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[eFile] OPA-20-003: SH Enterprises, Inc.'s Trial Brief re OSC

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Håfa Adai Jerrick,

Please find the attached for filing in the above-referenced matter, as follows:

- SH Enterprises, Inc.'s Trial Brief re OSC

Kindly return a filed stamped copy through email.

Please let us know if you have any questions or concerns. Thank you for your attention to this matter.

Sincerely,

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9 **BEFORE THE PUBLIC AUDITOR**

10 **PROCUREMENT APPEALS**

11 IN THE APPEAL OF:

12 APPEAL NO. OPA-PA-20-003

13 BASIL FOOD INDUSTRIAL SERVICES
14 CORPORATION,

15 Appellant.

16 **INTERESTED PARTY SH**
17 **ENTERPRISES, INC.’S**
18 **TRIAL BRIEF**

19 **INTRODUCTION**

20 Appellant Basil Food Industrial Services Corporation (“Basil”) appealed a decision by the
21 General Services Agency (“GSA”) on Basil’s February 7, 2020 protest of the November 8, 2019
22 award of GSA Bid No. GSA-056-19 to Interested Party SH Enterprises (“SH”). On December
23 11, 2020, the Public Auditor issued an Order to Show Cause to SH on why it should not be
24 suspended or debarred for breach of Ethical Standards of the Procurement Law by providing a
25 prohibited favor to the territory.. SH now submits this trial brief in response to the Order to
26 Show Cause and pursuant to the January 11, 2020 Scheduling Order.

27 **BACKGROUND**

28 For several years there have been only two vendors who have provided home delivery of
elderly food services and elderly nutrition program under the Department of Public Health and
Social Services (DPHSS) – Appellant Basil Food Industrial Services Corporation (“Basil”) and
SH Enterprises (“SH”). The procurement for these services under the program has been the
subject of much controversy, protests, and appeals.

On September 25, 2019, GSA issued GSA Bid No. GSA-056-19 (the “IFB”) for Nutrition
Services for the Comprehensive Management, Operations, and Maintenance of the Elderly

1 Nutrition Program, Congregate Meals and Home-Delivered Meals Components. IFB,
2 Procurement Record (“PR”) 1-04 at 3. The term for the contract was three (3) years with the
3 option to renew for two (2) additional one fiscal-year terms at the Department of Health and
4 Social Services’ (DPHSS) discretion. *Id.* at 53.

5 On November 8, 2019, GSA served SH with its Notice of Intent of Possible Award
6 (“NOI”) of the contract for the IFB to SH. NOI, PRI-09 at 1. GSA also issued Purchase Order
7 Number P206A00841 to SH on November 8, 2019. On November 22, 2019, Basil filed a protest
8 challenging GSA’s award of the contract to SH. The GSA issued a decision denying Basil’s
9 Protest on November 30, 2019 (“GSA Decision”). *See Notice of Appeal*, Ex. G (GSA Decision)
10 at 1. SH began delivering meals on December 1, 2019. *See Purchase Order*, PR11-14 at 5. On
11 December 16, 2019, Basil appealed the GSA Decision denying its Protest.

12 On February 7, 2020, Basil submitted a second protest to GSA pursuant to 5 GCA 5425(a)
13 alleging that SH had violated the Contracts Clause of GSA-056-19 incorporated by the Affidavit
14 Regarding No Gratuities and Kickbacks. *Notice of Appeal*, Exhibit F- Basil’s Protest (Feb. 27,
15 2020). Specifically, Basil contended that SH “willfully breached the contract” by donating space
16 to the Governor’s office after signing the Affidavit Regarding No Gratuities or Kickbacks in
17 connection with the contract. *Id.* at p.4. On February 8, 2020 GSA issued a decision denying
18 Basil’s protest.

19 Basil then submitted its second appeal in connection with GSA-056-19 on February 27,
20 2020. *Notice of Appeal*, (Feb. 27, 2020). Basil’s Notice of Appeal confirms the “Appeal Origin”
21 was from “Basil’s protest of the contract awarded to SH...” *Id.* at p.2. Basil contended that the
22 Public Auditor had jurisdiction over the decision on the protest of method of sources, selection,
23 solicitation or award of a contract pursuant to 5 G.C.A. § 5425(e).

24 On March 13, 2020, the OPA consolidated these two appeals into a single appeal. *Order*
25 *Consolidating Appeals* (Mar. 13, 2020). The Appeal was heard on October 5-7, 2020. The Public
26 Auditor granted Basil’s first protest in part, terminated SH’s contract, and deconsolidated OPA
27 Appeal NO. OPA-PA-20-003 pending an hearing on an order to show cause. SH now submits
28 this trial brief on the order to show cause.

1 **ARGUMENT**

2 The Public Auditor does not have the authority to debar or suspend a government
3 contractor on procurement appeal. The Public Auditor may only decide on appeal whether
4 debarment or suspension at the agency level was in accordance with law, in the best interests of
5 the government, and fair. It does not have the authority to review a decision at the agency level
6 to *not* debar or suspend a contractor. In any event, neither of those decisions is what occurred
7 here. Basil appealed a decision on the protest of the award of Bid No. GSA-056-199 pursuant to
8 Section 5425(a), and therefore a debarment and suspension matter is not properly before the
9 Public Auditor.

10 Even if the Public Auditor had the authority to debar or suspend a contractor on a
11 procurement appeal, it cannot do so without complying with the due process requirements of
12 Guam Procurement Law and the Administrative Adjudication Law. Reasonable notice and
13 meaningful opportunity for Basil to be heard, is not due process to SH. Even reasonable notice
14 and meaningful opportunity for SH to be heard would be insufficient, because the due process
15 rights required by statute under Guam Procurement Law and Administrative Law exceed such
16 minimum standards.

17 Finally, there can be no debarment or suspension because SH did not violate the Contracts
18 Clause in 2 GAR Division 4 § 11107(e), the Affidavit Regarding No Gratuities and Kickbacks,
19 nor the ethical standards of conduct in Article 11 of the Guam Procurement Law. The use of the
20 Hakubotan building was not *gratis*, and there was no connection whatsoever between the use of
21 the Hakubotan building and the challenged procurement – GSA-056-019, nor any other
22 procurement for that matter. Even if a violation were found, debarment or suspension of SH is
23 not in the best interests of the government nor fair. Neither GSA nor DPHSS has initiated
24 debarment or suspension against Basil under more compelling circumstances. The Public Auditor
25 would be imposing an inconsistent judgment over GSA and the Department of Public Health and
26 Social Services’ discretion of what is in the best interests of the governor and fair. Moreover, such
27 judgment would be unnecessarily punitive in light of the remedies available and already imposed
28 against SH.

1 **I. The Public Auditor does not have the authority to debar or suspend SH on this**
2 **procurement appeal.**

3 The Guam legislature limited the authority to debar or suspend a contractor to the Chief
4 Procurement Officer and the Procurement Policy Office. The Public Auditor may only review
5 decisions to debar or suspend under 5 G.C.A. § 5426(c) to determine if they were in accordance
6 in law, in the best interests of the government, and fair. The Public Auditor has no authority to
7 review decision *not* to debar or suspend a contractor under 5 G.C.A. § 5426(f) initiate and initiate
8 debarment or suspension proceedings on appeal. Basil did not comply with the statute and
9 regulations to petition GSA to debar or suspend SH. Therefore, no decision pursuant to Section
10 5426(c) is properly before the Public Auditor.

11 **A. Only the CPO and the Procurement Policy Office may debar or suspend a**
12 **contractor, and the Public Auditor’s review is limited to the CPO’s decision**
13 **to debar or suspend a contractor.**

14 The Public Auditor seeks to debar or suspend SH Enterprises presumably under the
15 authority of Section 5426 and Section 5706. Decision, p. 16, FN. 5 (Dec. 11, 2020). This exceeds
16 the Public Auditor’s authority. The authority to debar or suspend contractors is explicit in Guam
17 Procurement Law. *See* 5 G.C.A. § 5426(a)(“Authority to Debar or Suspend”); 5 G.C.A. §
18 5651(d)(“Right of the Territory to Debar or Suspend.”). Only the Chief Procurement Officer and
19 the Procurement Policy Office¹ have authority to debar or suspend a contractor. *Id.* No other entity
20 is authorized by law to debar or suspend a government contractor. Indeed, the Compiler of Laws’
21 Comment on Section 5651 - conferring the right to debar or suspend contractors on the Policy
22 Office – notes this section was modified from the Model Procurement Code such that “*the Policy*
23 *Office* acts as the Ethics Commission with respect to non-employees, in order to avoid the creation
24 of yet another commission[.]” *See* Comment to 5 GCA § 5651. The law defines, limits, and
25 compartmentalizes what entities have the authority and right to debar or suspend a contractor for
26 an alleged ethics violation. The Public Auditor’s jurisdiction does not include this authority.

27 Moreover, only the debarred or suspended person has the right to judicial or administrative
28 review under Section 5426(c). By contrast, no right of appeal is provided to a petitioner under

¹ The Procurement Policy Office was reactivated on April 2, 2019 by Executive Order 2019-10.

1 Section 5426(f). Although Section 5426(e) provides that a decision under Subsections (c) or (f)
2 are final and conclusive, unless fraudulent, “or an appeal is taken to the Public Auditor in
3 accordance with § 5706 of this Chapter,”the Public Auditor’s appellate role in debarment or
4 suspension proceedings is limited and discussed in 5 G.C.A. § 5705. 5 G.C.A. § 5705(a)(“Scope.
5 This § 5705 applied to review of a decision under § 5426 of this Chapter.”). Section 5705 limits
6 the Public Auditor’s authority on appeal of a decision under Section 5426 to deciding “whether,
7 or the extent to which, the debarment or suspension was in accordance with the statutes,
8 regulations and the best interest of the government or any autonomous agency or public
9 corporation, and was fair.” 5 G.C.A. § 5705(c).

10 The Public Auditor has construed this statute to mean that the Public Auditor does not
11 even have the jurisdiction to review decision to *not* debar SH. *In the Appeal of Teleguam holdings,*
12 *L.L.C., et. al.*, it stated:

13 The Public Auditor has no jurisdiction to debar PDS. GTA argues that the Public
14 Auditor can review GDOE’s decision not to institute debarment proceedings
15 against PDS. However, Guam’s Procurement Law prohibits this. The Public
16 Auditor is limited to deciding whether, or the extent to which a **debarment** was in
17 in accordance with the statues, regulations, in the best interests of the government,
18 and was fair[.] 5 G.C.A. § 5705(c). Here, GDOE did not debar PDS. Thus, the
19 Public Auditor lacks jurisdiction to review whether GDOE properly choose (*sic*)
20 not to debar PDS.

21 *In the Appeal of Teleguam Holdings LLC, et.al.*, OPA-PA-13-016, Decision and Order re
22 Purchasing Agency’s Motion to Dismiss for Lack of Jurisdiction, p. 4, (Jan. 7, 2014)(Emphasis
23 included).

24 Such an interpretation of the limits Section 5705 imposes on the Public Auditor is
25 consistent with the Supreme Court of Guam’s interpretation of the Public Auditor’s statutory
26 authority. In *Data Mgmt. Res., LLC, v. Office of Pub. Accountability*, 2013 Guam 27, the Supreme
27 Court determined that the Public Auditor has the power to revise technical specification on a
28 procurement appeal of a decision pursuant to Section 5425 because nothing in Guam’s
Procurement Law otherwise restricted the power to do so. *Id.* at ¶ 48. However, here, the Guam
Procurement Law expressly restricts the power the Public Auditor has on an appeal of a decision

1 pursuant to Section 5426. That restriction is in Section 5705 and must apply. Here, because Guam
2 Procurement law explicitly restricts the OPA's power of review of a decision under Section 5426,
3 to deciding whether or the extend which the CPO's debarment or suspension was in accordance
4 with the statutes, regulations, the best interest of the government, and fair. 5 G.C.A. § 5705(c).

5 The legislative history of Section 5705 and 5426 support that the Public Auditor's review
6 is limited to decisions to debar or suspend pursuant to Section 5426(c). Bill 224-32 attempted to
7 amend Section 5705 to expand the Public Auditor's review to decisions under Subsection (f). The
8 bill likewise sought to amend 5426(c) and (f) to give a petitioner under Section 5426(f), a decision
9 within the meaning of Section 5426(c) and the ability to appeal that decision. *See* Sections 3 and
10 12, An Act to Amend §5425, §5426, §5427, §5450, §5452, §5480, §5481 and §§5485 (a) and (b)
11 of Article 9, and §5703, §5705, §5706(b), §5707(a), §5708 of Article 12, Chapter 5, Title 5 of the
12 Guam Code Annotated relative to clarifying legal and contractual remedies in Guam Procurement
13 Law, 32nd Guam Legislature (2013).² The bill passed but was vetoed and never passed into law.³
14 Substantially similar Bill 20-33 was also vetoed.⁴

15 Bill 28-34 also unsuccessfully sought to amend 5426 and 5705 to give a petitioner seeking
16 to debar or suspend another contractor the right to an appealable decision not to debar or suspend
17 the contractor, and the right to review by the Public Auditor. *See* Sections 2 and 11, An Act to
18 Amend §§ 5425, 5426, 5427, 5450, 5452, 5480, 5481, and 5485(a) and (b), All of Article 9,
19 Chapter 5, Title 5, Guam Code Annotated; and to Amend §§ 5703, 5705, 5706(b), 5707(a) and
20 5708, and Add a New § 5710, All of article 12, Chapter 5, Title 5, Guam Code Annotated, Relative
21 to Legal and Contractual Remedies in Guam Procurement Law, Bill 28-34, 34th Guam Legislature
22 (2017).⁵ Bill 28-34 also sought to the have the Office of Public Accountability (OPA) perform
23 as the Procurement Policy Office until the Policy Office was established. *Id.* The bill was
24

25 ² [http://www.guamlegislature.com/Bills_Introduced_32nd/Bill%20No.%20B224-32%20\(COR\).pdf](http://www.guamlegislature.com/Bills_Introduced_32nd/Bill%20No.%20B224-32%20(COR).pdf)

26 ³ [https://www.guamlegislature.com/Vetoed_Bills_32nd/Bill%20No.%20B224-32%20\(COR\)%20VETO.pdf](https://www.guamlegislature.com/Vetoed_Bills_32nd/Bill%20No.%20B224-32%20(COR)%20VETO.pdf)

27 ⁴ [http://www.guamlegislature.com/Vetoed_Bills_33rd/Bill%20No.%2020-33%20\(COR\)%20VETOED.pdf](http://www.guamlegislature.com/Vetoed_Bills_33rd/Bill%20No.%2020-33%20(COR)%20VETOED.pdf)

28 ⁵ [http://www.guamlegislature.com/Bills_Introduced_34th/Bill%20No.%2028-34%20\(COR\).pdf](http://www.guamlegislature.com/Bills_Introduced_34th/Bill%20No.%2028-34%20(COR).pdf)

1 vetoed.⁶ In the Governor’s veto message, he noted that having the OPA perform the
2 administrative duties of the Policy Office was inconsistent from its purpose oft being independent
3 of the executive, legislative, and judicial branches of the Government of Guam.⁷

4 The Public Auditor’s reliance on Section 5706 would be misplaced. *See* Decision, p. 16,
5 FN. 5 (Dec. 11, 2020)(“Together, [5 G.C.A. 5426(e) and 5 G.C.A. § 5706] confer appellate
6 jurisdiction to the Public Auditor over decision by the CPO concerning debarments and
7 suspensions.”). Section 5706 states: “(a) Scope. This § 5706 applies to a review by the Public
8 Auditor of a decision under § 5427 of this Chapter.” 5 G.C.A. § 5706(a). Section 5706(c) likewise
9 restricts the Public Auditor’s power on a procurement appeal of a Section 5427 decision to
10 deciding “the contract or breach of contract controversy.” 5 G.C.A. § 5706. Section 5427 governs
11 contract and breach of contract controversies, not debarment or suspensions. *See* 5 G.C.A. §
12 5427(a). This is not what the Public Auditor seeks to do now; it has already terminated SH’s
13 contract in its December 11, 2020 Decision. *See* Decision, (Dec. 11, 2020). Instead, the Public
14 Auditor seeks to debar or suspend SH. Debarment and suspension is not a breach of contract
15 controversy and therefore outside the Public Auditor’s authority.

16 **B. A debarment or suspension matter is not properly before the Public Auditor.**

17 Even if the Public Auditor had the authority to review a Section 5426(f) decision not to
18 debar or suspend a contractor, the Public Auditor has not acquired jurisdiction over such a matter.
19 Section 5703 of Guam Procurement Law defines the Public Auditor’s jurisdiction. The Public
20 Auditor’s jurisdiction to hear a procurement appeal is limited by whether the appeal and issues
21 are “properly submitted” to him in the first instance. *In re Data Mgmt Resources, LLC*, OPA-PA-
22 12-007, Decision and Order, p.3 (Jul. 13, 2012). “An issue that is not presented in accordance
23 with either procurement regulations or the Guam code is not ‘properly submitted.’ It is well settled
24 that an appeal the OPA of a procurement protest is dependent upon the existence of an agency
25 level protest and Decision regarding that protest.” *Id.*

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27
28 ⁶ [http://www.guamlegislature.com/Voting_Records_34th/Bill%20No.%2028-34%20\(COR\)%20veto.pdf](http://www.guamlegislature.com/Voting_Records_34th/Bill%20No.%2028-34%20(COR)%20veto.pdf)

⁷ http://www.guamlegislature.com/Mess_Comms_34th/Doc.%20No.%2034GL-18-2440.pdf

1 The issue of whether a government contractor should be debarred or suspended by the
2 CPO must be presented in accordance with 5 G.C.A. § 5426(f). No such protest existed at the
3 agency level, and therefore no such decision under Section 5426 is properly before the Public
4 Auditor. Moreover, even if the CPO's February 8, 2020 decision could be construed as a Section
5 5426(f) decision, such decision is not appealable to the Public Auditor and cannot possibly ever
6 be properly before him.

7 What Basil did instead was submit a protest to GSA pursuant to 5 GCA 5425(a). *See*
8 Notice of Procurement Appeal, Exhibit F (Feb. 27, 2020). Section 5425(a) gives any actual or
9 prospective bidder the right to protest the award of a contract to the Chief Procurement Officer or
10 head of a purchasing agency. 5 G.C.A. § 5425(a). Basil's February 7, 2020, protest of the award
11 of GSA-056-019 repeats in no uncertain terms that it is a "protest *of the award* of Bid No. GSA-
12 056-199 issued by GSA to SH..." *Id.* Basil further provided that its protest of the award was
13 pursuant to 5 G.C.A. § 5425(a). *Id.* Basil summarized the thrust of its protest of the award as
14 follows:

15 Basil *protests the award* of GSA-056-019 to S.H. Enterprises because S.H.
16 Enterprises donated approximately +/- 5,000 square feet of commercial space...in
17 direct contravention *to the contract specifications set forth in GSA-056-019* and
18 is a violation of 2 GAR, Div. 4, § 11107(4)...and 5 G..C.A. § 5630(a)[.]

19 Notice of Procurement Appeal, Exhibit F - Basil's Protest, p.3 (Feb. 27, 2020). (Emphasis added).
20 Basil contended that SH "willfully breached the contract" by donating space to the Governor's
21 office after signing the Affidavit Regarding No Gratuities or Kickbacks in connection with the
22 contract. *Id.* at p.4. Basil again reiterates that the remedy it seeks it to terminate SH's contract. *Id.*
23 at p.5.

24 Debarment or suspension was literally only mentioned once in Basil's protest - as part of
25 Basil's laundry list prayer for relief - by characterizing it as a "remedy" to Basil's Section 5425
26 protest. However, the remedies to solicitations or awards in violation of law are found in Sections
27 5450-5452 of the Guam Procurement Law, and do not include debarment or suspension. 5 G.C.A.
28 §§ 5450-5452 (remedies prior to and after award where it is determined upon administrative or

1 judicial review that a solicitation or award of a contract is in violation of law). The requested
2 remedy was simply not authorized under the claim for relief – the continuous award of the contract
3 to SH after SH’s alleged breach.

4 Basil’s Notice of Appeal reinforces that its protest was pursuant to Section 5425(a). In it,
5 it confirms the “Appeal Origin” was from “Basil’s protest of the contract awarded to
6 SH...” Notice of Procurement Appeal, p.2 (Feb. 27, 2020). Basil contended that the Public
7 Auditor had jurisdiction over the decision on the protest of method of sources, selection,
8 solicitation or award of a contract pursuant to 5 G.C.A. § 5425(e). In Basil’s statement supporting
9 the appeal it again emphasizes that its protest was based on SH’s alleged violation of its contract
10 *Id.* at p. 12 (alleging donation of Hakubotan building was “signification violation of the
11 contract...”).

12 It was only for the first time on appeal, that Basil attempted to invoke 5 G.C.A § 5651 as
13 a remedy to its protest pursuant to Section 5425. *Id.* at p. 11. This is not authorized by law. The
14 law separates the CPO and Procurement Policy’s Office’s authority to debar and suspend.
15 *Compare* 5 G.C.A. § 5426 and § 5651. The remedies to be sought under 5 G.C.A. § 5651(b) can
16 only be afforded by the Procurement Policy Office. Basil did not petition that office, and its
17 decisions are not appealable to the Public Auditor anyway. Further, Basil did not invoke the
18 CPO’s authority to debar or suspend through a petition under Section 5426 and therefore, this
19 matter is not properly before the Public Auditor. Quite simply, Basil filed a Section 5425 protest
20 to challenge a contract award, then threw in a request to debar or suspend on appeal without
21 initiating the proper procedure at the agency level.

22 Basil failed to present the issue of debarment or suspension to the CPO in accordance with
23 the procurement regulations and Guam Procurement Law. There was no agency level petition to
24 debar or suspend pursuant to Section 5426. Therefore, it was not properly submitted. In
25 accordance with *In re Data Mgmt Resources, LLC*, OPA-PA-12-007, Decision and Order, (Jul.
26 13, 2012), the Public Auditor must find that it lacks jurisdiction over the issue of debarment or
27 suspension of SH.

1 **II. Debarment or suspension violates SH’s due process rights.**

2 Debarment and suspension proceedings before the Public Auditor on appeal denies SH
3 the due process required by law. Reasonable notice and a meaningful opportunity to Basil to be
4 heard on their appeal, is not due process to SH who would face debarment or suspension. Indeed,
5 it is impossible for SH to be afforded the statutory due process protections required by law via a
6 debarment or suspension proceeding before the Public Auditor. SH would be deprived of the
7 three levels of review required of the CPO, the Department of Public Health and Social Services,
8 and the Attorney General. Moreover, SH would be denied the more expansive appellate rights
9 guaranteed by Guam Procurement Law and the Administrative Adjudication Law. Therefore, an
10 action to debar or suspend cannot be taken by the Public Auditor on a procurement appeal.

11 **A. When a statutorily prescribed procedure exceeds minimum due process
12 standards, the statute must be followed.**

13 An agency of the government must scrupulously observe rules, regulations, or procedures
14 which it has established. When it fails to do so, its action cannot stand, and courts will strike it
15 down. This doctrine was announced in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S.
16 260 (1954). *Accardi* involved an attempt to bypass three levels of review required by the agency's
17 regulations. The regulations prescribed the procedure to be followed in processing an alien's
18 application for suspension of deportation. *Id.* at 265. The procedure called for decisions at three
19 separate administrative levels below the Attorney General—hearing officer, Commissioner, and
20 the Board of Immigration Appeals. *Id.* at 266. Thus, the regulations did not allow the Attorney
21 General to sidestep or dictate the action of the lower agency review by the Board. *Id.* at 267.
22 However, the Attorney General did just that, by dictating the Board’s decision. *Id.* The Supreme
23 Court therefore vacated a deportation order of the Board because the procedure leading to the
24 order did not conform to the relevant regulations. *Id.* at 268. The failure of the Board and of the
25 Department of Justice to follow their own established procedures was held a violation of due
26 process. *Id.*

27 Here, any action by the Public Auditor to debar or suspend SH would sidestep and dictate
28 the action of the CPO, contrary to the Guam Procurement Law and regulations. 2 GARR § 9102
prescribes the procedure to be followed in debarment or suspension. It requires three levels of

1 review before – by the CPO, the affected using agency, and the Attorney General – before
2 debarment or suspension proceedings may be initiated. *Id. Id.* at § 9102(b)-(c). Further, the
3 regulations provide that the contractor subject to debarment or suspension may request a hearing
4 before a final decision may issue. *Id.* at § 9102. By initiating debarment or suspension proceedings
5 at the procurement appeal level, the Public Auditor would be sidestepping and dictating its
6 decision to the CPO, the Department of Public Health and Social Services, and the Attorney
7 General of Guam. Under the *Accardi* doctrine, such failure to follow the Guam Procurement
8 Regulations would be a violation of due process.

9 It is of no significance that the procedures or instructions which the Public Auditor may
10 establish are more generous than what Constitutional due process requires. In *Service v. Dulles*,
11 354 U.S. 363 (1959), the Supreme Court nullified the discharge of a foreign service officer
12 because of the State Department's failure to follow its own procedures. The Court concluded that
13 it made no difference that the State Department had no statutory or constitutional obligation to
14 establish the procedure in question: “While it is of course true that * * * the Secretary was not
15 obligated to impose upon himself these more rigorous substantive and procedural standards, * *
16 * having done so he could not, so long as the Regulations remained unchanged, proceed without
17 regard to them.” 354 U.S. at 388. *See also Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959).

18 Moreover, the *Accardi* doctrine requires reversal of an administrative determination
19 irrespective of whether a new trial would produce the same verdict. In both *Yellin v. United States*,
20 374 U.S. 109, 121 (1963), and *Accardi* itself, 347 U.S. at 268, the Supreme Court vacated
21 government actions and remanded for new determinations consistent with the established
22 procedures even though the Court doubted that these procedures would lead to a different result.
23 Even though it was unlikely that the appellant would prevail on remand, the Court held that he
24 “should at least have the chance given him by the regulations.” *Yellin v. United States*, 374 U.S.
25 at 121.

26 Many state courts have expressly applied the *Accardi* doctrine ... When a statutorily
27 prescribed procedure exceeds minimum due process standards, the statute must be followed.
28 *People v. Johnson* 109 P.2d 770, 42 C.A.2d Supp. 827, 833, 109 P.2d 770, 774 (1941) (““The

1 provision for the hearing and for notice thereof, being a part of the statutory embodiment of due
2 process, must be regarded as mandatory, for, even though some other form of hearing or some
3 different notice might have been regarded as sufficient, the statute has not so declared, and
4 compliance must be had with what has been, not merely what might have been, provided.”). *See*
5 *also, Western Union Telegraph Co. v. Industrial Com’n of Minn.*, 24 F.Supp. 370, 377 (a State or
6 Federal statute can require more in the way of due process than required by the Fourteenth
7 Amendment) citing *Morgan v. United States*, 298 U.S. 468, 477 (1938). *See also, Beck v.*
8 *Ransome-Crummey Co.*, 42 Cal. App. 674, 679, 184 P. 431, 433 (Cal. Ct. App. 1919)(“[I]f the
9 statute requires as the initial step in the process of depriving a man of his property the performance
10 of a specifically defined act, unless that act be performed substantially no jurisdiction–power–
11 exists for further action in that proceeding against him.”).

12 **B. The Due Process Requirements of Guam Procurement Law, Guam**
13 **Procurement Regulations, and the Administrative Adjudication Law.**

14 Reasonable notice and hearing before the Public Auditor is insufficient due process for
15 government contractors facing debarment or suspension. *See* Decision, p. 16 (Dec. 11,
16 2020)(“BASIL⁸ will receive a reasonable notice and meaningful opportunity to be heard on its
17 appeal.”). The statutorily prescribed procedure for debarment or suspension exceeds minimum
18 due process standards. The statutorily prescribed procedure for a government contractor facing
19 debarment or suspension can be found in two sections of Guam Procurement Law. The section
20 governing the CPO’s authority and procedure for debarment and suspension provides in pertinent
21 part:

22 (a) Authority. After reasonable notice to the person involved and reasonable
23 opportunity for that person to be heard, the Chief Procurement Officer, the Director
24 of Public Works or the head of a purchasing agency, *after consultation with the*
25 *using agency and the Attorney General*, shall have authority to debar a person for
26 cause from consideration for award of contracts. The debarment shall not be for a
period of more than two (2) years. The same officer, *after consultation with the*
using agency and the Attorney General, shall have authority to suspend a person

27 ⁸The due process required by Guam statutes and the Constitution require that the notice and
28 opportunity to be heard be afforded to SH as the one who faces debarment or suspension, not
Basil.

1 from consideration for award of contracts if there is probable cause for debarment.
2 The suspension shall not be for a period exceeding three (3) months. *The authority*
3 *to debar or suspend shall be exercised in accordance with regulations promulgated*
4 *by the Policy Office.*

...

4 (c) Decision. The Chief Procurement Officer, the Director of Public Works or the
5 head of a purchasing agency shall issue a written decision to debar or suspend. The
6 decision shall:

7 (1) state the reasons for the action taken; and (2) inform the debarred or
8 suspended person involved of its rights to judicial or administrative review
9 as provided in this Chapter.

...

10 (e) Finality of Decision. A decision under Subsections (c) or (f) of this Section shall
11 be final and conclusive, unless fraudulent, or an appeal is taken to the Public
12 Auditor in accordance with § 5706⁹ (*sic*) of this Chapter.

13 5 G.C.A § 5426. (Emphasis added).

14 The section governing the Procurement Policy Office's authority and procedure for
15 debarment and suspension provides in pertinent part:

16 (d) Right of the Territory to Debar or Suspend. Debarment or suspension may be
17 imposed by the Procurement Policy Office in accordance with the procedures set
18 forth in § 5426 of this Chapter for breach of the ethical standards of this Chapter,
19 *provided that such action may not be taken without the concurrence of the Attorney*
20 *General.*

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

23 5 G.C.A. § 5651 (d) & (e). (Emphasis added). The Compiler of Laws noted the enactment of this
24 section was modified from the Model Procurement Code such that "procedures [for debarment or
25 suspension] are to be under the Administrative Adjudication Law *rather than some undefined and*
26 *variable 'due process' requirement.*" See Comment to 5 GCA § 5651. (Emphasis added).

27 The intertwining requirements of these statutes and referenced regulations governing
28 debarment and suspension cannot be overemphasized. Section 5426(a) provides that the CPO's
procedures to debar or suspend must in accordance with regulations promulgated by the

⁹ Although Section 5426 refers to Section 5706, this appears to be in error. Section 5706 states that the scope of the section applied to review of a decision under § 5427, while Section 5705 states it applies to review by the Public Auditor of a decision under Section 5426.

1 Procurement Policy Office. In turn, Section 5651(e) provides that the Procurement Policy’s
2 Office’s procedures to debar or suspend shall be in accordance with the Administrative
3 Adjudication Law, and not some other undefined and variable due process requirement. The
4 procurement regulations confirm that the procedures for the CPO to debar or suspend a contractor
5 must be in accordance with “**the Administrative Adjudication Law.**” 2 GARR § 9102(g).
6 (Emphasis included). Further, whether the action is initiated by the CPO or the Procurement
7 Policy Office, the procedure for debarment or suspension cannot be initiated without the Attorney
8 General’s concurrence. 5 G.C.A §5426(a); 5 G.C.A. § 5651(d); 2 GARR §11112(4).

9 The statutorily prescribed procedures within the Guam Procurement Law and
10 Administrative Adjudication Law exceed minimum due process standards, and the statutes must
11 be followed. *See People v. Johnson*, 42 C.A.2d Supp. at 833. Reasonable notice and meaningful
12 opportunity to be heard by Basil on its appeal, does not meet the due process requirements that
13 must be afforded to SH. An accusation must first set for the written statement of charges, the
14 acts or omissions with which SH, has been charged and the statutes and regulations with which
15 SH is alleged to have violated. 5 G.C.A. § 9202. The accusation must be verified by a public
16 officer in their official capacity. *Id.* at § 9203. The notice of hearing on the accusation must
17 provide SH with notice of the right to the issuance of subpoenas. *Id.* at § 9216. SH must have
18 the right to petition to compel the deposition of any witnesses. *Id.* at § 9218. Finally, SH shall
19 have the right to petition for reconsideration after the hearing. *Id.* at § 9235.

20 Guam Procurement Law also grants contractors facing debarment or suspension more
21 expansive appeal rights. Unlike appeals of decisions from the Public Auditor to the Superior Court
22 of Guam that must be made within 14 days, actions in the Superior Court to determine whether
23 the debarment or suspension is in accordance with statutes and regulations may be made within
24 six (6) months after decision by the Procurement Policy Office (section 5651) or Procurement
25 Appeal Board (5707). *Compare* 5 G.C.A. § 5481(a) and (b).

26 Finally, the most prejudicial deprivation of due process to SH is the absence of
27 consultation with the using agency, the Department of Public Health and Social Services, and a
28 finding of the probable cause by the Attorney General. *See* 5 G.C.A. § 5426(a) and § 5651(d). It

1 is impossible for SH to be afforded all the statutory due process protections via a debarment or
2 suspension proceeding before the Public Auditor. Any action taken by the Public Auditor would
3 merely sidestep and dictate any position taken by the CPO, the Department of Public Health and
4 Social Services, and the Attorney General. Therefore, an action to debar or suspend SH on this
5 procurement appeal would be a violation of SH's due process rights and must not be taken.

6
7 **III. SH did not violate ethical standards and should not be debarred or suspended.**

8 SH did not violate the Contracts Clause in 2 GAR Division 4 § 11107(e), the Affidavit
9 Regarding No Gratuities and Kickbacks, nor the ethical standards of conduct in Article 11 of the
10 Guam Procurement Law. The use of the Hakubotan building was not *gratis*, because SH received
11 consideration of substantially equal or greater value from the Governor's use. Further, there was
12 no connection whatsoever between the Governor's use of the Hakubotan building and the
13 challenged procurement – GSA-056-019, nor any other procurement for that matter. Finally, the
14 debarment or suspension of SH is not in the best interests of the government nor fair.

15 **A. SH did not provide a gratuity or favor in violation of the Contract or Ethical**
16 **Standards.**

17 Basil's February 7, 2020 protest alleged that SH violated the contract for GSA-056-19 by
18 breaching the Contracts Clause as set forth in 2 GAR Division 4 § 11107(e) and the Affidavit
19 Regarding No Gratuities and Kickbacks. *See* Notice of Procurement Appeal, Exhibit F, p.3 (Feb.
20 27, 2020). SH's Affidavit Regarding No Gratuities and Kickbacks provides:

21 To the best of the affiant's knowledge, neither affiant, nor any of the offeror's
22 officers...are violating the prohibition against gratuities and kickback as set forth
23 in 2 GAR Division 4 § 11107(e).

24 Notice of Procurement Appeal, Exhibit I (Feb. 27, 2020). Section 11107(e) requires that bidders
25 promise they will not violate the prohibition against gratuities and kickback set for the in § 11206
26 of the Guam Procurement Regulations. 2 GAR Division 4 § 11107(e).

27 Basil also argues the donation of the Hakubotan space "violated 2 GAR, Div. 4, §
28 11107(4) and 5 G.C.A. § 5630(d) which prohibits favors to the government." Notice of

1 Procurement, Appeal, Exhibit F, p.2 (Feb. 27, 2020). *See also Id.* at p.3 (“This donation is in
2 direct contravention to the contract specifications set forth in GSA-056-019 and is a violation of
3 2 GAR, Div. 4, § 11107(4) Favors to the government of Guam and 5 G.C.A. § 5630(d) Favors to
4 the Territory.”). Although the Contracts Clause and Affidavit Regarding No Gratuities and
5 Kickbacks does not address “favors” to the government as set for in 2 GAR, Div. 4, § 11107(4)
6 and 5 G.C.A. § 5630(d), Basil equates a “gratuity” with a “favor.” *Id.* at pp. 3-4 (“Based on these
7 definitions, gratuities and favors are one in the same.”). The Public Auditor seems to have
8 accepted this reasoning. *See* Decision, pp. 15-16 (Dec. 11, 2020)(finding that the use of the
9 Hakubotan space was a “favor” to the government and a breach of the representation against
10 “gratuity or kickbacks.”). Applying the reasoning that “gratuity” and “favor” are one in the same,
11 and assuming *arguendo* that the use of the Hakubotan space was a “favor,” one must still conclude
12 that SH did not breach any ethical standards, nor the Contracts Clause as incorporated into GSA-
13 056-19.

14 **1. The use of the Hakubotan building was not *gratis*.**

15 First, the use of the Hakubotan building was not *gratis* because SH received consideration
16 of substantially equal or greater value. Article 11 of Guam Procurement Law de fines a “gratuity”
17 as anything of more than nominal value, “*unless consideration of substantially equal or greater*
18 *value is received.*” 5 G.C.A. § 5601(f)(Emphasis added). Since Basil has argued, and the Public
19 Auditor has accepted, that gratuities and favors are the same based on their definitions in
20 regulation and statute, it follows that no “favor” can be found where the giver received
21 consideration of substantially equal or greater value.

22 The evidence will show that SH received consideration of substantially equal or greater
23 value for the Governor’s use of the Hakubotan building. The Hakubotan building was used for
24 approximately two weeks. Prior to that, the space had been vacant for two years and was dirty.
25 The Government installed permanent fixtures within the space, including a reception
26 area/counter, as well as foundations and pipes for the outdoor AC units. The Government also
27 deep cleaned the interior space as well as painted all the interior walls. The Government also
28 provided their own temporary restrooms and air condition units. Several government

1 representatives worked on the cleaning and improvements for approximately three (3) days. The
2 space is unoccupied today, but when last rented out, the rent started at \$4,000 per month and
3 ended at \$5,000 per month. Therefore, the consideration received for material, labor and
4 improvements to the space and building were of substantially equal or greater value, than the
5 approximate two weeks that the space was used.

6
7 **2. There is no relationship between the use of the Hakubotan building and GSA-056-19.**

8 Second, there is no nexus between use of the Hakubotan building by the Office of the
9 Governor with any matter related to GSA-056-19. Title 2 GAR, Div. 4, § 11107 requires that
10 for a gratuity to constitute a breach of the prohibition against gratuities, the gratuity must be made
11 as follows:

12 in relation to any proceeding, or application, request for a ruling, determination,
13 claim or controversy, or other particular matter...and in connection with any: (a)
14 decision; (b) approval; (c) disapproval; (d) recommendation; (e) preparation of any
15 part of a program requirement or a purchase request; (f) action to influence the
16 content of any specification or procurement standard; (g) rendering of advice; (h)
17 investigation; (i) auditing; or (j) other advisory capacity.

18 2 G.A.R. Div. 4, § 11107(b). Thus, Basil's allegation that SH breached the Contracts Clause must
19 show that the "*gratis*" use of the Hakubotan building was in relation to GSA-056-19 and in
20 connection with some government discretion exercised related to a matter regarding GSA-056-
21 19.

22 Neither GSA nor DPHSS had any role in the use of the Hakubotan Building for the war
23 claims processing center. The matter was handled entirely by the Governor's office. SH was
24 contacted by the Office of the Governor who told SH of their need for a space to set up the war
25 claims program. SH agreed to allow them temporary use of space within the Hakubotan building
26 for that purpose. The CPO, Claudia Acfalle, testified that she was only aware of the Office of the
27 Governor's use of the Hakubotan space incidentally through the media, and that it had no relation
28 to any procurement. Since 2 GAR, Div. §11107 requires there be a specific connection between
the Governor's use of the Hakubotan building and GSA-056-19 in order for there to be a breach

1 of Section 11107, there can be no finding that SH violated the Contracts Clause as set forth in
2 Section 11107(e) and the Affidavit Regarding No Gratuities and Kickbacks.

3
4 **B. Debarment and suspension are not in the best interests of the government nor fair.**

5 SH maintains that neither debarment nor suspension is within the Public Auditor’s
6 jurisdiction. Nevertheless, where the Public Auditor *is* authorized to review a decision to debar
7 or suspend, it is clear the Public Auditor must determine whether debarment or suspension is
8 “in...the best interest of the government” and “fair.” 5 G.C.A. § 5705(c). Therefore, should the
9 Public Auditor review the decision on Basil’s protest as one under Section 5426(c)¹⁰, the Public
10 Auditor should find that debarment or suspension of SH is not in the best interest of the
11 government, nor fair.

12 Basil has had food service contracts with the government stretching back to 2014. In a
13 span of 23 months while it had the elderly nutrition program contract, it received at least seven
14 (7) “C” and “D” ratings by DPHSS. During this period, GSA issued Basil a Notice of Default
15 because of its “D” rating. The notice stated that the contract may be terminated. GSA further
16 issued a Notice of Violation with Intent to Revoke. Basil continued to receive poor ratings off
17 and on again. In May 2016, DPHSS issued a closure notice for Basil’s facility until the newly
18 found violations were corrected. Finally, after Basil failed to correct these last set of noticed
19 violations, GSA terminated Basil’s contract. The decision was appealed by Basil up to the
20 Supreme Court, which upheld that the termination was proper.

21 Based on these circumstances, GSA could have properly initiated debarment and
22 suspension proceedings against Basil. It did not exercise its discretion to do so. It is not in the best
23 interests or fair for the Public Auditor to substitute its discretion on the procuring and using
24 agency to debar or suspend the only other contractor for this program, when GSA has chose not
25 to under the most egregious of circumstances.

26 It also bears repeating that Basil did not comply with the regulatory and statutory process
27 to pursue debarment or suspension, and instead pursued a protest of award of contract with GSA.

28

¹⁰ Decision, p. 16 (Dec. 11, 2020).

1 The remedies for a Section 5425 protest are limited to that of Sections 5450-5452 of the Guam
2 Procurement Law, and do not include debarment or suspension. It would be manifestly unfair to
3 subject SH to the most extreme remedies of debarment or suspension on a procurement appeal,
4 when the remedies for Basil's protest are limited to Sections 5450-5452 of the procurement law.
5 Basil has already obtained the remedy it sought and that is permitted under these statutes – the
6 termination of SH's contract.

7 Finally, it would not be fair to debar or suspend SH for what at most could be an
8 unknowing violation of 5 G.C.A. § 5631. To the best of SH's knowledge is did not violate the
9 prohibition against gratuities and kickbacks set forth in 2 GAR Division 4 § 11107(e). See
10 Notice of Procurement Appeal, Exhibit I (Feb. 27, 2020). SH did not seek out this situation. The
11 Office of the Governor contacted them and made SH sympathetic to their cause. This appeared
12 to be permissible. See 5 G.C.A. § 22408 and § 22704. Without any precedent, it would be
13 unreasonably punitive to impose debarment or suspension without a finding of intent by SH.

14 Section 5651 provides a range of remedies for breaches of ethical standards. 5 G.C.A. §
15 5651. It provides in pertinent part:

16 (b) Supplemental Remedies. In addition to existing remedies for breach of the
17 ethical standards of this Chapter or regulations promulgated hereunder, the
18 Procurement Policy Office, in connection with non-employees, may impose any
19 one or more of the following: (1) written warnings or reprimands; (2) termination
20 of transactions; and (3) debarment or suspension from being a contractor or
21 subcontractor under territorial contracts.

22 5 G.C.A. § 5651(b). Without precedent or *mens rea*, a written warning or reprimand is most
23 appropriate. However, the more severe remedy of termination of the contract has already been
24 imposed. Therefore it would unnecessarily punitive and unfair to impose the most extreme
25 remedy of debarment or suspension. Accordingly, even if the Public Auditor were authorized to
26 exercise his discretion over a debarment or suspension, it could not either action in the best interest
27 of the government nor fair pursuant to 5 G.C.A. § 5705(c).
28

1 **CONCLUSION**

2 The Public Auditor cannot debar or suspend SH. No legislative authority has been
3 conferred on the Public Auditor to conduct debarment or suspension proceedings, and the matter
4 is not properly before the Public Auditor. Any debarment or suspension proceedings initiated at
5 the procurement appeals level violates the due process required by the Guam Procurement Law
6 and Administrative Adjudication Law. Finally, debarment or suspension is simply unwarranted.
7 It is not in the best interest of the Government, and would be manifestly unfair.

8 Respectfully submitted this 25TH day of January, 2021.

9
10 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
Attorney for Interested Party SH Enterprises Inc.

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12 

13 _____
14 VANESSA L. WILLIAMS, ESQ.