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 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS

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IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEAL

IN THE APPEAL OF	)	Docket No. OPA-PA-19-011
	)	OPA-PA-20-003
BASIL FOOD INDUSTRIAL	)	
SERVICE CORPORATION,	)	
	)	PURCHASING AGENCY'S
Appellant.	)	BRIEF ON JURISDICTION
	)	
	)	

I. INTRODUCTION.

This memorandum addresses whether the Public Auditor (OPA) has jurisdiction to hear and resolve procurement ethical complaints. On February 27, 2020, Appellant Basil Food filed a Notice of Procurement Appeal, OPA-PA-20-003. The appeal alleged that SH Enterprises gave an illegal favor when it donated office space in the Hakubotan Building to the Governor of Guam for her use as the Guam War Claims Processing Center. Basil contends that the donation constitutes an illegal

favor from a contractor to the government in violation of 5 GCA § 5630(d) and 2 GARR §11107(4)<sup>1</sup> which states:

**5 GCA § 5630(d) Favors to the Territory. \*\*\*\*** It shall be a breach of ethical standards for any person who is or may become a contractor, a subcontractor under a contract to the prime contractor or higher tier contractor, or any person associated therewith, to offer, give or agree to give any employee or agent of the Territory or for any employee or agent of the Territory to solicit or accept from any such person or entity or agent thereof, a favor or gratuity on behalf of the Territory whether or not such favor or gratuity may be considered a reimbursable expense of the Territory, during the pendency of any matter related to procurement, including contract performance warranty periods. (Omission in original).

To the extent that GSA's pending Motion for Summary Judgment raises and discusses the issue of the OPA's jurisdiction, the arguments and authorities therein are incorporated in full by this reference.

**II. THE PROCUREMENT POLICY OFFICE HAS EXCLUSIVE JURISDICTION OVER ETHICAL COMPLAINTS CONCERNING NON-GOVERNMENT EMPLOYEES.**

In its Notice of Appeal filed on February 27, 2020, Basil requests relief against SH Enterprises and argues that SH should be debarred or suspended for the donation.<sup>2</sup> The starting point for analysis of whether the Public Auditor has jurisdiction to hear procurement ethical complaints must begin with the statute itself. That statute, as cited by Basil<sup>3</sup> with respect to ethical violations committed by non-

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<sup>1</sup> This section is cited on the *Affidavit re No Gratuities or Kickbacks* form as 2 GARR §11107(e), but the Compiler of Laws has codified it as §11107(4). Whichever citation is used, it is the same section.

<sup>2</sup> Basil Food Notice of Appeal at pp. 11-12 (Feb. 27, 2020).

<sup>3</sup> *Id.*

employees such as SH Enterprises, is 5 GCA § 5651 which says that non-government employees who violate the ethical prohibitions of § 5630 are subject to debarment or suspension to be imposed by *the Procurement Policy Office*:

**5 GCA § 5651. Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards. \*\*\*\***

(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...

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(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.

(Emphasis added). *See also*, 5 GCA § 5481(b) (authorizing the Superior Court of Guam to hear appeals arising from debarments or suspensions decided by the Procurement Policy Office under its § 5651 authority).

The Compiler of Laws' *Comment* to Section 5651 further confirms that the Procurement Policy Office acts as the Ethics Commission relative to complaints involving non-government employees:

The modifications are that (a) *the Policy Office acts as the Ethics Commission with respect to non-employees*, in order to avoid the creation of yet another commission and (b) that procedures are to be under the Administrative Adjudication Law rather than some undefined" and variable "due process" requirement. Change by Committee on GGO. (Emphasis added).

The Procurement Policy Office is an office within the larger Office of the Governor that has the authority to promulgate procurement regulations and policies. *See*, 5 GCA §§ 5101-5102. After years of inactivity, the Procurement Policy Office was re-activated on April 2, 2019, by Governor Lourdes Leon Guerrero through the issuance of Executive Order 2019-10. EO 2019-10 places the Department of Administration (DOA) in charge of the local procurement and policy, and the Bureau of Statistics and Plans is charged with overseeing federal grant and awards.

GSA is itself a division within DOA, however, it does not act as the Procurement Policy Office and does not promulgate regulations or make procurement policies. According to Public Law 34-132:2 (codified as 5 GCA § 5110), the function of GSA and the Chief Procurement Officer (CPO) is to be “uniquely responsible for the supervision and procurement of supplies and services” for the Government of Guam.

**III. THE CIVIL SERVICE COMMISSION HAS EXCLUSIVE JURISDICTION OVER ETHICAL COMPLAINTS CONCERNING GOVERNMENT OF GUAM EMPLOYEES.**

Although Basil does not expressly allege in its Notice of Appeal over the Hakubotan Building that GSA or any government of Guam employee committed an ethical violation, by identifying and insisting that GSA as the purported purchasing agency involved in the Hakubotan Building donation,<sup>4</sup> a full analysis of the jurisdiction of the Public Auditor to handle procurement ethics complaints

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<sup>4</sup> Basil Notice of Appeal at p. 2 (Feb. 27, 2020).

necessitates that the proper forum for addressing complaints against both government and non-government employees be addressed.

In a statute similar to Section 5651 (non-government employees), the Procurement Law provides for remedies against employees to be imposed by the Civil Service Commission instead of the Procurement Policy Office:

**5 GCA § 5650. Civil and Administrative Remedies Against Employees Who Breach Ethical Standards. \*\*\*\***

(b) Supplemental Remedies. In addition to existing remedies for breach of the ethical standards of this Chapter or regulations promulgated hereunder, *the Civil Service Commission may, in connection with employees of the government of Guam*, direct the appointing authority to issue any one or more of the following:

- (1) oral or written warnings or reprimands;
- (2) suspension with or without pay for specified periods of time; and
- (3) termination of employment;

but *the Civil Service Commission members who made such recommendation* shall not sit upon any appeal from the resulting adverse action and the Governor shall appoint members pro tempore, without the consent of the Legislature, to hear such appeals. (Emphasis added).

The Civil Service Commission is in charge of ethical complaints against employees arising in the context of a procurement because the complaint constitutes grounds for an employee adverse action. *See e.g.*, DEPARTMENT OF ADMINISTRATION PERSONNEL RULES 3.000(d) which prohibits the solicitation of gifts : “An employee shall not, except as permitted by statute or regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or

persons whose interests may be substantially affected by the performance or non-performance of the employee's duties, or that of the employee's department.”

This DOA Personnel Rule 3.000(d) is the counterpart of 5 GCA § 5630(d) which covers non-employees. Just as the Public Auditor does not hear ethical complaints against non-employees, he similarly does not hear adverse actions arising from ethical complaints against employees.

#### IV. THE PROCUREMENT LAW DOES NOT APPLY TO THE HAKUBOTAN BUILDING.

As a “creature of statute,”<sup>5</sup> the Public Auditor’s jurisdiction is limited by the procurement law to making determinations on “whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.” 5 GCA § 5425(e); 2 GARR § 12112. The Public Auditor is also authorized to hear breach of contract controversies. 5 GCA § 5427(e), § 5706; 2 GARR § 12113.

Public Auditor is without jurisdiction, however, to handle controversies that arise *outside* of the procurement law. With respect to the Hakubotan Building, the law authorizes the Governor to acquire and lease office space such as that used for the War Claims Processing Center provided that the term of the lease is for less than fifty years. 5 GCA § 22704(a). Additionally, if the lease payment is more than \$10,000 or if the term of the lease exceeds five years, then a sealed bid procurement is required before the lease can be entered into:

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<sup>5</sup> *Data Mgmt. Res, LLC v. Office of Pub. Accountability*, 2013 Guam 27, ¶ 32.

5 GCA § 22704. Acquisition of Office Space & Other Facilities. \*\*\*\*\*

(c) All lease or lease-purchase agreements that are proposed to be entered into pursuant to (a) hereof, *where the total sum of money to be paid to the same lessor shall exceed \$10,000 or the total number of years involved shall exceed five years, may be entered into only after advertising for sealed bids* in a newspaper of general circulation within Guam, 14 days prior to the formal bid opening, and then only to the lowest responsible bidder. (Emphasis added).

By its plain language, the sealed bid procurement requirement of Section 22704(c) only applies to leases “where the total sum of money paid to the lessor” is more than \$10,000 or the leasehold term is over five years. Because the space in the Hakubotan Building was donated to the Governor for free and the term was for a mere two weeks, a sealed bid procurement was not required to be done.

The procurement law, including the procurement law’s ethical provisions at 5 GCA §§ 5650-5651, does not, and cannot, apply where there is no procurement. If there is no procurement, then there can be no procurement protest over which the Public Auditor can take jurisdiction. There is also no ethical procurement violation that can be heard by either the Civil Service Commission or the Procurement Policy Office.

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V. CONCLUSION

Nothing in the procurement law (including its within ethical prohibitions against favors and gratuities) grants concurrent jurisdiction to both the Public Auditor and the Procurement Policy Office/Civil Service Commission. With all due respect, the Public Auditor is not authorized to act as an ethics commission, and his jurisdiction is statutorily limited to hearing breach of contract disputes and protest appeals over the method of source selection, solicitation or award of a contract.

Additionally, there is no jurisdiction because the Public Auditor's review is limited to matters arising under the procurement law, and that law does not apply to the donation of the Hakubotan Building. Under 5 GCA § 22704(a), the Governor is legally authorized to obtain office space without going through procurement as long as the cost paid for the space is less than \$10,000 or for term of less than five years. The office space in the Hakubotan Building met both of these criteria, and therefore its acquisition and use fall *outside* the procurement law and outside of the Public Auditor's jurisdiction.

Respectfully submitted on this 7th day of August, 2020.

OFFICE OF THE ATTORNEY GENERAL  
Leevin Taitano Camacho, Attorney General

By:



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