

1 VANESSA L. WILLIAMS, ESQ.
LAW OFFICE OF VANESSA L. WILLIAMS, P.C.
2 414 WEST SOLEDAD AVENUE
GCIC BLDG., SUITE 500
3 HAGÄTÑA, GUAM 96910
TELEPHONE: 477-1389
4 EMAIL: VLW@VLWILLIAMSLAW.COM

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

6 **BEFORE THE PUBLIC AUDITOR**
7 **PROCUREMENT APPEALS**

8 IN THE APPEAL OF:

9 BASIL FOOD INDUSTRIAL SERVICES
10 CORPORATION,

11 Appellant.

DOCKET NO. OPA-PA-19-011
OPA-PA-20-003

**INTERESTED PARTY SH
ENTERPRISES, INC.'S
REPLY BRIEF RE: JURISDICTION**

12 **INTRODUCTION**

13 Interested Party SH Enterprises ("SH") submits this Reply Brief in response to
14 Appellant Basil Food Industrial Services Corporation's Brief on the Issue of Jurisdiction.

15 **REPLY**

16 The Public Auditor has the power to review and determine *do novo* any matter properly
17 submitted to it. 5 G.C.A. § 5703. There are three different categories of controversies in Guam
18 Procurement Law that may be resolved by the Chief Procurement Officer and result in an agency
19 decision. They can found in Article 9, Subarticle A of the Guam Procurement Law. *See* 5 G.C.A.
20 §§ 5425, 5426 & 5427. These sections respectively give the Chief Procurement Officer or head
21 of the purchase agency the authority to resolve protested solicitations and awards, the authority
22 to debar or suspend, or the authorize to resolve contract and breach of contract controversies. *See*
23 *Id.* They are distinctly different, but Basil Food Industrial Services Corporation ("Basil") invites
24 the Public Auditor to set a precedent that would render these individual sections moot and
25 convolute the administrative review process.
26
27
28

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: Aug. 7, 2020

TIME: 3:57 AM PM BY: CMW

FILE NO OPA-PA: 19-011/20-023

1 It is undisputed that the Public Auditor has jurisdiction to review a purchasing agency's
2 decision denying a protest concerning the method of source selection, solicitation, or award of a
3 contract. 5 G.C.A. § 5425(e). However, Basil has made abundantly clear on the record that it is
4 challenging SH's actions and not "the method of source selection, solicitation or award of a
5 contract" as provided for in 5 G.C.A. § 5425. Basil contends that they believe SH's act of
6 donating commercial space for use by the Governor's office was either a violation of the Terms
7 and Conditions of an existing contract and/or the failure to abide by the ethical standards provided
8 in 5 G.C.A. § 5630(d) and 2 GAR Div. 4, §11107(4). *See* Appellant Basil Food Industrial Service
9 Corporation's List of Issues ¶ 3 (Jul. 31, 2020).

10 The alleged violation of Terms and Conditions of an existing contract are not in
11 connection "the method of source selection, solicitation or award of a contract" as provided for
12 in 5 G.C.A. § 5425. Title 5 G.C.A. § 5102 provides that the Chief Procurement Officer shall
13 exercise authority over the award or administration of a contract "in accordance with provisions
14 of this Chapter." 5 G.C.A. § 5102. The provisions of that Chapter, Guam Procurement Law,
15 provide for the resolution of contract controversies through 5 G.C.A. § 5427, not 5 G.C.A. § 5425.
16 This is a controversy based upon breach of that contract or other cause for contract modification
17 or rescission. *See* 5 G.C.A. § 5427(a)("This Section applies to controversies between the Territory
18 and a contractor and which arise under, or by virtue of, a contract between them. This includes
19 without limitation controversies based upon breach of contract, mistake, misrepresentation, or
20 other cause for contract modification or rescission."). Guam's Procurement Regulations
21 emphasizes for purposes of 5 G.C.A. § 5247, "The word controversy is meant to be broad and all-
22 encompassing. It includes the full spectrum of disagreements from pricing of routine contract
23 changes to claims of breach of contract." 2 GAR, Div. 4, Chap. 9, § 9103(b). Section 5427, not
24 5425, governs the resolution of such a controversy. Basil did not avail of the Chief Procurement
25 Officer's authority to resolve a contract or breach of contract controversy under 5 G.C.A. § 5427.
26 Instead, Basil chose to file a protest pursuant to 5 G.C.A. § 5425. Therefore, this matter is not
27 properly before the Public Auditor.

1 The alleged failure to abide by ethical standards is also not related to “the method of source
2 selection, solicitation or award of a contract” as provided for in 5 G.C.A. § 5425. Although Basil
3 correctly acknowledges any member of the public may petition the CPO to take action against
4 SH as a government contractor for an alleged cause for debarment or suspension under § 5426(f),
5 that is not what Basil did either. If it had, it would have triggered the administrative review process
6 under Subsection (a) of that Section. *See* 5 G.C.A. § 5426(f)(“Any member of the public may
7 petition the Chief Procurement Officer to take action...pursuant to Subsection (a) of this
8 Section.”)(emphasis added). Subsection (a) provides the process for petitioning the CPO to take
9 action against SH for the allegation violation as follows:

10 After reasonable notice to the person involved and reasonable
11 opportunity for that person to be heard, the Chief Procurement
12 Officer, the Director of Public Works or the head of a purchasing
13 agency, after consultation with the using agency and the Attorney
14 General, shall have authority to debar a person for cause from
15 consideration for award of contracts. The debarment shall not be for
16 a period of more than two (2) years. The same officer, after
17 consultation with the using agency and the Attorney General, shall
18 have authority to suspend a person from consideration for award of
19 contracts if there is probable cause for debarment. The suspension
20 shall not be for a period exceeding three (3) months. The authority
21 to debar or suspend shall be exercised in accordance with
22 regulations promulgated by the Policy Office.

23 5 G.C.A. § 5426(a).

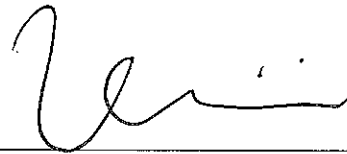
24 Neither the process under §§ 5427 nor 5426(f) are initiated through a § 5425 protest, which
25 is the matter which is currently before the OPA. As such, the OPA does not have the jurisdiction
26 to hear this issue through this § 5425 protest appeal as Basil did not have the right to raise this
27 issue in its appeal in the first place.
28

CONCLUSION

For the foregoing reasons, the Public Auditor lacks jurisdiction to consider Basil’s Appeal
NO. OPA-PA-20-003 and it should be dismissed.

1 Respectfully submitted this 7th day of August, 2020.
2
3

4 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
5 *Attorney for Appellant*

6 
7

8 _____
9 VANESSA L. WILLIAMS, ESQ.
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28