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Re: OPA-PA-19-011 and 20-003 Decision

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6 **BEFORE THE PUBLIC AUDITOR**
7 **PROCUREMENT APPEALS**
8 **TERRITORY OF GUAM**

9 In the Appeal of) **Appeal No: OPA-PA-19-011**
10 Basil Food Industrial Services Corp.,) **Appeal No: OPA-PA-20-003**
11 Appellant.) **DECISION**
12 _____)

13 **I. INTRODUCTION**

14 This is the Decision of the Public Auditor, pursuant to 2 G.A.R. §12110, for Consolidated
15 Appeals OPA-PA-19-011 and 20-003. The consolidated appeal was brought by Appellant, BASIL
16 FOOD INDUSTRIAL SERVICES CORPORATION, (Hereinafter referred to as “BASIL”) on
17 protest denials by the Chief Procurement Officer (CPO) in Invitation for Bid (IFB) No. GSA-056-
18 19, the Department of Public Health and Social Services’ (“DPHSS”) procurement of meal services
19 for the elderly (Hereinafter referred to as the “*Manâmku*’ meals IFB”). The Appeal was heard on
20 October 5, 6, and 7, 2020 before Public Auditor Benjamin J. F. Cruz. Geri E. Diaz, Esq. appeared
21 on behalf of the Appellant, BASIL. Assistant Attorney General Sandra Cruz Miller, Esq., appeared
22 on behalf of Purchasing Agency, GENERAL SERVICES AGENCY (Hereinafter referred to as
23 “GSA”). Vanessa Williams, Esq. appeared on behalf of Interested Party, SH ENTERPRISES, INC.
24 (Hereinafter referred to as “SH”).
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1 **II. JURISDICTION: STANDARD OF REVIEW**

2 The decision of the Public Auditor under appeal is as authorized by 5 G.C.A. §5703.ⁱ The
3 determination of an issue, the findings of fact, and the decision of the Public Auditor are as stated
4 in 5 G.C.A. §5704.ⁱⁱ

6 **III. FINDINGS OF FACT**

7 In reaching this Decision, the Public Auditor reviews and determines *de novo* any matter
8 properly submitted. 2 G.A.R. §12103(a).¹ From the procurement record, documents submitted by
9 the parties, testimony, and arguments made during the hearings held on October 5, 6, and 7, 2020,
10 the Public Auditor makes the following findings of fact:

11
12 **A. PRIOR PROCUREMENT HISTORY: BASIL AND GSA IN A NEARLY**
13 **4-YEAR PROTRACTED LITIGATION OVER TERMINATION OF ITS**
14 **CONTRACT BECAUSE OF BASIL’S “D” AND “C” RATINGS; 8-**
15 **MONTH EMERGENCY PROCUREMENTS PRIOR TO THE**
16 **MANÁMKU’ MEALS IFB**

17 While BASIL and SH have had food service contracts with the government stretching back
18 to 2014, both have had issues with grades received from DPHSS after food establishment
19 inspections. In June 2016, BASIL’s contract to provide food services to the elderly was terminated
20 when it received a “D” rating in a series of food establishment inspections by the DPHSS’
21 Environmental Division.² BASIL protested the termination, appealed the protest and lost, received

22 ¹ A finding of fact by the Public Auditor is final and conclusive unless arbitrary, capricious, fraudulent,
23 clearly erroneous, or contrary to law. 5 G.C.A. §5704(a) (2005); *Basil Food Indus. Serv. Corp. v. Gen. Serv.*
24 *Agency*, 2019 Guam 29. Factual issues decided by the Public Auditor “are ordinarily not to be relitigated,”
25 *see id.* ¶ 8; *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 32. Such findings, however, may be “clearly
26 erroneous” and therefore subject to reversal if unsupported by substantial evidence. Substantial evidence is
27 more than a mere scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
28 mind might accept as adequate to support a conclusion. *See* 2019 Guam 29 (citations omitted).

² DPHSS grades food establishments according to the number of demerits recorded at inspections for food
found to be unwholesome or adulterated, or for employees with communicable disease found to be working
at the food establishment. *See* 10 G.C.A. §§23102 (inspections to detect unwholesome or adulterated food),
23103 (prohibition on employees with communicable disease at food establishments), 23106 (ratings: “A” –
10 or fewer demerits; “B” – 11 to 20 demerits; “C” – 21 to 40 demerits; “D” more than 40 demerits).

1 an adverse judgment from the Superior Court, then appealed to the Guam Supreme Court, where it
2 lost. 2019 Guam 29.

3
4 SH received a “C” rating and a Letter of Warning from DPHSS after its food establishment
5 inspection on April 3, 2019. At the time, SH was performing under a DPHSS emergency
6 procurement for April 2019 meal services for the elderly (the “*Manâmkû*’ meals emergency
7 procurement”). Section 12.9 of the *Manâmkû*’ meals emergency procurement contract provided that
8 it could be terminated by DPHSS in the event of a “C” rating.³ Although DPHSS inspected SH,
9 neither it nor the CPO took steps to terminate the *Manâmkû*’ meals emergency procurement contract.
10 On April 5, 2019, SH withdrew from the *Manâmkû*’ meals emergency procurement contract due to
11 instances of late food deliveries, which GSA allowed. GSA also assessed penalties against SH for
12 the late deliveries.
13

14 BASIL reported to the CPO about SH’s “C” rating on that same day, April 5, 2019. The
15 CPO testified that she was aware of the “C” rating only after BASIL reported it. After SH withdrew,
16 the CPO issued a purchase order to BASIL under the emergency procurement, and BASIL continued
17 to provide meal services on an emergency procurement through November 2019.
18

19 **B. THE MANÂMKU’ MEALS IFB**

20 On September 25, 2019, GSA issued Invitation for Bid No. GSA-056-19 for Nutrition
21 Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition
22 Program, Congregate meals, and Home-Delivered Meals Components (the “*Manâmkû*’ meals IFB”).
23 The procurement was for the same meal services as the emergency procurement, but for a term of
24 three years with two 1-year options.
25

26
27 ³ The language in Section 12.9 of the emergency procurement contract was litigated in Basil’s appeal in 2019
28 Guam 29. At *id.* ¶¶ 14-21, the Guam Supreme Court held that there was no right to cure failed inspections
as Basil had argued.

1 Section 15 of the General Terms and Conditions of the *Manâmkû'* meals IFB provides the
2 following:

3
4 **DETERMINATION OF RESPONSIBILITY OF BIDDERS:** The CPO reserves
5 the right for securing from bidders information to determine whether or not they
6 are responsible and to inspect plant site, place of business, and supplies and services
as necessary to determine their responsibility in accordance with Section 15 of these
General Terms and Conditions.

7 Section 16 of the General Terms and Conditions of the *Manâmkû'* meals IFB provides the
8 following:

9 **STANDARD FOR DETERMINATION OF LOWEST RESPONSIBLE**
10 **BIDDER:** In determining the lowest responsible offer, the CPO shall be guided by
the following:

- 11 a) Price of items offered.
- 12 b) The ability, capacity, and skill of the Bidder to perform.
- 13 c) Whether the Bidder can perform promptly or within the specified time.
- 14 d) The quality of performance of the Bidder with regards to awards previously
made to him.
- 15 e) The previous and existing compliance by the Bidder with laws and
regulations relative to procurement.
- 16 f) The sufficiency of the financial resources and ability of the Bidder to perform.
- 17 g) The ability of the bidder to provide further maintenance and services for the
subject of the award.
- 18 h) The compliance with all of the conditions in the Solicitation.

19 The Mandatory Federal Programs Forms section of the *Manâmkû'* meals IFB identified six
20 Mandatory Federal Program Forms that were required to be completed, submitted, and signed and
21 further provided that “*Failure to complete and submit the forms will automatically disqualify the*
22 *Bidder’s submission to this IFB, as being non-responsive.*” The mandatory forms also provided
23 that, “*Failure to comply with this [Required Signature] provision will automatically disqualify the*
Bidder’s submission to this IFB, as being non-responsive.”

24 As one of the Mandatory Federal Program Forms, the B-4 certification required by the
25 *Manâmkû'* meals IFB required bidders to warrant that it had not been “debarred, suspended, declared
26 ineligible or voluntarily excluded” to be a contractor during the previous three-year period. Section
27 2.5 (a) and (b) required evidence of the latest graded Food Inspection Report issued by DPHSS for
28

1 the past 12 months preceding the submission of the bid. Otherwise, the Bidder would agree to an
2 inspection from DPHSS and that it must receive at least a “B” grade (“B” rating) before it can
3 receive the award. The *Manâmkû* meals IFB also required the Bidder to list citations in the areas
4 of procurement, questioned costs, material weaknesses, and the organization’s noncompliance with
5 contract provisions.
6

7 Included in the *Manâmkû* meals IFB was an Affidavit Regarding No Gratuities and
8 Kickbacks that is required in all bids pursuant to 2 G.A.R., Div. 4, Chap. 11, §11107(e). Paragraphs
9 2 and 3 of the Affidavit provides as follows:
10

11 2. To the best of the affiant’s knowledge, neither affiant, nor any of the offeror’s
12 officers, representatives, agents, subcontractors or employees have violated, [or]
13 are violating the prohibition against gratuities and kickbacks set forth in 2 G.A.R.
14 Division 4 §11107(e). Further affiant promises, on behalf of offeror, not to
15 violate the prohibition against gratuities and kickbacks set forth in 2 G.A.R.
16 Division 4 §11107(e).

17 3. To the best of the affiant’s knowledge, neither affiant, nor any of the offeror’s
18 officers, representatives, agents, subcontractors or employees have offered, given
19 or agreed to give, any Government of Guam employee or former Government of
20 Guam employee, any payment, gift, kickback, gratuity or offer of employment in
21 connection with the offeror’s proposal.

22 *See* Affidavit re No Gratuities and Kickbacks dated Oct. 9, 2019 by SH and BASIL. Both bidders
23 made specific representations denying violations of prohibitions against gratuities and kickbacks at
24 the time it submitted its Affidavit.

25 After a series of amendments, the bid opening was scheduled for October 24, 2019 and a
26 requirement was removed to provide information about Department of Labor claims made against
27 the bidder.

28 GSA received BASIL’s and SH’s bid on October 24, 2019. BASIL’s bid was \$1,014,000
for congregate meals and \$2,806,630 for home-delivered meals for a total bid amount of \$3,820,630.

1 SH's bid was \$1,070,550 for congregate meals and \$2,718,661 for home-delivered meals for total
2 bid amount of \$3,789,211.

3
4 On October 25, 2019, GSA recommended that SH be awarded the bid, subject to the
5 approval of the DPHSS Director, and the procurement record was then certified by the procurement
6 office and the CPO.

7 On October 30, 2019, GSA received the concurrence from the Director of DPHSS that SH
8 met the specifications of the *Manâmkû'* meals IFB.

9 On November 8, 2019, GSA sent a Notice of Intent to Award to SH and Bid Status to BASIL
10 indicating that their bid was rejected due to "high price".

11
12 On November 12, 2019, BASIL filed a Freedom of Information Act (FOIA) request with
13 GSA, requesting the bid documents submitted by SH in response to the *Manâmkû'* meals IFB.
14 Through its FOIA request, BASIL noted the produced documents demonstrate that SH failed to
15 fully disclose important information required by the IFB.

16 On November 22, 2019, BASIL protested that SH was ineligible to receive the award
17 because SH was not the lowest responsible bidder. GSA found BASIL's protest was without merit
18 and denied BASIL's protest on November 30, 2019. GSA also made a written determination that
19 the failure by BASIL and SH to submit the previous three years' inspection reports was a minor
20 informality, and the Deputy Attorney General reviewing the protest signed off on the determination.

21
22 On December 16, 2019, BASIL appealed the CPO's decision to deny the protest to the Public
23 Auditor (OPA-PA-19-011).

24 On January 24, 2020, with the pending OPA-PA-19-011 appeal, the Pacific Daily News
25 reported that the Government's War Claims Processing Center was located at the Hakubotan
26 Building in Tamuning. BASIL filed a FOIA request with the Governor's Office requesting all
27
28

1 records related to, and/or discussing the use of, the former Hakubotan building in Tamuning to the
2 Government of Guam for use as the War Claims Processing Center.

3
4 On January 29, 2020, SH submitted its bid on IFB No. GSA-001-20, which was for the
5 Department of Corrections meal services (the “DOC meals IFB”). SH submitted their DOC meals
6 bid after the media reported the use of the Hakubotan building for the War Claims processing.

7 On January 30, 2020, BASIL received a copy of a January 22, 2020 letter from SH to the
8 Governor in response to the FOIA request. The letter indicated that SH was donating to the
9 government “the temporary utilization of approximately 5,000 square feet of commercial space
10 located on the first floor, utilities, and access to the building’s parking lot for the Guam War Claims
11 Center”.

12
13 BASIL submitted a second protest on the *Manâmkû* meals IFB with GSA on February 7,
14 2020, on grounds that SH provided a favor to the Government of Guam in violation of 2 G.A.R.,
15 Div. 4, §11107(4), which prohibits favors to the government.

16 On February 8, 2020, GSA denied BASIL’s second protest, which was based on 5 G.C.A.
17 §5630 (a) and (b). BASIL received the CPO’s Notice of Denial of its protest on February 12, 2020.
18 In OPA-PA-20-003, BASIL contends that GSA failed to address 5 G.C.A. §5630(d) and 2 G.A.R.,
19 Div. 4, §11107 in her decision.
20

21 On February 25, 2020, GSA awarded the DOC meals IFB to SH.

22 On February 27, 2020, BASIL filed a second appeal regarding the government’s *gratis* use
23 of the Hakubotan building (OPA-PA-20-003). The Public Auditor on March 13, 2020 issued an
24 Order Consolidating Appeals OPA-PA-19-011 and OPA-PA-20-003. On May 26, 2020, a Status
25 Conference was held for OPA-PA-19-011 and 20-003.
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1 On June 10, 2020, GSA filed a Motion for Summary Judgment in the consolidated appeal.
2 On July 8, 2020, GSA filed a second Motion for Summary Judgment.

3
4 On July 29, 2020, a Hearing on GSA’s Motions for Summary Judgment was held. Hearings
5 on the consolidated appeals were then taken up on October 5 to 7, 2020.

6 **IV. ANALYSIS**

7 **A. BASIL’S PROTEST THAT SH’S “C” RATING RENDERED IT A**
8 **NONRESPONSIBLE/NONRESPONSIVE BIDDER WAS UNTIMELY**

9 BASIL’s protest expired fourteen days after BASIL became aware of SH’s “C” rating. This
10 was no later than fourteen days after April 5, 2019, when BASIL informed the CPO of the “C”
11 rating. An aggrieved protestant may protest at any phase of a procurement. 2 G.A.R., Div. 4,
12 §9101(c)(2); 2020 Guam 14 ¶ 84. The jurisdiction for a protest, therefore, lapsed long before
13 BASIL’s protest to the CPO on November 22, 2019.

14
15 That portion of BASIL’s consolidated appeal protesting that SH was a non-responsible
16 and/or nonresponsive bidder is dismissed.

17 **B. BASIL’S PROTEST THAT SH FAILED TO INCLUDE INFORMATION**
18 **RELATED TO ITS “C” RATING IN ITS *MANÁMKU’ MEALS IFB***
RESPONSE WAS UNTIMELY

19 Under *DFS Guam L.P. v. The A.B. Won Pat International Airport Authority Guam Opinion*,
20 it is necessary to evaluate additional facts as they come to determine whether a protest is timely.
21 2020 Guam 14 ¶ 89 (Timeliness “depends on the cumulation of facts available to the protester.”).
22 More facts accumulated at the time of the submission of bids on October 24, 2019 as the contents
23 of the competing bids were opened. Section 3109 of the Procurement Regulations, which governs
24 Competitive Sealed Bidding, states that public disclosure of opened bids is allowed unless the parties
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1 have a CPO determination regarding confidential proprietary rights.⁴ It is unclear whether GSA
2 would have permitted BASIL's inspection notwithstanding the regulation; the parties showed no
3 evidence of GSA's disclosure procedures; and BASIL did not protest on this basis. Therefore,
4 BASIL did not avail of this provision allowing public disclosure. Instead, BASIL filed a FOIA on
5 the date of the award and waited until November 22, 2019 to file its protest.
6

7 It was not until BASIL could be said to have a duty of inquiry that it could be charged with
8 knowledge of a fact. *Goodman v. Simonds*, 61 U.S. 343 (1857). That occurred at the time it could
9 be charged with knowledge that SH's bid submission was potentially deficient. BASIL had a duty
10 to inquire so that it could preserve its protest, but it did not. The earliest possible time when BASIL
11 could have obtained such information was during SH's bid opening on October 24, 2019. BASIL's
12 protest was without jurisdiction after fourteen days.
13

14 BASIL's consolidated appeal protesting that SH failed to include information and
15 certifications regarding its "C" rating in its bid submission to the *Manåmku'* meals IFB is dismissed.
16

17 **C. BASIL'S PROTEST THAT THE MANÅMKU' MEALS IFB
18 PROCUREMENT WAS IN VIOLATION OF GUAM PROCUREMENT
19 LAWS WAS TIMELY**

20 On November 30, 2019, the CPO provided a written determination denying BASIL's protest
21 that SH's failure to submit information on its "C" rating and the required certifications were a "minor
22

23 ⁴ See 2 GAR Div. 4 §3109 (1)(2) (The opened bids shall be available for public inspection except to the extent
24 the bidder designates trade secrets or other proprietary data to be confidential as set forth in Subsection
25 3109(1)(3) of this section. Material so designated shall accompany the bid and shall be readily separable from
26 the bid in order to facilitate public inspection of the nonconfidential portion of the bid. Prices and makes and
27 models or catalogue numbers of the items offered, deliveries, and terms of payment shall be publicly available
28 at the time of bid opening regardless of any designation to the contrary.); See also §3109(1)(3) (Confidential
Data. The Procurement Officer shall examine the bids to determine the validity of any requests for
nondisclosure of trade secrets and other proprietary data identified in writing. If the parties do not agree as
to the disclosure of data, the Procurement Officer shall inform the bidders in writing. If the parties do not
agree as to the disclosure of data, the Procurement Officer shall inform the bidders in writing what portions
of the bids will be disclosed and that, unless the bidder protests under Chapter 9 (Legal and Contractual
Remedies of this Guam Procurement Regulations, the bids will be so disclosed. The bids shall be opened to
public inspections subject to any continuing prohibition on the confidential data.)

1 informality” *sic*. See Determination of the CPO, November 30, 2019. The Procurement Appeal of
2 that CPO decision was timely filed on December 16, 2019.

3
4 Section 5001 of the Procurement Law guides how the law is to be applied:

5 **Purposes, Rules of Construction. (a) Interpretation.** This Chapter shall be
6 construed and applied to promote its underlying purposes and policies.

7 **(b) Purposes and Policies.** The underlying purposes and policies of this Chapter
8 are:

9 (1) To simplify, clarify, and modernize the law governing procurement by this
10 Territory;

11 (2) To permit the continued development of procurement policies and practices;

12 (3) To provide for increased public confidence in the procedures followed in public
13 procurement;

14 (4) To ensure the fair and equitable treatment of all persons who deal with the
15 procurement system of this Territory;

16 (5) To provide increased economy in territorial activities and to maximize to the
17 fullest extent practicable the purchasing value of public funds of the Territory;

18 (6) To foster effective broad-based competition within the free enterprise system;

19 (7) To provide safeguards for the maintenance of a procurement system of quality
20 and integrity; and

21 (8) To require public access to all aspects of procurement consistent with the sealed
22 bid procedure and the integrity of the procurement process.

23 With years of litigation between the government and BASIL, determining that food establishment
24 inspection grades is a mere formality must be evaluated for its consistency with Section 5001 of the
25 Procurement Law, and implicates *inter alia* subsections (3), (4), (6), (7), and (8).

26 Section 5003 of the Procurement Law requires the parties involved in the negotiation,
27 performance, or administration of territorial contracts to act in good faith. Section 5002 states that
28 the principles of law and equity, including the Uniform Commercial Code of Guam, the law
merchant, and law relative to capacity to contract, agency, fraud, misrepresentation, duress,
coercion, mistake, or bankruptcy supplements Guam Procurement Law unless the Procurement Law
provides for the result. “Good faith” under Guam’s Uniform Commercial Code means honesty in
fact in the conduct or transaction concerned. 13 G.C.A. §1201(19). Every contract imposes a duty
of good faith and fair dealing in its performance and its enforcement. See Restatement (Second) of
Contract §205. The duty obliges parties not to destroy the reasonable expectations of the other party

1 and also applies to the government throughout the procurement process. If the government conducts
2 a procurement in an arbitrary, capricious, or irrational manner, then it has breached the implied
3 contract to consider all bids fairly and honestly. The government is said to breach the implied
4 contract of good faith and fair dealing if its consideration of offers is arbitrary and capricious toward
5 the bidder-claimant. *See Comprehensive Health Services, Inc. v. United States*, 70 Fed. Cl. 700,
6 738 (Ct. Cl. 2006) (citations, quotations omitted).

8 Four factors determine whether a breach of the duty of good faith and fair dealing has
9 occurred in procurement: 1) absence of a reasonable basis for the administrative decision; 2) the
10 amount of discretion afforded to the procurement officials by applicable statutes and regulation; 3)
11 proven violations of pertinent statutes or regulations; and 4) subjective bad faith. There is no
12 requirement that each of the four factors be present to find a breach. *Id.* (citations, quotations
13 omitted).

15 A rejected bidder bears a heavy burden of showing that a contracting officer's decision had
16 no rational basis because the officer engages in what is inherently a judgmental process. *Id.* at 720-
17 21 (citations, quotations omitted). However, the agency must treat each offeror equally, applying a
18 consistent standard for evaluating each proposal because uneven treatment goes against the standard
19 of equality and fair-play that is a necessary underpinning of the government's procurement process,
20 amounting to an abuse of the agency's discretion. *Id.* at 721 (citations, quotations omitted). The
21 procuring agency is presumed to be acting in good faith. Otherwise, the proof must be almost
22 irrefragable, which is equivalent to the "clear and convincing evidence" standard. *Id.* (citations,
23 quotations omitted). "Clear and convincing evidence means testimony that is so clear, direct,
24 weighty, and convincing as to enable the trier of fact to come to a clear conviction, without
25 hesitancy, of the truth of the precise facts in issue." *Storehaven Corp. v. Taitano*, 2001 Guam 16 ¶
26
27
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1 19.

2 The Public Auditor finds that GSA did not treat BASIL as equally as SH and applied an
3 inconsistent standard to evaluate each proposal that goes against fair play. When the issue of DPHSS
4 food establishment inspection grades was cause for termination of BASIL's contract, forcing it to
5 seek procurement appeal and judicial review, while GSA treated inspection grades and certifications
6 on them as a minor informality and waived the requirement for SH. The Public Auditor, therefore,
7 finds the waiving of the food establishment inspection information and certifications to be an abuse
8 of discretion as a violation of the implied contract of good faith and fair dealing.
9

10 If it is found that an agency's decision is not rational, then the bidder must be prejudiced by
11 the Government's conduct. *Id.* (citations omitted). To prevail in a protest, the protester must show
12 not only a significant procurement process error, but also that the error prejudiced it. *Id.* (citations,
13 quotations omitted). The CPO, in denying BASIL's protest, waived the requirement to benefit SH,
14 a competing bidder but did not apply it to benefit BASIL. Section 2.5 (a) of the *Manâmkû'* meals
15 IFB speaks to a "B" rating or better within the last 12 months. The CPO in her decision to waive
16 the requirement weighed SH's recent conduct as a minor informality against BASIL's, which
17 occurred in 2016, and which was cause for termination of the 2016 contract and was a serious-
18 enough violation of the 2016 contract to litigate. BASIL was prejudiced by the CPO's waiver.
19

20 The Public Auditor's jurisdiction shall be utilized to promote the integrity of the procurement
21 process and the purposes of Guam Procurement Law. 5 G.C.A. § 5703 (f). The Public Auditor
22 herein determines that the contract for the *Manâmkû'* meals IFB in favor of SH is to be terminated.
23

24 The CPO's decision that the food inspection information and certifications were a minor
25 informality involved no conduct by SH. As a remedy, if after an award it is determined that a
26 solicitation or award of a contract is in violation of law and the person awarded the contract has not
27

1 acted fraudulently or in bad faith, the contract may be ratified and affirmed, provided it is determined
2 that doing so is in the best interests of the Territory; or the contract may be terminated and the person
3 awarded the contract shall be compensated for the actual expenses reasonably incurred under the
4 contract, plus a reasonable profit, prior to the termination. 5 G.C.A. §5452 (a). The Public Auditor
5 herein decides that SH is to be compensated for actual expenses reasonably incurred, upon which it
6 will be awarded a reasonable profit of one hundred dollars (\$100.00). SH shall submit evidence of
7 costs to the Public Auditor within ten days of this Decision for accounting.
8

9 **D. BASIL’S PROTEST THAT SH GRANTING THE GOVERNMENT
10 FREE USE OF THE HAKUBOTAN BUILDING, FREE UTILITIES,
11 AND FREE PARKING IS A VIOLATION OF THE PROCUREMENT
LAW’S ETHICAL STANDARDS WAS VALID**

12 BASIL became aggrieved on the date it can be charged with knowledge of the fact that SH
13 had given Hakubotan property rights *gratis*. On January 30, 2020, the Governor’s Office responded
14 to BASIL’s FOIA request. The protest was timely submitted to the CPO on February 7, 2020.
15 BASIL received the CPO’s denial of its protest on February 12, 2020, and this appeal was timely
16 filed on February 27, 2020.
17

18 BASIL alleges breach of ethical conduct in SH’s allowing the government *gratis* use of the
19 Hakubotan building as a gratuity, kickback, or favor for the territory:

20 **5 G.C.A. §5630. Gratuities and Kickbacks.**

21 **(a) Gratuities.** It shall be a breach of ethical standards for any person to offer, give
22 or agree to give any employee or former employee, or for any employee or former
23 employee to solicit, demand, accept or agree to accept from another person, a gratuity
24 or an offer of employment in connection with any decision, approval, disapproval,
25 recommendation, preparation of any part of a program requirement or a purchase
request, influencing the content of any specification or procurement standard,
rendering of advice, investigation, auditing, or in any other advisory capacity in any
proceeding or application, request for ruling, determination, claim or controversy, or
other particular matter, pertaining to any program requirement or a contract or
subcontract; or to any solicitation or proposal therefor.

26 **(b) Kickbacks.** It shall be a breach of ethical standards for any payment, gratuity or
27 offer of employment to be made by or on behalf of a subcontractor under a contract
28 to the prime contractor or higher tier subcontractor or any person associated
therewith, as an inducement for the award of a subcontract or order.

1
2 (c) **Contract Clause.** The prohibition against gratuities, kickbacks and favors to the
3 Territory prescribed in this Section shall be conspicuously set forth in every contract
and solicitation therefor.

4 (d) **Favors to the Territory.** For purposes of this Section, a favor is anything,
5 including raffle tickets, of more than *de minimis* value and whether intended for the
6 personal enjoyment of the receiver or for the department or organization in which
7 they are employed or for any person, association, club or organization associated
8 therewith or sponsored thereby. It shall be a breach of ethical standards for any
9 person who is or may become a contractor, a subcontractor under a contract to the
10 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.

11 GSA argues that the Governor is allowed to accept charitable donations:

12 **5 G.C.A. §22408. Charitable Donations.** The Governor is authorized to accept
13 monetary donations, from any individual or organization, which shall be deposited
14 in a separate fund by the Treasurer of Guam. Such donations shall, upon
15 authorization by the Governor, be used and expended in accordance with the terms
and conditions upon which they were made. Nothing herein shall be construed to
prevent the Governor on behalf of the Government of Guam from accepting
donations of property from any individual or organization.

16 The Public Auditor finds that the CPO was without authority to apply Government Operations'
17 General Fiscal Policies and Controls. They are outside of the laws enlisted in Guam Procurement
18 Law's Supplementary General Principles of Law section. *See* 5 G.C.A. §5002 ("Unless displaced
19 by the particular provisions of this Chapter, the principles of law and equity, including the Uniform
20 Commercial Code of Guam, the law merchant, and law relative to capacity to contract, agency,
21 fraud, misrepresentation, duress, coercion, mistake, or bankruptcy shall supplement the provisions
22 of this Chapter").

24 Additional considerations support this finding. First, there is no exception to the prohibition
25 on Favors for the Territory found in Guam Procurement Law or other authority provided by GSA.
26 Mechanically, the CPO was in error to supplement the application of the Favors to the Territory
27 prohibition with Fiscal Law, when deciding on the *gratis* use of the Hakubotan building and whether
28

1 it was a violation of the Ethical Standards. Second, it is possible to construe the “Charitable
2 Donations” statute in the Fiscal law together with the “Favors to the Territory” prohibition in the
3 Procurement Law as allowing the Governor to accept charitable donations so long as the donation
4 does not violate the Guam Procurement Law Ethical Standards. Lastly, GSA put forth no evidence
5 of the Governor’s acceptance of the use of the Hakubotan building including utilities and parking
6 as a charitable donation. In addition, that she would accept it as an exception to the prohibition
7 against Favors for the Territory.
8

9 Having determined the CPO’s error, a gratuity comprises anything of more than a nominal
10 value, including any tangible or intangible benefit in the nature of favors, transportation, or
11 accommodation, present or promised, unless the government receives consideration of substantially
12 equal or greater value. *See* 5 G.C.A. §5601(f); 2 G.A.R., Div. 4, §11101(6). Section 5630(d) of
13 Guam Procurement Law expressly declares it a breach of ethical standards for any person who is or
14 may become a contractor, or any person associated therewith, to offer, give or agree to give any
15 employee or agent of the Territory, a favor or gratuity **“during the pendency of any matter related
16 to procurement, including contract performance warranty periods.”** *See id* (emphasis
17 supplied). SH gave a favor of more than a nominal value to the Territory when SH allowed the
18 government free use of 5,000 square feet of the Hakubotan building, including the utilities and
19 parking. This occurred during the pendency of the *Manâmkû’* meals and DOC meals procurements.
20 Assuming that it made a similar representation in the DOC meals IFB, as required by Guam
21 Procurement Law, it would be a false statement made in connection with SH’s bid submission in
22 that procurement.
23
24

25 Therefore, the Public Auditor finds that SH violated Guam Procurement Law Ethical
26 Standards. The prohibited *Hakubotan* favor to the government was a breach of Guam Procurement
27
28

1 Law and SH represents it did not to give gratuities or kickbacks. Any similar affidavit in the DOC
2 meals IFB would falsely represent that SH did not violate the prohibition against kickbacks and
3 gratuities.
4

5 As a remedy, BASIL requested the CPO debar or suspend SH from being a government
6 contractor. However, the CPO concluded there was no violation and did not commence such
7 proceedings when it denied BASIL's protest. The authority for a proceeding to debar or suspend a
8 contractor is found at 5 G.C.A. §5426(a):

9
10 After reasonable notice to the person involved and reasonable opportunity for that
11 person to be heard, the CPO, the Director of Public Works or the head of a purchasing
12 agency, after consultation with the using agency and the Attorney General, shall have
13 authority to debar a person for cause from consideration for award of contracts. The
14 debarment shall not be for a period of more than two (2) years. The same officer,
15 after consultation with the using agency and the Attorney General, shall have
16 authority to suspend a person from consideration for award of contracts if there is
17 probable cause for debarment. The suspension shall not be for a period exceeding
18 three (3) months. The authority to debar or suspend shall be exercised in accordance
19 with regulations promulgated by the Policy Office.

20 No notice to SH of debarment or suspension proceedings has been issued. However, an appeal was
21 taken by BASIL on February 27, 2020 of a decision required from the CPO in accordance with
22 5 G.C.A. §5426(c), and jurisdiction is now properly with the Public Auditor.⁵

23
24 **E. DEBARMENT AND SUSPENSION PROCEEDINGS ON APPEAL TO**
25 **THE PUBLIC AUDITOR AFTER CPO'S DENIAL IN ERROR**

26 As SH provided a Favor to the territory in violation of Guam Procurement Law's Ethical
27 Standards, the Public Auditor now *deconsolidates* this appeal so that each will proceed separately.⁶
28

24 ⁵ See 5 G.C.A. §5426(e) (Finality of Decision. A decision under Subsections (c) or (f) of this Section shall
25 be final and conclusive, unless fraudulent, or an appeal is taken to the Public Auditor in accordance with
26 §5706 of this Chapter). See also 5 G.C.A. §5706 (Conferring jurisdiction to the Public Auditor to resolve
27 contract controversies). Together, the statutes confer appellate jurisdiction to the Public Auditor over
28 decisions by the CPO concerning debarments and suspensions.

27 ⁶ The power to consolidate cases includes the power to deconsolidate them. *E.g. In re Student-Athlete Name*
28 *and Likeness Litigation*, 2010 WL 5644656; *Blue Cross Blue Shield of Massachusetts, Inc.*, 617 F.3d 635
(7th Cir. 2015).

1 Accordingly, OPA Appeal No. OPA-PA-19-011 is decided except for award of SH's costs and
2 reasonable profit. OPA Appeal No. OPA-PA-20-003 remains undecided and is unconsolidated.

3 Section 5426(f) states that any member of the public may petition the CPO to take action
4 under the authority of §5426(a) to debar or suspend a contractor for Ethical Standards violations.
5 BASIL's protest was a petition to the CPO for debarment or suspension. The CPO denied the
6 petition and BASIL appealed in OPA-PA-20-003, in pursuit of its administrative remedies.

7 BASIL will receive a reasonable notice and meaningful opportunity to be heard on its appeal.
8 A copy of this Decision will also be served on SH, together with an Order to show cause why it
9 should not be debarred or suspended for violation of the Ethical Standards of the Procurement Law.
10 SH will have thirty (30) days from the date of the order to show cause to respond, after which a
11 hearing on the order to show cause will be set, with a Decision to follow.

12 CONCLUSION

13 Based on the foregoing, the Public Auditor determines the following:

14 A. BASIL's protest that SH was not the lowest responsible and responsive bidder in IFB
15 No. GSA-056-19 is untimely and that portion of the consolidated appeal is dismissed.

16 B. BASIL's protest that SH failed to include certifications and information related to its
17 April 3, 2019 "C" rating in IFB No. GSA-056-19 is untimely and that portion of the consolidated
18 appeal is dismissed.

19 C. Basil's protest that the CPO's waiver of minimum health inspection grades violated
20 the Procurement Law when the CPO determined that information in the *Manâmku'* meals IFB was
21 a minor informality is timely, and BASIL's appeal to the Public Auditor on such basis was timely.
22 The CPO abused her discretion by granting a waiver of requirements related to food establishment
23 grades because she applied the requirement unequally, thereby prejudicing BASIL. The remedy for
24 the violation is post-award. The contract with SH is to be terminated, and SH shall submit evidence
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1 of costs for accounting. SH will be awarded a reasonable profit of \$100.00 on top of those accounted
2 costs.

3
4 D. BASIL's protest that SH's allowing the government to use the Hakubotan building
5 free of rent and utilities was a violation of ethical standards as a prohibited Favor for the Territory
6 and is valid. The CPO erred in concluding that it was a Charitable Donation, which it was not.

7 E. OPA Appeal No. OPA-PA-20-003 is deconsolidated from this consolidated appeal.
8 A decision, in that case, is pending a hearing on an Order to show cause why SH should not be
9 disbarred or suspended for violation of the Procurement Law's Ethical Standards.

10 The parties shall bear their respective costs and attorney's fees.

11 This is a Final Administrative Decision for Appeal No. OPA-PA-19-011. The Parties are
12 hereby informed of their right to appeal from a Decision of the Public Auditor to the Superior Court
13 of Guam in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after
14 receipt of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties
15 and their respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for
16 review on the OPA website at www.opaguam.org.

17
18
19 **DATED this 11th day of December, 2020.**

20
21 
22 **BENJAMIN J.F. CRUZ**
23 **Public Auditor of Guam**
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27
28



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-19-011 and 20-003

Jerrick Hernandez <jhernandez@guamopa.com>

Fri, Dec 11, 2020 at 11:16 AM

To: "Geri E. Diaz" <gdiaz@icclawgroup.com>, Sandra Miller <smiller@oagguam.org>, Robert Kono <robert.kono@gsa.guam.gov>, Vanessa Williams <vlw@vlwilliamsllaw.com>

Cc: Clariza Roque <croque@guamopa.com>

Hafa Adai,

Please see attached Decision for OPA-PA-19-011 and 20-003. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you

--

Regards,

Jerrick J.J.G. Hernandez, MA, CGAP, CICA

Auditor

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**19-011 and 20-003 Decision.pdf**

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