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OPA-PA-20-003: GSA's Trial Brief

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Hi Jerrick,

Please see the attached for filing pursuant the Scheduling Order of January 11, 2021.

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

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

INTRODUCTION

On December 11, 2020, the Public Auditor issued to SH Enterprises an *Order to Show Cause* (OSC) “why it should not be suspended or debarred for breach of Ethical Standards of the procurement law by providing a prohibited favor to the territory” The OSC was based on the Public Auditor’s finding in the *Decision* issued on December 11, 2020, that SH’s donation of office

space in the Hakubotan Building to the Governor of Guam was a violation of the procurement law's ethical standards.¹

DISCUSSION

I. THESE PROCEEDINGS VIOLATE DUE PROCESS BECAUSE THE PUBLIC AUDITOR IS NOT AUTHORIZED TO CONDUCT DEBARMENT OR SUSPENSION HEARINGS.

According to the *Decision* of December 11, 2020, the Public Auditor assumed jurisdiction over these debarment proceedings because: (1) the CPO did not initiate debarment; and (2) because Basil filed a procurement protest to the Public Auditor “*of a decision required from the CPO in accordance with 5 GCA § 5426(c). . .*”²

The Public Auditor concluded that in the context of a procurement protest, the CPO's decision to not pursue debarment means that “jurisdiction [to determine debarment] is now properly before the Public Auditor.”³

GSA respectfully submits that this finding is in error.

¹ *In the Appeal of Basil Food Industrial Services Corp.*, DECISION, OPA-PA-19-011 & OPA-PA-20-003 at pp. 15-16 (Dec. 11, 2020).

² DECISION at p. 16. *See also*, *Id.* at fn. 5 (concluding that 5 GCA § 5426(c) and § 5706 together “confer jurisdiction appellate jurisdiction to the Public Auditor over decisions by the CPO concerning debarments and suspensions.”).

³ *Id.*

A. The CPO has the Discretion to Decide Whether to Commence Debarment or Suspension Proceedings.

As pointed out in the Public Auditor's *Decision*,⁴ the authority to debar or suspend a contractor is found at 5 GCA § 5426(a):

5 GCA § 5426. Authority to Debar or Suspend. (a) Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, *the Chief Procurement Officer*, the Director of Public Works or the head of a purchasing agency, *after consultation with the using agency and the Attorney General, shall have authority to debar a person for cause from consideration for award of contracts.* . . . The authority to debar or suspend shall be exercised in accordance with regulations promulgated by the Policy Office. (Emphasis added).

See also, 2 GARR §9102 (debarment or suspension by CPO, Director of DPW or head of purchasing agency).

In this case, the CPO declined to exercise her authority to commence debarment proceedings when Basil filed its protest over the Hakubotan Building. By these proceedings, the Public Auditor has assumed that it has appellate jurisdiction over the CPO's decision to *not* debar.

By its plain language, however, Section 5426(a) clearly grants discretion to commence debarment or suspension proceedings *only* to the CPO, the Director of DPW, or the head of a purchasing agency. **Nothing in the procurement law or its regulations compels the CPO to hold debarment proceedings or to otherwise exercise her discretion one way or another. Additionally, there is also nothing in the law that grants the Public Auditor any authority to review the CPO's discretionary decision *against* pursuing debarment.** *GFT v. Rector*, 2005 Guam 25, ¶¶ 25, 46-47, 51 (absent a legal duty to conduct a hearing on a charge of unfair labor practices, the DOA cannot be compelled to hold the hearing where it has exercised its discretion to not hold a hearing).

⁴ *Id.*

“To compel a discretionary action [by mandamus or otherwise] could violate the separation of powers doctrine this Court strives to uphold. Nonetheless, where the exercise of discretion, or the failure to exercise such discretion is so fraudulent, arbitrary, or palpably unreasonable that it constitutes an abuse of discretion as a matter of law, mandamus may issue. . . This abuse of discretion standard is highly deferential.” *Holmes v. TLUC*, 1998 Guam 8, ¶ 12 (citations omitted); *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 8 (deference to agency’s decision is appropriate where “the agency has specialized knowledge in the area”).

The Public Auditor’s entire authority with respect to debarment proceedings is set forth in 5 GCA § 5705 which unambiguously says that the Public Auditor may review decisions taken by the CPO *to debar under § 5426*, and further that the limited scope of this review is to “***decide whether, or the extent to which, the debarment or suspension was in accordance with the statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair.***”

5 GCA § 5705. Suspension or Debarment Proceedings. (a) Scope. This § 5705 applies to a review by the Public Auditor of a decision under § 5426 of this Chapter.

(b) Time Limitation on Filing an Appeal. The aggrieved person shall file his/her appeal with the Public Auditor within sixty (60) days of the receipt of a decision under Subsection (c) of § 5426 of this Chapter.

(c) Decision. ***The Public Auditor shall decide whether, or the extent to which, the debarment or suspension was in accordance with the statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair.*** The Public Auditor shall issue her or his decision within thirty (30) days of the completion of the hearing on the issue. (Emphasis added).

As used in § 5705(a) above, a “*decision under § 5426*” means a written decision of debarment issued by the CPO in the event debarment is deemed appropriate. 5 GCA § 5426(c) (the

CPO “shall issue a written decision to debar or suspend.”). When 5 GCA § 5426 and § 5705 are read together, it is clear that the Public Auditor’s review with respect to debarment decisions is *limited to written decisions of debarment issued by the CPO after a hearing held pursuant to the Administrative Adjudication Law.*

The procurement regulations support and clarify this conclusion. According to 2 GARR § 12114, the Public Auditor is only authorized to review debarment or suspension actions to determine “*whether, or the extent to which the debarment or suspension was imposed on a Contractor in accordance with applicable statutes, regulations and the best interest of the government or any autonomous agency or public corporation, and was fair.*”

With respect to the Hakubotan Building, and in her discretion, the CPO did not hold a debarment or suspension hearing, nor has she issued a written decision imposing debarment or suspension under 5 GCA § 5426(a) and (c). Because there does not exist a written debarment “decision under § 5426” that “was imposed on a contractor” as is clearly required by 5 GCA § 5705 and 2 GARR § 12114 in order to invoke the Public Auditor’s review, this means that these proceedings are *not* “properly before the Public Auditor.”

Although the Public Auditor can certainly *recommend* debarment,⁵ he and his office cannot *sua sponte* initiate and/or conduct debarment proceedings. Rather, the authority of the Public Auditor is limited to reviewing the CPO’s written decision *to debar*, and not her discretionary decision *to not debar*. The plain language of 5 GCA § 5426 and § 5706 is clear and unambiguous,

⁵ See e.g., OPA Report No. 03-08, GUAM INTERN’L AIRPORT AUTHORITY, SUPPLEMENT TO GIAA’S FY2002 REPORT ON COMPLIANCE AND INTERNAL CONTROL at pp. 2 and 9 (Sept. 2003) (Public Auditor recommended that the Attorney General determine if debarment of contractor is appropriate after electrical and mechanical contract increased by \$21 million and was used to pay favored subcontractors for bronze statues, a gliding event and other excessively priced projects).

and neither the Public Auditor nor the courts of Guam may read into it any further. *Govt. of Guam v. Kim*, 2015 Guam 15, ¶ 22 (plain reading construction applies when statute is clear on its face).

B. The Attorney General has not Concurred That Debarment Proceedings may Take Place.

Under 5 GCA § 5426(a), in order for the CPO to commence debarment proceedings, it is required that she first consult with the Attorney General and obtain his concurrence. The procurement regulations also reiterate the requirement of the Attorney General's concurrence to a debarment proceeding:

2 GARR §11112. Right of the Territory to Debar or Suspend [Non-employees who Breach Ethical Standards]. *****

(4) Debarment or suspension may be imposed by the Procurement Policy Office in accordance with the procedures set forth in 5 GCA §5426 (Authority to Debar or Suspend) for breach of the ethical standards of this Chapter, provided that *such action may not be taken without the concurrence of the Attorney General.*

The Attorney General has not concurred to these debarment proceedings. The procurement law and regulations are clear that no debarment action, *including this one*, may be taken without his concurrence. If the CPO is does not have the power to debar unless the Attorney General concurs, then the Public Auditor likewise does not have that same power.

C. These Proceedings Violate the Administrative Adjudication Law.

The procurement regulations require that all debarment or suspension proceedings taken against non-government employees be made in accordance with the Administrative Adjudication Law (AAL). This is a non-negotiable and non-waivable statutory requirement.

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

(e) Due Process. *All procedures under this Section shall be in accordance with the Administrative Adjudication Law.* (Emphasis added).

See also, 2 GARR § 11112(e) (“All procedures under this Section [to debar or suspend non-government employees] shall be in accordance with the *Administrative Adjudication Law*.”).

Here, this case is being handled as an Order to Show Cause, which is a judicial proceeding, and not as Executive Branch administrative adjudication. Although it is arguable that the two proceedings are similar because both offer an opportunity to be heard and to present evidence, that is not what the law demands. ***Adherence to the statutory requirement that debarment proceedings be strictly conducted pursuant to the AAL is a legal duty, a violation of which cannot be ignored.***

Where a remedy in law is clearly given and each step is set forth in particular detail as it is in the AAL, observance of the law is an absolute requirement. No authority or discretion to waive or deviate can be taken or implied. To do so is an abuse of discretion and a violation of all involved parties’ right to due process.

“A trial court has no “discretion” in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992).

“Abuse of discretion occurs when a trial court's decision is based on an erroneous conclusion of law or where the record contains no evidence upon which a court could have rationally based its decision.” *Navarro v. Navarro*, 2000 Guam 31, ¶ 6. *See also*, *Guam v. Perez*,

2004 Guam 4, ¶ 7 (abuse of discretion occurs when there is an “erroneous conclusion of law” or when “the record contains no evidence on which the [trial court] could have rationally based the decision.”); “An abuse of discretion occurs where there is arbitrary determination, capriciousness or ‘whimsical thinking.’” *Phillips v. Ceribo*, 1984 WL 48862, at *2 (D.Guam App.Div. 1984).

II. THE PUBLIC AUDITOR DOES NOT HAVE JURISDICTION TO DECIDE NON-EMPLOYEE ETHICAL COMPLAINTS.

A. Ethics Complaints Against Non-Employees are the Jurisdiction of the Procurement Policy Office.

On July 8, 2020, GSA brought a motion for summary judgment in the previously consolidated case wherein it raised the argument that this case (OPA-PA-20-003) should be dismissed because jurisdiction over ethical complaints against non-government employees is statutorily the provenance of the Procurement Policy Board and not the Public Auditor. Subsequently, on July 29, 2020, the Public Auditor issued an *Order* that the parties submit further briefing on the issue of jurisdiction. On August 7, 2020, GSA filed a *Brief of Jurisdiction*, which further analyzed and advanced this argument.

At the Third Status Hearing held on August 17, 2020, the Public Auditor stated that he “want to keep [the issues raised in the summary judgment motion] open, I’ve not dismissed that.” The Public Auditor also indicated that he wished to wait on a decision until after all evidence could be put on the record at the formal hearing on the merits.⁶

⁶ [https://media.guamopa.net/opasiteaudio/opa-pa-19-011 and 20-003 third status conference - august 17 2020.m4a](https://media.guamopa.net/opasiteaudio/opa-pa-19-011%20and%2020-003%20third%20status%20conference%20-%20august%2017%202020.m4a) at 5:00 to 6:12.

However, after the formal hearing when the *Decision* was issued on December 11, 2020, the Decision was silent with respect to the jurisdiction of the OPA vs. the Procurement Policy Office, and no analysis or mention of it was made.

Jurisdiction is a fundamental threshold issue, and the Public Auditor has a duty to address it in a written adjudicatory decision. Otherwise the administrative record will remain incomplete. “The OPA is required by law to substantively engage in issues before it, and prepare a written decision detailing the evidence it relied upon in rendering that decision.” *TLK Marketing Co., Ltd. v. GAB, OPA, and HIC Inc.*, CV0914-16, DECISION & ORDER at p. 12, ll. 3-5 (Super. Ct. Nov. 13, 2018). “[T]he OPA’s failure to address this important issue renders its decision arbitrary, capricious, and contrary to law.” *Id.* at p. 12, ll. 15-18.

GSA respectfully re-submits and reincorporates its previous argument that with respect to non-government employee contractors, the procurement law at 5 GCA § 5651 unambiguously requires that procurement ethic complaints be filed with the Procurement Policy Office which is under the control of the Director of the Department of Administration per the Governor’s Executive Order 2019-10.

As a matter of law, nothing in 5 GCA § 5651 or anywhere else authorizes an ethical complaint to be filed as a procurement protest appeal with the Public Auditor. And moreover once again, just as the CPO requires the concurrence of the Attorney General in order to impose debarment or suspension, § 5651(d) also clearly states the requirement that any debarment or suspension action imposed by the Procurement Policy Office likewise “*may not be taken without the concurrence of the Attorney General.*”

II. SH ENTERPRISES DID NOT ACT UNETHICALLY WITH RESPECT TO THE HAKUBOTAN BUILDING.

In the *Decision* of December 11, 2020, the Public Auditor held that SH violated the prohibition against gratuities and kickbacks set forth in in the procurement law at 5 GCA § 5630. Just as the Public Auditor's *Decision* of December 11, 2020, did not address the jurisdiction of the Procurement Policy Office to oversee ethical complaints against non-employees, the *Decision* also did not address the authority of the Governor under 5 GCA § 22704(c) to acquire office space outside of a formal procurement if the rental cost is less than \$10,000 or the term is less than five years.⁷

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

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

Under 5 GCA § 22704(c), a sealed bid procurement applies to leases where the total sum to be paid is less than \$10,000 or where the leasehold term is over five years. Because the Hakubotan Building space was donated to the Governor for no charge and for a term of less than two weeks, a sealed bid procurement was *not required to be done*.

It goes without saying that the procurement law and its ethical provisions at 5 GCA §§ 5650-5651 do not apply where there is no procurement. The Governor's acquired the Hakubotan

⁷ PURCHASING AGENCY'S BRIEF ON JURISDICTION, OPA-PA-19-011 & OPA-PA-20-003 at pp. 4-7 (Aug. 7, 2020); https://www.opaguam.org/sites/default/files/opa-pa-19-011_and_20-003_purchasing_agencys_brief_on_jurisdiction.pdf

Building space pursuant to her clear statutory authority under 5 GCA § 22704(c), and the acquisition legally falls outside procurement as a matter of law. Because the procurement laws and regulations do not apply to the office space in the Hakubotan Building, and then by extension the procurement ethical remedies and prohibitions also do not apply, and SH Enterprises cannot be found to be in violation of them.

CONCLUSION

SH Enterprises should not be suspended or debarred for breach of the procurement law's ethical standards because the findings made by the Public Auditor in *Decision* of December 11, 2020, are in error and violate due process.

As a matter of law, it is the Chief Procurement Officer's discretion to hold a debarment or suspension hearing. Under 5 GCA § 5705 and 2 GARR § 12114, the Public Auditor's appellate jurisdiction is only invoked when and if the CPO issues a written decision imposing debarment on a contractor. The Public Auditor has no discretion to review or second guess the CPO's exercise of her discretion to not debar or to not hold debarment proceedings.

Additionally, all debarment and suspension proceedings require the concurrence of the Attorney General. 5 GCA § 5426(a); 2 GARR §11112(4). Here, the Attorney General has not concurred to these debarment proceedings. This is a violation of due process and an abuse of discretion. It is a further violation of due process and an abuse of discretion for these proceedings to be held as a judicial Order to Show Cause and not a proceeding under the Administrative Adjudication Law as statutorily mandated by 5 GCA § 5651(e) and 2 GARR § 11112(e).

Finally, SH Enterprises cannot be found to have violated the procurement law ethical standards because the Governor's use of the Hakubotan Building was not a procurement. Pursuant to 5 GCA § 22704(c), the Governor was authorized to acquire office space without a formal sealed bid procurement if the rental cost is less than \$10,000 or the term is less than five years. Because the Hakubotan Building space was donated to the Governor for no charge and for a term of less than two weeks, a sealed bid procurement was *not required to be done* and the ethical provisions of the procurement law do not apply.

For all of the reasons set forth herein, Purchasing Agency GSA respectfully submits that good cause has been shown and established that SH Enterprises "should not be suspended or debarred for breach of Ethical Standards of the procurement law by providing a prohibited favor to the territory."

Respectfully submitted on this 25th day of January, 2021.

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