidder's contract performance history." *Id.* at 5. This policy argument ignores the
19 fact that there *is no* requirement under the IFB for this procurement or Guam Procurement Law
20 – and Basil has not provided any authority — that a voluntary withdrawal from a prior contract
21 must be disclosed in a bid for this procurement. There is no prejudice to Basil because, as Basil
22 admits, the GSA was the purchasing agency under the former contract, and therefore, was already
23 aware of this performance history. *Id.* at 5.

24 Related to this issue of non-responsibility is Basil's erroneous contention that SH was
25 required to disclose the DPHSS rating because SH had not effectively withdrawn from the
26 contract pursuant to 5 GCA § 5211(f) prior to the rating being given to SH. *Id.* at 4-5. Basil
27 completely fails to support this theory of "automatic termination" with any legal authority. The
28 argument also does not make sense. As stated above, there is no "automatic termination" under

1 the terms of the prior contract or under Guam law, and because GSA accepted SH's withdrawal,
2 there was no termination, and SH did not have a duty to disclose.

3 Basil also takes issue with GSA's acceptance of SH's withdrawal in this procurement
4 appeal, specifically, that the GSA failed to follow the statutory procedure for withdrawal. The
5 acceptance of SH's withdrawal was proper and Basil does not establish otherwise. Basil's
6 complaint about GSA's acceptance of SH withdrawal and whether it was compliant with statutory
7 procedure does not change the fact that it was accepted, the prior contract was not terminated, and
8 there was no prior termination or "citation" for SH to disclose in its bid for this procurement. SH
9 does not control what third parties and the GSA do, and there has never been any prior
10 determination that the withdrawal was somehow legally flawed or non-complaint. As such, the
11 actions of GSA and third parties cannot support any disclosure obligation on the part of SH and
12 cannot bind SH from bidding on this procurement and future procurements.

13 SH was not required to disclose a termination which never occurred. SH's bid complied
14 with the IFB and was found to be a responsive bidder. Summary judgment should be granted on
15 this issue and Basil's appeal should be denied on this issue.

16 **C. GSA PROPERLY ADDRESSED ALL ISSUES BASIL RAISED IN ITS**
17 **PROTEST**

18 SH and GSA did not "misread" the Protest. Basil's now states in its Opposition that the
19 DPHSS rating should have been disclosed in this procurement because of the requirement to
20 disclose citations related to government contract performance. GSA's response that SH had
21 voluntarily withdrawn from the contract prior to the rating sufficiently addressed this issue. *See*
22 *id.* at 6. Basil was given a response on this issue, and the fact that it disagrees with GSA does not
23 mean a response was not given. The Appeal should be denied on this issue.

24 **D. GSA DID NOT CREATE AN UNFAIR PROCUREMENT**
25 **ENVIRONMENT**

26 Basil has not provided any legal authority to support why conduct unrelated to this
27 procurement should be considered in this Appeal and why this issue, which is raised for the first
28 time on Appeal, should be considered at all. Consideration of outside conduct in this appeal would

1 unduly prejudice SH, which was properly awarded this contract in this procurement. Further,
2 Basil has not shown why it has standing to pursue such claims. *See In re A.B. Won Pat Int'l*
3 *Airport Auth.*, 2019 Guam 6 ¶ 42 n. 10 (citing *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137
4 S. Ct. 1645 at 1650 (2017) (“[A party] must demonstrate standing for each claim he seeks to press
5 and for each form of relief sought.”) (citations omitted) (alteration in original)). As such, summary
6 judgment in favor of SH should be granted on this issue and the appeal denied on this issue.

7 **E. BASIL HAS ABANDONED THE ISSUE OF THE TWO-DAY NOTICE**
8 **REQUIREMENT OF 5 GCA § 5425(G)**

9 5 GCA § 5425(g) does not apply to this Protest because this is a post-award protest. *See*
10 *MSJ* at 7-8. Basil did not address this issue in its Opposition and has therefore abandoned and
11 conceded this issue. Accordingly, the Appeal should be denied on this issue.

12 **II. CONCLUSION**

13 For the foregoing reasons, summary judgment should be granted in favor of SH on all
14 issues and the Appeal dismissed.

15 Respectfully submitted this 14th day of February, 2020.

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21 VANESSA L. WILLIAMS, ESQ.