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Attorney for Appellant
BASIL FOOD INDUSTRIAL SERVICES CORPORATION

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Appeal No. OPA-PA-19-011
Appeal No. OPA-PA-20-003
CONSOLIDATED

**APPELLANT BASIL FOOD
INDUSTRIAL SERVICES
CORPORATION'S HEARING BRIEF**

COMES NOW Basil Food Industrial Services Corporation (hereinafter "Basil") with its Hearing Brief in its appeal of procurement controversies against the General Services Agency (hereinafter "GSA").

I. INTRODUCTION AND FACTUAL BACKGROUND

Basil has filed two separate protests to GSA 056-19 Nutrition Services For the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Meals Components (hereinafter "the Contract"). GSA denied these protests, which led Basil to file two separate appeals with the Office of Public Accountability (hereinafter "OPA"). There premise of Basil's appeals are that SH Enterprises

should not have been considered a responsible or responsive bidder for GSA-056-19 when it failed to apprise GSA of its government contract that was terminated in 2019, and that it violated the procurement rules and regulations when it donated the Hakubotan building as a favor to the government after it was awarded GSA-056-19.

The relevant facts for both protests are as follows:

On September 25, 2019, GSA issued an Invitation for Bid (“IFB”) No. GSA-056-19. The IFB was to provide an estimated seven hundred (700) to eight hundred (800) meals to the manamko at designated sites, including twelve (12) Senior Citizen Centers and three (3) Adult Day Care Centers (congregate component). The contract also included the provision of approximately one thousand (1,000) to one thousand two hundred (1,200) meals to those manamko who live at home (home delivered meals component). The contract was set to last three (3) years with the option to renew for two (2) additional fiscal years, one fiscal year at a time, subject to the availability of funds. The IFB included several requirements mandating bidders to submit specific documents or to make certain disclosures, one of which was whether a bidder had a government contract terminated for cause in the last three years. **Procurement Appeal Record, Tab 5.**

On October 8, 2019, SH Enterprises submitted its bid for the IFB. **Exhibit 7.** It indicated in the Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion that it has not, within a three year period preceding their application/proposal, had one or more public transactions terminated for cause or default. **Exhibit 8.** One month later, on November 8, 2019, GSA awarded the contract for congregate meals (**Exhibits 8-9**) and home delivered meals (**Exhibit 11**) to SH Enterprises. The provision of meals would commence on December 1, 2019. **Exhibits 9 and 11.**

Basil immediately filed a protest of the award to SH Enterprises on November 22, 2019 (**GSA Exhibit J**) on several basis, one of which was that SH Enterprises had failed to disclose that it had an emergency procurement contract for the Elderly Nutrition Program in April 2019 that was terminated.

GSA denied the protest via its Written Determination on November 30, 2019 (**GSA Exhibit K**). Thereafter, Basil filed its Notice of Procurement Appeal on December 16, 2019 and the appeal was given Docket No. OPA-PA-19-011.

While this appeal was pending, the Pacific Daily News reported on January 24, 2020 that the new War Claims Processing Center was now open to the public and was located in the former Hakubotan building in Tamuning. **Exhibit 15**. That same day, one of the topics discussed during the Patty Arroyo Show on Newstalk K57 was the new site for the War Claims Processing Center. While on-air, a listener called in and questioned Ms. Arroyo on whether the government had gone through the procurement process to secure the former Hakubotan building as the new location for the processing center. Ms. Arroyo's response was that the owner of the building donated the space, fixtures, and the utilities.

The undersigned immediately served a Freedom of Information Act (FOIA) request on the Governor's office on January 24, 2020 to obtain documentation confirming whether the building was, in fact, donated per the statements made during the radio show. **Exhibit 16**.

On January 29, 2020, SH Enterprises submitted its bid for IFB No. GSA-001-20 for Food Services For DOC Inmates and Detainees. **Exhibit 17**. This contract was for a term of three (3) years with the option to renew for two (2) additional fiscal years. GSA awarded this new contract to SH Enterprises on February 25, 2020. See Exhibit C to Basil's Opposition to GSA's Motion for Summary Judgment dated June 10, 2020.

Then, on January 30, 2020, in response to the FOIA request, the undersigned received a copy of a one-page document dated January 22, 2020 from S.H. Enterprises, Inc. to Governor Leon Guerrero indicating that it was donating “the temporary utilization of approximately +/- 5,000 square feet of commercial space located on the first floor, utilities, and access to the building’s parking lot for the Guam War Claims Center.” **Exhibit 14.**

Thereafter, Basil’s filed a second timely protest to GSA-056-19 on February 7, 2020. The next day, on February 8, 2020, GSA authored a denial¹ of the protest based on 5 GSA § 5630 (a) and (b), but it completely ignored and failed to address 2 GAR § 11107(4) Favors to the Government of Guam, which is the basis for Basil’s protest. See Agency Report for OPA-PA-20-003 Consolidated into OPA-19-11 dated May 19, 2020.

Basil filed a timely Notice of Procurement Appeal on February 27, 2020 and it was given Docket No. OPA-PA-20-003.

Thereafter, on March 12, 2020, both Basil Food Industrial Services Corporation, OPA-PA-19-011 (Office of Public Accountability) and Basil Food Industrial Services Corporation, OPA-PA-20-003 (Office of Public Accountability) were consolidated because both appeals concern the identical parties and similar issues.

II. SCOPE OF OPA’S REVIEW

This case presents four main issues: first, whether SH Enterprises’ non-compliance with Section 12.9 of an April 2019 emergency procurement contract for the Elderly Nutrition Program effectively terminated that contract; second, whether SH Enterprises was a responsive bidder when it willfully withheld information regarding its non-compliance with the April 2019 Elderly Nutrition Program’s bid specifications; third, whether GSA-056-19 was correctly awarded to SH

¹ GSA’s denial of the protest is dated February 8, 2020 but was not served on the undersigned until February 12, 2020.

Enterprises pursuant to 5 GCA § 5211(g); and fourth, whether SH Enterprises' donation of the Hakubotan building is deemed a favor to the Territory of Guam, which violates the Guam Procurement Act and the Guam Procurement Regulations and the terms and conditions of GSA-056-19. On these issues, the OPA may evaluate GSA's actions and decision on a de novo basis.

III. FIRST PROCUREMENT APPEAL OF GSA-056-19 (OPA-PA-19-001)

A. ADDITIONAL RELEVANT FACTS

GSA and DPHSS issued an emergency procurement solicitation for the Elderly Nutrition Program, Home-Delivered Meals for the period of April 1, 2019 to April 30, 2019. SH Enterprises and Basil submitted bids and SH Enterprises was awarded the contract, as evidenced by a Purchase Order dated March 28, 2019. **Exhibit 1.** This Purchase Order is for the total amount of \$246,030.00.

Section 12.8 of the Program Specifications for the emergency procurement for the Elderly Nutrition Program ("ENP"), Home-Delivered Meals provides the following:

Termination for Non-Compliance with Regulatory Requirements.

In the event the Vendor who is awarded this emergency procurement for the provision of ENP Nutrition Services is issued a "C" rating from the Division of Environmental Health, DPH&SS or is issued a "Stop Order" by the Guam Fire Department, the awarded Vendor *shall be terminated as the Vendor of the ENP Nutrition Services* [emphasis added].

Exhibit 2.

On April 3, 2019, which was only a few days after SH Enterprises was awarded the emergency procurement contract, DPHSS conducted an inspection of SH Enterprise's operation and issued a Food Establishment Inspection Report wherein SH Enterprises received a grade of 38 and was given a "C" rating, which triggered an automatic termination for cause under the Program Specifications. **Exhibit 3.**

On April 5, 2019, Basil wrote to GSA and reminded it of Section 12.8's strict language regarding the termination of a Vendor upon receipt of a "C" rating from DPHSS. **Exhibit 5.** That same day, GSA submitted to Basil a Purchase Order for the Emergency Procurement of Elderly Nutrition Program, Home-Delivered Meals for the period of April 8, 2019 through April 30, 2019. **Exhibit 4.**

Several months later, upon receiving notice from GSA that it had awarded GSA-056-19 to SH Enterprises, Basil issued a FOIA request to GSA on November 12, 2019 requesting a copy of all documents related to the termination or cancellation of the Emergency Procurement contract for the Elderly Nutrition Program (**Exhibit 10**), and no relevant documents were provided.

As mentioned above, Basil immediately filed a protest of the award to SH Enterprises on November 22, 2019 (**GSA Exhibit J**) based on several violations, one of which was the fact that SH Enterprises was neither a responsive nor responsible bidder. GSA denied the protest and advised that SH Enterprises was not terminated, but had withdrawn from the emergency procurement contract.

B. SH ENTERPRISES' "C" RATING FROM DPHSS EFFECTIVELY TERMINATED ITS APRIL 2019 EMERGENCY PROCUREMENT CONTRACT

Section 12.8 of the April 2019 ENP emergency procurement contract specifically states that upon receipt of a "C" rating from DPHSS, "the awarded Vendor shall be [emphasis added] terminated as the Vendor of the ENP Nutrition Services."

In attempting to assess the meaning of this section, it is important to ascertain the definition of the terms and phrases utilized, such as the phrase "shall be terminated." Guam Procurement Law defines "may" as being permissive and "shall" as being imperative. 5 GCA § 5030(m) and (t). Guam Procurement Regulations utilize the same definitions. 2 GAR § 1106(13) and (20). Along these same lines, the word "may" connotes a discretionary or permissive act and the word

“shall” connotes a mandatory act. Woolls v. Superior Court, 127 Cal.App.4th 197, 208 (2005). Therefore, using these definitions, it can be reasonably argued that upon DPHSS’ issuance of the “C” rating to SH Enterprises, the ENP emergency procurement contract was effectively terminated even without the mere formality of a written letter from GSA documenting the termination.

The Supreme Court’s decision in Basil Food Indus. Servs. Corp. v. Guam is instructive in this case as it dealt with a similar issue. Specifically, in that case, Basil entered into two contracts with GSA to provide meals to Guam’s manamko. Section 12.9 of that contract stated that in the event the Bidder who is awarded the ENP Nutrition Services contract is issued a “C” rating from DPHSS, “the awarded Vendor may be [emphasis added] terminated as the Vendor of the ENP Nutrition Services.” Basil, 2019 Guam 29 ¶ 3.

Basil was awarded the contract and in the course of providing its services, it received “C” and “D” ratings. In most instances, it was allowed to cure the deficiencies, but in a turn of events, Basil received another D rating in July 2015 for failing to have a HACCP Plan and GSA terminated the contract pursuant to section 12.9. Basil protested and appealed its termination, but was denied.

In deciding this matter, the Supreme Court stated, “[w]e look at the contracts to determine the terms that govern. If the language is clear and explicit and does not involve an absurdity, the plain language controls. 18 GCA § 87105 (2005).” Id. at 15. The Court also stated, “[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible....” 18 GCA § 87105 (2005). Id. at 15.

The Court held that section 12.9 is clear and unambiguous that GSA may terminate the contract if Basil received a “C” rating from DPHSS. Despite Basil’s contentions, the Court stated that section 12.9 was not conditioned upon any of the other sections of the contract or on the Procurement regulations which Basil argued were incorporated into the contract. Id. at ¶ 20. The

court further held that “[t]he provision allows for immediate termination at any point Basil receives a “C” rating, at the discretion of GSA.”

For comparison purposes, the language of section 12.9 in GSA-056-19 is more rigid and instead of provides that the Vendor “shall be terminated” upon receipt of a “C” rating. This is in stark contrast to the issue decided by the Supreme Court, but the analysis is applicable to the case at hand as we are simply dealing with an opposite contract term. Accordingly, if the Supreme Court held that GSA had the discretion to terminate the contract based on the permissive language of section 12.9 that the Vendor “may be terminated,” then it follows that use of the phrase “shall be terminated” in GSA-056-19 denotes an imperative or mandatory action which would equate to SH Enterprises’ automatic and effective termination upon receipt of the “C” rating. **Exhibit 2.** Further, unlike the case decided by the Supreme Court, there are no other contract terms in the emergency procurement contract indicating that SH Enterprises had the right to cure and so the most logical argument is that once it received the “C” rating, the emergency procurement contract was terminated.

As mentioned above, GSA argued that SH Enterprises was not terminated, but merely withdrew from the award. **Exhibit 13.** However, in the event that the OPA relies on this argument, it is questionable whether the withdrawal is valid because under Guam law, any permitted withdrawal of a bid after an award or cancellation of a contract must be supported by a written determination made by the Chief Procurement Officer or the head of the purchasing agency. 5 GCA § 5211(f). Here, there is no written determination by the Chief Procurement Officer in this regard. Therefore, in considering this issue, no weight should be placed on SH Enterprises’ withdrawal.

C. SH ENTERPRISES WAS NOT A RESPONSIVE BIDDER WHEN IT VIOLATED THE REQUIREMENTS OF SECTIONS 2.4 AND 2.5 OF GSA-056-19

Sections 2.4 and 2.5(f) of the Bid Specifications for GSA-056-19 require each bidder that was awarded a government contract in the last three (3) years to list citations in the areas of procurement, material weaknesses, and its organization's non-compliance with contract provisions. Additionally, each bidder was required to make a certification as to whether its organization had had a government contract terminated for cause in the preceding three (3) years.

As discussed above, per section 12.9 of the emergency procurement contract, SH Enterprises' "C" rating from DPHSS effectively terminated the contract. However, to avoid a written termination, SH Enterprises strategically withdrew from the contract. This mere formality should not undo SH's Enterprises failure to abide by the terms of the contract.

Interestingly, in its response to Basil's protest, GSA redirected its focus onto Basil's alleged deficiencies in its reporting, and then stated, "the government has determined to waive this requirement as a minor informality." **Exhibit 13.** However, GSA should not have very easily swept under the rug SH Enterprises' failure to carry out the requirements of the April 2019 emergency procurement contract.

Guam Procurement Law defines a responsive bidder as a person who has submitted a bid which conforms in all material respects to the Invitation for Bid. 5 GCA § 5201(g). Further, a responsible bidder is one who has the capability in all respects to carry out the contract's requirements to the fullest extent while preserving its own integrity and reliability. 5 GCA § 5201(f). In this case, SH Enterprises is neither a responsible nor responsive bidder as its bid failed to include any mention of its terminated contract such that it is not a responsive bidder. Further, it is not a responsible bidder as it could not even fulfill the terms of the emergency procurement contract for one full week.

The General Terms and Conditions of GSA-056-19 provides further guidance on the requirements of a responsible and responsive bidder. It states that the “[a]ward shall be made to the lowest responsible and responsive bidder, whose bid is determined to be the most advantageous to the Government, taking into consideration the evaluation factors set for in this solicitation. Section 16 of the General Terms and Conditions adds that some of the factors taken into consideration of the lowest responsible bidder include: a) the price of items offered; b) the ability, capacity and skill of the Bidder to perform; c) whether the Bidder can perform promptly or within a specified time; d) the quality of performance of the Bidder with regards to awards previously made to him; e) the previous and existing compliance by the Bidder with laws and regulations relative to procurement; f) the sufficiency of the financial resources and ability of the bidder to perform; g) the ability of the Bidder to provide future maintenance and services for the subject of the award; and h) compliance with all of the conditions to the Solicitation.

In considering whether SH Enterprises was a responsible bidder when it submitted its bid for GSA-056-19, it is clear based on DPHSS inspection report that SH Enterprises could not even meet the minimum required food and safety guidelines as a food services contractor a few months earlier. This is significant in that DPHSS imposes these guidelines to not only to ensure the cleanliness of the facility and the proper preparation of food, but also to safeguard and protect the health and safety of our local manamko who are the recipients of these meals. The fact that it could not pass this inspection is troubling.

Furthermore, analysis should also be made to SH Enterprises’ allegation that it did not have enough drivers to deliver the meals. This is quite surprising as SH Enterprises was on full notice that this contract was for a minimum of one thousand (1,000) meals per day and the fact that SH

Enterprises could not even employ the necessary drivers² within the first few days of its contract, when it had, in fact, provided those very assurances when it submitted its bid, drastically calls into question its truthfulness and integrity as well as its ability carry out the requirements for GSA-056-19. All of the facts are relevant and should have been considered by GSA when deciding if SH Enterprises was a responsible bidder. Since SH Enterprises willingly failed to provide the information related to its terminated emergency procurement contract, it should not be considered a responsible or a responsive bidder.

D. GSA-056-19 WAS INCORRECTLY AWARDED TO SH ENTERPRISES PURSUANT TO 5 GCA § 5211(G)

A bidder whose bid does not meet the requirements demanded in the IFB may not be awarded a procurement contract. Here, SH Enterprises failed to meet the requirements of GSA-056-19 and, as such, should not have been awarded the contract. Moreover, SH should be disqualified as a nonresponsive bidder.

IV. SECOND PROCUREMENT APPEAL OF GSA-056-19 (OPA-PA-20-003)

A. SH ENTERPRISES' DONATION OF THE HAKUBOTAN BUILDING IS DEEMED A FAVOR TO THE TERRITORY OF GUAM, WHICH VIOLATES THE GUAM PROCUREMENT ACT AND THE GUAM PROCUREMENT REGULATIONS, INCLUDING 2 GAR §§ 11107 AND 11206 AND 5 GCA § 5630, AND THE TERMS AND CONDITIONS OF GSA-056-19

The Contract specifies that it is governed by the Guam Procurement Act (5 GCA Ch. 5) and the Guam Procurement Regulations. Exhibit 7, General Terms and Conditions, No. 1. The purpose of the Procurement Regulations is to provide standard policies and procedures governing

² It should be noted that section 4.13 of the Emergency Procurement contract specifically states that the Vendor shall ensure all means are complete with meal order, properly packaged, labeled and read for delivery to homebound authorized clients prior to leaving the central kitchen. The Vendor shall ensure meals be delivered no earlier than 10:00am and no later than 12:30 pm....”

the procurement, management, control and disposal of supplies, services, and construction for the territory in conformity with Guam Procurement Law. 2 GAR § 1101. Here, SH Enterprises knowingly and willfully violated the Guam Procurement Act, the Guam Procurement Regulations and the terms and conditions of the IFB when it donated the Hakubotan building to the Government of Guam for use as the War Claims Processing Center.

1. SH ENTERPRISES VIOLATED THE PROHIBITION AGAINST FAVORS OR GRATUITIES TO THE GOVERNMENT OF GUAM

SH Enterprises' bid packet included a "Special Reminder to Prospective Bidders" form that contained a checklist of all the required documents that were essential for the bid opening. **Exhibit 7.** Included in the list was a No Kickbacks or Gratuities Affidavit which was signed by Hui Sook Min, the Vice President of SH Enterprises, Inc. **Exhibit 7.** In the affidavit, Mrs. Min acknowledged that to the best of her knowledge, neither she nor her officers, representatives, agents, subcontractors, or employees have violated or are violating the prohibition against gratuities and kickbacks set forth in 2 GAR § 11107(e). Mrs. Min also promised, on behalf of SH Enterprises, not to violate the prohibition against gratuities and kickbacks as set forth in 2 GAR § 11107(e). That section states,

(e) Contract Clause. The following clause shall be conspicuously set forth in every contract and solicitation therefor:

REPRESENTATION REGARDING GRATUITIES AND KICKBACKS

The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in §11206³ (Gratuities and Kickbacks) of the Guam Procurement Regulations.

³ The current version of the 2 GAR Chapter 11 Public Contracting does not contain § 11206. However, the November 1, 1984 edition of Chapter 11, which was included as Exhibit J in Basil's Notice of Appeal dated February 27, 2020, does contain section § 11-206. For comparison purposes, subsections 1, 2 and 3 of 2 GAR § 11-2016 are identical to subsections 1, 2 and 3 of the current 2 GAR § 11107. It is likely that when the updates and amendments were made to Chapter 11 Ethics in Public Contracting, the Compiler of Law failed to amend this section to ensure that any reference to § 11206 was changed to §11107.

2 GAR § 11107(e).

Since § 11206 (Gratuities and Kickbacks), which is referenced in 2 GAR § 11107(e), is identical to 2 GAR § 11107 (Gratuities and Kickbacks), the latter applies to the present case and was reviewed in its entirety to verify whether there were any violations.

The most relevant section in 2 GAR § 11107 is subsection 4⁴, Favors to the Government of Guam. That section states as follows:

(d) Favors to the Territory. For purposes of this Section, a favor is anything, including raffle tickets, of more than *de minimis* value and whether intended for the personal enjoyment of the receiver or for the department or organization in which they are employed or for any person, association, club or organization associated therewith or sponsored thereby. 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.

2 GAR § 11107 (4).

More specifically, § 11107(4) states that it is a breach of ethical standards for any government contractor to give or agree to give an agent of the government of Guam a favor or gratuity during the pendency of any matter related to procurement, including contract performance warranty periods.

This regulation, 2 GAR § 11107(4), is highly relevant and applicable in this case as SH Enterprises willfully breached the prohibition against providing favors to the government. SH

⁴ In the "Source" explanation immediately following the 1997 and 2002 updated editions to 2 GAR § 11107, it states that subsection 4, Favors to the Government of Guam, was added to comply with 5 GCA § 5630(d). Both 2 GAR § 11107(4) and 5 GCA § 5630(d) are identical and were in effect at the time of the issuance of the Invitation for Bid No. GSA-056-19.

Enterprises became a contractor of the Government of Guam on November 8, 2019 when it was awarded the GSA-056-19. At that very instance, it became bound to all the terms and conditions outlined in that contract, including 2 GAR § 11107 which prohibits gratuities, kickbacks, or favors. Thus, as soon as SH Enterprises donated the Hakubotan building to the Government of Guam in January 2019, which was less than three months after it was awarded the contract, it immediately violated the ethical prohibitions outlined not only in GSA-056-19, but also those proclaimed in Guam's procurement laws and regulations. This act was a complete deviation from S.H. Enterprises' promise to comply with the contract's specifications and requirements.

It should also be emphasized that SH Enterprises' donation of the Hakubotan building to the Government of Guam in January 2019, without more, is sufficient for a violation under 5 GCA § 5630 (d) and 2 GAR § 11107(4). Unlike 5 GCA § 5630(a) & (b) and 2 GAR § 11107(1) & (2) which require that there be evidence of a relationship between the gratuity and a decision, approval, disapproval recommendation, etc., 5 GCA § 5630(d) and 2 GAR § 11107(4) **do not**. See 2 GAR § 11107(b) which discusses the requirements for a relationship or connection between the gratuity and a decision, approval, disapproval recommendation, etc. There is absolutely **no** requirement indicated in 2 GAR § 11107 that there be a relationship between a favor to the Government and the decision, approval, disapproval recommendation, etc.

Surprisingly, GSA denied⁵ Basil's protest and indicated that the facts in this case did not warrant a breach. In its denial letter, GSA focused on 5 GCA § 5630d⁶, which is entitled "Gratuities

⁵ GSA's denial letter dated February 8, 2020 can be found in Exhibit K of Basil's Notice of Appeal dated February 27, 2020.

⁶ The counterpart to 5 GCA § 5630 is 2 GAR § 11107, which is also entitled "Gratuities and Kickbacks." Both sections are essentially identical with the exception of § 5630(d), which is entitled "Favors to the Territory," while § 11107(4) is entitled "Favors to the Government." Further, § 11107(4) uses the term "Government" instead of "Territory" in the body of that subsection.

and Kickbacks,” and referenced only the Gratuities (§ 5630(a)) and Kickbacks (§ 5630(b)) sections. This is in error as GSA should have analyzed and reviewed the entirety⁷ of 5 GCA § 5630, which not only encompasses the general rules related to gratuities and kickbacks, but which also includes favors as defined in § 5630(d).

2 GAR § 11107(e) clearly refers to the entirety of § 11206⁸ (Gratuities and Kickbacks) of the Guam Procurement Regulations, not just the specific subsections dealing with gratuities and kickbacks, namely 2 GAR § 11107(1) Gratuities and § 11107(2) Kickbacks⁹. Since the reference to § 11206 in 2 GAR § 11107(e) was stated generally, GSA should have reviewed the entirety of 2 GAR § 11107, which is entitled, “Gratuities and Kickbacks.” Similarly, this would also equate to an entire review of 2 GAR § 11107’s counterpart, namely, 5 GCA § 5630, which is also entitled “Gratuities and Kickbacks.” If the entirety of both of these provisions were correctly analyzed, GSA’s analysis of Basil’s protest would have also included a review of whether SH Enterprises actions were a violation of the prohibition of favors to the government. Specifically, 2 GAR §

⁷ In support of the argument that we must look to the entirety of 5 GCA § 5630 (and its counterpart 2 GAR § 11107), we should examine 2 GAR § 11107(e), which generally references the “prohibition against gratuities and kickbacks set forth in § 11206 (Gratuities and Kickbacks)” provision and compare it to 2 GAR § 11107(b)(1) which specifically references the Gratuities provision. 2 GAR § 11107(b)(1) states:

(b) Gratuities Prohibition.

(1) **Breach.** It is a breach of § 11206 (1) (Gratuities and Kickbacks, Gratuities) of these Regulations....

This section states that it only applies to § 11206(1), which in essence is § 11107(1), and it specifically mentions “gratuities” in the phrase “Gratuities and Kickbacks, Gratuities.” This is clear evidence of how the drafters narrowed the applicability of 2 GAR § 11107(b)(1).

On the other hand, the reference in 2 GAR § 11107(e) to “§11206 (Gratuities and Kickbacks)” is stated generally such that we must look at the entire section of § 11107 and not just § 11107(1) for Gratuities and § 11107(2) for Kickbacks.

⁸ 2 GAR § 11107 and § 11206, they are identical.

⁹ The counterparts for these sections are 5 GCA § 5630(a) and (b).

11107(3) and 5 GCA § 5630(c) discuss the Contract Clause¹⁰, and both § 11107(4) and § 5630(d) cover Favors to the Territory/Government of Guam.

In its denial, GSA argued that the donation by SH Enterprises does not meet the requirements for a gratuity, as specified in 5 GCA 5630(a). It stated,

“There was no decision or approval, disapproval recommendation, preparation of any part of the program requirement or a purchase request, including the content of this or any specification or program standard. Nor was there any advice, investigation, auditing or any other advisory capacity in this or any other procurement action. Nor was there any employment offered or given to state that it comes under the definition of Gratuity or Kickback. SH Enterprises donation was not related to this procurement at all.” See Exhibit K of Basil’s Notice of Appeal dated February 27, 2020.

This language is derived from both 5 GCA § 5630 (a) and 2 GAR § 11107(1). GSA then goes on to state that the requirements for kickback violations, as outlined in 5 GCA § 5630(b), are also not satisfied. However, it is important to note that Basil’s protest specifically refers to and discusses the ethical breach pursuant to 2 GAR § 11107(4) Favors to the Government of Guam and its counterpart 5 GCA § 5630 (d) Favors to the Territory. Further, as explained above, the options for breach are not limited to 2 GAR § 11107 (1) and (2) and 5 GCA § 5630 (a) and (b), but the entirety of 2 GAR § 11107 and 5 GCA § 5630.

Per 2 GAR § 11107(a)(1), a gratuity is defined as “a payment, loan, subscription, advance, deposit of money, services or anything of more than nominal value, present or promised, unless consideration of substantially equal or lesser value is received.” 2 GAR § 1106(41). Chapter 11 of 2 GAR also provides another definition of gratuity in 2 GAR § 11101(6) and states that it “means a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is

¹⁰ 5 GCA § 5630(c) states, “Contract Clause. The prohibition against gratuities, kickbacks and favors to the Territory prescribed in this Section shall be conspicuously set forth in every contract and solicitation therefor.”

received. In this Chapter, the gratuity may include any tangible and intangible benefit in the nature of gifts, favors, entertainment, discounts, passes, transportation, accommodation, hospitality or offers of employment.

Based on these definitions, the donation of the Hakubotan building to the government in January 2020 for use as the War Claims Processing Center is a service or a tangible benefit that is more than nominal value and which falls in line with a gift or a favor that is unquestionably prohibited by the Guam Procurement law and GSA-056-19. This donation was a violation of 2 GAR § 11107(4) and 5 GCA § 5630(d) as these sections quite clearly preclude SH Enterprises, who has been a government contractor since November 2019, from providing favors or gratuities to the government during the contract performance period. The value of the benefits received by the Government of Guam for the free use of the former Hakubotan building, which includes utilities and parking, likely equates to a monumental amount reaching several thousands of dollars and far exceeds the thresholds of what is considered a *de minimus* value.

Not surprisingly, nowhere in GSA's briefs or arguments to the court does it address SH Enterprises violation of 2 GAR § 11107(4) and 5 GCA § 5630(d). Instead, it intentionally avoids these applicable sections and focuses on the procurement of the Hakubotan building, which it claims it had no part in.

Lastly, in its denial, GSA references 5 GCA § 22408 for the proposition that the Governor is authorized to accept monetary or property donations. However, again, Basil's attention is not focused on the Governor's authority or actions. The core of Basil's protest is SH Enterprises' unequivocal failure to abide by the ethical standards provided in 5 GCA §5630(d) and 2 GAR § 11107(4). As a government contractor, SH Enterprises was well aware of its duty to abide by the Guam Procurement law and the terms and provisions of GDS-056-19. This is not only evidenced

by SH Enterprises signed Affidavit Regarding No Gratuities or Kickbacks dated October 9, 2019 (**Exhibit 7**), but also as its prior experience in the procurement process a government contractor.

Based on a review of the requirements for GSA-056-19 and the relevant Procurement laws and regulations, it is clear that GSA's denial of Basil's protest was in error as SH Enterprises had, in fact, violated not only an integral part of GSA-056-19, but also the ethical codes and standards required of a government contractor. This would, in turn, warrant a validation of Basil's protest.

2. SH ENTERPRISES WAS AWARE OF THE PROHIBITION AGAINST GRAUITIES AND KICKBACKS

In addition to SH Enterprises' prior experience in the procurement process, and the signed Affidavit Regarding No Gratuities or Kickbacks, GSA-056-19 is replete with information, requirements and prohibitions related to maintaining ethical standards and refraining from the provision of gratuities or kickbacks to either the government or government employees. The following was included in the terms of the contract:

No. 6 of the General Terms and Conditions.

6. COMPLIANCE WITH SPECIFICATIONS AND OTHER SOLICITATION REQUIREMENTS: Bidders shall comply with all specifications and other requirements of the Solicitation. **Exhibit 7.**

No. 31 of the General Terms and Conditions.

31. REPRESENTATION REGARDING ETHICS IN PUBLIC PROCUREMENT: The bidder or contractor represents that it has not knowingly influenced and promises that it will not knowingly influence a Government employee to breach any of the ethical standards and represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities and kickbacks set forth in Chapter 11 (Ethics in Public Contracting) of the Guam Procurement Act and Chapter 11 of the Guam Procurement Regulations. **Exhibit 7.**

Section 16.8 Debarment (Guam and Federal) of the General Specification on Item 16.0 Contract Clauses Required by 2 Code of Federal Regulations (CFR) Part 200.

A. Guam Debarment and Suspension. Contractor warrants that it will comply with the provisions of 5 GCA Chapter 5 Articles 9 and 11, subject to debarment or suspension. **Exhibit 7.**

Section 22. ADDITIONAL CONTRACT TERMS AND CONDITIONS

22.2 Prohibition Against Gratuities and Kickbacks. With respect to this Agreement and any other contract that the Bidder may have, or wish to enter into, with any government of Guam agency, the Bidder represents that he has not violated, is not violating, and promises that it will not violate, the prohibition against gratuities and kickbacks set forth in the Guam Procurement Regulations. **Exhibit 7.**

These ethical standards and requirements are found throughout GSA-056-19 to ensure that a bidder or contractor cannot falsely claim that they were unaware of potential ethical violations. S.H. Enterprises' deliberate act of donating its Hakubotan building to the Government of Guam soon after receiving a multi-million dollar procurement contract is a significant violation of the procurement laws and regulations regarding transparency, fairness and equality, and it chips away and negates the public's trust in the procurement system.

3. SH ENTERPRISES' SUBSEQUENT ACTIONS FURTHER MAGNIFY ITS ETHICAL VIOLATIONS

The Public Auditor should place significant weight on the ethical violations discussed in Basil's protest dated February 7, 2020, and its Notice of Procurement Appeal dated February 27, 2020, because soon after the donation of the Hakubotan building to the Government of Guam, SH Enterprises was awarded a second multi-million dollar contract by GSA (GSA-001-20) on February 25, 2020 to provide food services to the Department of Corrections. See Exhibit C to Basil's Opposition to GSA's Motion for Summary Judgment dated June 10, 2020.

The award of this new contract should cause concern about the impropriety of SH Enterprises' actions as the cornerstone of Guam's Procurement Law is to ensure the fair and equitable treatment of those involved in and who participate in the procurement system. In the

procurement process, there is a critical need to preserve the integrity of government contracting to ensure the fair treatment of bidders, offerors, and contractors. Any violation of the ethical rules in the procurement process can lead to a bid protest and undermine the public's confidence in the Government, both of which have occurred here.

Based on SH Enterprises' actions and the chronology of events, this is yet another example of a clear violation of the procurement law and regulations. SH Enterprises' efforts call to question the fairness, equality, and impropriety in the procurement process, which Guam's Procurement Code has continually aimed to prevent.

Not surprisingly, GSA-001-20 also required all offerors and bidders to certify to and sign the very same affidavits regarding the prohibitions of ethical violations pursuant to the Procurement Law and Regulations. See Exhibit C to Basil's Opposition to GSA's Motion for Summary Judgment dated June 10, 2020. And even despite its actions relating to the Hakubotan building, SH Enterprises attested to and signed these affidavits as part of its bid packet for GSA-001-20.

In a nutshell, SH Enterprises' actions clearly violate the ethical provisions of Guam's Procurement laws. The events that occurred in this case not only calls into question the integrity of the award of the contracts, but it also decreases the public's confidence in the procurement system.

V. CONCLUSION

Basil's protests to GSA were incorrectly denied as there is ample evidence that SH Enterprises' April 2019 Emergency Procurement contract should have been terminated and reported as part of its bid for GSA-056-19. Its failure to provide this information makes it a non-

responsive bidder. Further, there is ample evidence that its donation of the Hakubotan building violated a myriad of ethical rules in Guam's Procurement Laws and Regulations which significantly calls into question the integrity of the procurement process. Accordingly, it is imperative that the Public Auditor rule in favor of Basil and not only disqualify SH Enterprises as a non-responsive and non-responsible bidder, but also terminate GSA-056-19 and either debar or suspend SH Enterprises for its willful actions and violations.

DATED: Hagåtña, GU, August 7, 2020.

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