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**OPA-PA-19-011 & 20-003: Proposed Findings of Fact & Conclusions of Law**

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**Sandra Miller** <smiller@oagguam.org>

Fri, Oct 16, 2020 at 1:51 PM

To: Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;, admin@guamopa.com

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Hafa adai Jerrick,

Attached on behalf of GSA is the proposed findings of fact & conclusions of law. Because this document already discusses and incorporates the identical remedies that would be requested for in a remedies brief, I am not submitting a separate brief.

Thank you,  
Sandra Miller

**GSA\_Proposed Findings of Fact and Conclusions of Law.docx**

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEAL**

<b>IN THE APPEAL OF</b>	)	Docket No. <b>OPA-PA-19-011</b>
	)	<b>OPA-PA-20-003</b>
<b>BASIL FOOD INDUSTRIAL SERVICE CORPORATION,</b>	)	
	)	
<b>Appellant.</b>	)	<b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>
	)	
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This consolidated appeal came before the Public Auditor on October 5, 2020. Protestant Basil Food Industrial Service Corporation. In accordance with Guam Rule of Civil Procedure 52(a) and having reviewed the parties’ pre- and post-trial submissions as well as the entire record, the Public Auditor now makes the following findings of fact and conclusions of law.

**I. FINDINGS OF FACT.**

**A. OPA-PA-19-011 (Elderly Congregate and Home Delivered Meals).**

1. Starting on or about March 15, 2019, Purchasing Agency General Services Agency initiated a thirty-day emergency procurement on behalf of the Department of Public Health & Social Services (DPHSS) for the month of April 2019

by sending out a Request for Quotations (RFQ) for the federally funded *Elderly Nutrition Program: Congregate and Home Delivered Meals*.<sup>1</sup>

2. In response to the RFQ, Appellant Basil Food submitted a bid,<sup>2</sup> as did Appellee SH Enterprises.<sup>3</sup> On March 28, 2019, GSA awarded Purchase Order No. P19E-003-4 for the emergency procurement to SH Enterprises.<sup>4</sup>

3. On April 3, 2019, DPHSS conducted an inspection of SH's food establishment. The inspection found thirty eight demerits, which under 10 GCA § 23106(c), warranted a letter grade of "C" plus a Letter of Warning.<sup>5</sup>

4. On April 5, 2019, Basil sent a letter to the Chief Procurement Officer (CPO) of GSA notifying the agency that Basil had learned of the C rating given to SH and demanding that GSA take action.<sup>6</sup>

5. Also on April 5, 2019, SH Enterprises advised GSA that it was withdrawing from the purchase order because it lacked enough drivers to ensure delivery of the program's home meals.<sup>7</sup>

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1 GSA Exhibits A to D.

2 GSA Exhibit B.

3 GSA Exhibit C.

4 GSA Exhibit E; Basil Food Exhibit 1; Basil Food Notice of Appeal Exhibit C.

5 Basil Food Exhibit 3; Basil Food Notice of Appeal Exhibit E.

6 Basil Food Exhibit 5; Testimony of Michael Zhou.

7 GSA Exhibit F.

6. The CPO received the withdrawal of SH before seeing Basil's letter and before learning of the C rating. The CPO accepted SH's withdrawal and awarded the purchase order to Basil Food.<sup>8</sup>

7. Basil Food was also awarded emergency purchase orders for the subsequent months of May through November 2019.<sup>9</sup>

8. On or about September 25, 2019, GSA published in the Guam Daily Post, an Invitation for Bid (IFB) No. GSA-056-19 seeking "*Nutrition Services for the comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals, and Home-Delivered Meals Component.*" The services sought by the IFB were similar to that of the emergency procurement, but for a term of three years (instead of thirty days) with an option to renew for two additional one-year terms (total five years).

9. Section 2.4/2.5(f) of the IFB required that if a bidder had been awarded a government contract in the past, then the bidder must list any citations received that were related to that previous contract.<sup>10</sup>

10. The IFB additionally required each bidder to sign and submit a written certification (aka the B-4 Certification) warranting that the bidder had not been "*debarred, suspended, or declared ineligible, or voluntarily excluded*" to be a

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8 Testimony of CPO Claudia Acfalle.

9 Testimony of Michael Zhou.

10 Procurement Record at Tab 4, p. 56.

contractor during the previous three-year period.<sup>11</sup> Three bidders responded to the IFB: Basil Food, SH Enterprises, and Sunleader Guam, Co. Ltd.<sup>12</sup>

11. SH's bid response contained no indication of the C-rating it received in April 2019.

12. Basil Foods' bid response contained no indication of multiple C and D-ratings it had received that were related to previous government contracts, including a D-rating and suspension received in 2016 which was the subject of a pending 2018 appeal to the Guam Supreme Court. Final resolution of the appeal was not had until December 31, 2019, when the Supreme Court issued an opinion in 2019 Guam 29 which ruled against Basil.<sup>13</sup>

13. A public bid opening for the IFB was held on October 24, 2019, and representatives of all three bidders (Basil, SH Enterprises and Sunleader) were physically present.<sup>14</sup>

14. After the bids were opened, SH Enterprises was found to have been the lowest responsive and responsible bidder.<sup>15</sup>

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11 Procurement Record at Tab 4, p. 38.

12 GSA Exhibit G (Basil Food bid submittal); GSA Exhibit H and Basil Food Exhibit 7 (SH bid submittal).

13 Testimony of Michael Zhou.

14 Testimony of Michael Zhou.

15 Procurement Record at Tab 9 (GSA Bid Analysis dated October 25, 2019).

15. On November 8, 2019, GSA issued a Bid Status Report recommending award of the contract in GSA-056-19 to SH Enterprises.<sup>16</sup> That same day, GSA also notified SH of its intention to award it the contract.<sup>17</sup> Finally, also on November 8, 2019, GSA awarded Purchase Order No. P206A00841 to SH Enterprises.<sup>18</sup>

16. Fourteen days later on November 22, 2019, Basil Food filed a procurement protest with GSA over the award of the contract to SH Enterprises.<sup>19</sup> GSA denied the protest on November 30, 2019.<sup>20</sup> This appeal followed on December 16, 2019.

**B. OPA-PA-20-003 (Hakubotan Building).**

17. In January 2020, the Office of the Governor contacted Mrs. Hui Sook Min at SH Enterprises to inquire if there was vacant space available on the first floor of the Hakubotan building in Tamuning. The building is owned by SH Enterprises. Mrs. Min replied that the space was available, but it had no utilities.<sup>21</sup>

18. Subsequently, the Governor's Chief of Staff, Mr. Jon Calvo, and the Deputy Director of DPW, Mr. Jesse Garcia, toured the Hakubotan Building and asked

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16 Basil Food Exhibit 8.

17 GSA Exhibit I.

18 Basil Food Exhibits 9 and 11.

19 GSA Exhibit J; Basil Food Notice of Appeal Exhibit I.

20 GSA Exhibit L; Basil Food Exhibit 13; Basil Food Notice of Appeal Exhibit G.

21 Testimony of Mrs. Min.

if SH Enterprises would allow for the space to be temporarily used for two weeks without charge in order to host the Guam war claims processing center. SH Enterprises agreed.<sup>22</sup>

19. On or about January 24, 2020, Guam war claims processing center opened in the Hakubotan building.<sup>23</sup>

20. The Hakubotan building's use as the Guam war claims processing center was entirely procured by the Office of the Governor without any involvement, action, or knowledge on the part of GSA.<sup>24</sup>

21. On February 7, 2020, Basil Food a second protest appeal alleging that the donation of the Hakubotan building by SH Enterprises for use as the war claims processing center violated the ethical prohibitions against giving gratuities and kickbacks to the Government of Guam.

## **II. CONCLUSIONS OF LAW.**

### **A. OPA-PA-19-011. Timeliness.**

22. Under Guam law, a protestant must bring a protest within fourteen days after he knows or should known of the facts giving rise thereto. 5 GCA §5425(a).

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22 Testimony of Mrs. Min.

23 Exhibit C, Basil Food's *Notice of Procurement Appeal*, OPA -PA-20-003.

24 Testimony of CPO Claudia Acfalle.

23. The Guam Supreme Court has clarified that section 5425(a) means that the 14-day window begins to run when the protester knew or should have known the facts **establishing the essential elements of the protest claim**. *DFS Guam L.P. v. The A.B. Won Pat International Airport Authority, Guam*, 2020 Guam 14, ¶ 88.

24. Where knowledge of the essential elements of the protest claim is known before an award, then a sufficient legal basis exists to support a protest against the qualifications of a competitor so that the protester may obtain relief prior to the issuance of an award. 2020 Guam 14 ¶¶ 96, 133.

25. The 14-day clock begins to run when knowledge of the purported misconduct is received, and not necessarily when an award is made. “There may be situations in which the announcement of an award reveals new facts forming the basis of a protest or where the award is a key fact itself that forms the basis of a protest. . . as a general proposition, ***when alleged misconduct forms the basis of a procurement protest, the time runs from the date on which the protesting party first learned of the purported misconduct.***” 2020 Guam 14 ¶ 89.

26. Michael Zhou from Basil Foods testified that at the bid opening of October 24, 2019, he and SH representatives were both present and that he heard the announcement that SH was the low bidder. At the time, Mr. Zhou also had actual knowledge of the C-rating received by SH in April 2019.



27. An award of the IFB was made to SH on November 8, 2019. However, as of October 24, 2019, and prior to award, Basil Foods had actual knowledge of the fact establishing the essential elements of its protest claim questioning the qualifications and responsiveness of SH. Basil therefore had a legal obligation to bring its protest within 14 days after October 24, or by November 7, 2019, and to thereby triggering the automatic stay of award provided for by 5 GCA § 5245(g).

28. Because Basil failed to file its protest by the deadline of November 7, 2019, and instead waited until November 22, 2019, its protest is untimely.

29. GSA properly denied Basil's untimely protest.

**B. OPA-PA-20-003 (Method of Source Selection, Solicitation, or Award).**

30. Under 5 GCA § 5425m the remedy of a procurement protest is limited to resolving grievances over *“the method of source selection, solicitation or award of a contract.”*

31. In order to maintain a cause of action against GSA for the Hakubotan Building procurement, Basil Foods must allege facts, which if proved, show that the GSA wrongfully executed its duties over the method of source selection, solicitation or award of a contract for the building.

32. GSA Chief Procurement Officer Claudia testified that the procurement of the Hakubotan building was handled exclusively by the Office of the Governor, that GSA had no procurement duties at all with respect to the building, and that GSA only learned of the building's use as the Guam war claims center through media reports.

33. Because GSA is not the agency involved in the “method of source selection, solicitation or award” with respect to the Governor’s use of the Hakubotan building, not action can be maintained against GSA and Basil’s protest must be dismissed.

**C. Debarment and Suspension.**

34. Pursuant to 5 GCA § 5426, authority to debar or suspend is vested in the Chief Procurement Officer of GSA, the Director of Public Works, or the head of a purchasing agency. Debarment authority can only be exercised after consultation with the using agency and the Attorney General.

35. Pursuant to 5 GCA § 5705, the Public Auditor’s may review an appeal of a decision to debar or suspend, but the Public Auditor does not have original jurisdiction or authority to sua sponte initiate debarment or suspension proceedings.

36. Because SH Enterprises has not been administratively debarred or suspended, nor have proceedings for such action been initiated by the Chief Procurement Office after consultation with the using agency and the Attorney General under 5 GCA § 5426, and there is no appeal of a debarment or suspension decision before the Public Auditor, Basil Food’s request for the Public Auditor to debar or suspend SH Enterprises is denied.

### III. CONCLUSION.

In light of the findings of fact and conclusions of law, the Public Auditor ORDERS that this consolidated appeal be dismissed with prejudice in its entirety. Each party shall bear their own attorneys' fees and costs.

SO ORDERED this \_\_\_\_\_ day of October, 2020.

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**BENJAMIN J.F. CRUZ**  
Public Auditor of Guam