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Re: OPA-PA-20-003 Decision

- For Review
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1 building as the War Claims Processing Center. This second appeal is consistent with the holding in
2 *Data Management Resources, v. Office of Public Accountability*, 2013 Guam 27, where the Guam
3 Supreme Court held that OPA had jurisdiction and authority to review a denial of a protest and
4 impose corrective actions to remedy the Chief Procurement Officer's (CPO's) errors and complete
5 the record. Title 5 G.C.A. § 5705 (c) makes it incumbent on OPA to decide whether, or the extent
6 to which, the CPO's denial of the petition was in accordance with the statutes, regulations, and best
7 interest of the government or any autonomous agency or public corporation, and was fair. SH failed
8 to show cause. It is necessary to protect the public interest and promote the government's policy of
9 conducting business with responsible persons. The risk that favor-giving and receiving, which
10 diminishes the procurement process's integrity and frustrates the Procurement Law's purposes, was
11 not eliminated to the extent that debarment would be unnecessary. The debarment for a period of
12 one year is warranted in this case.

15 II. JURISDICTION

16 The Public Auditor shall have the power to review and determine *de novo* any matter
17 properly submitted. 5 G.C.A. § 5703 (a). The threshold facts and basis for Basil's Protest were
18 discussed in OPA-PA-19-011 Decision.¹ In response to their FOIA request, Basil received
19 information that SH gave free use of the Hakubotan building to the Governor's Office for use as the
20 government's War Claims Processing Center. Basil timely protested the award of the *Manåmku'*
21 meals contract to SH on that basis and timely filed this Appeal to review the CPO's decision on the
22 protest. In the OPA-PA-19-011 Decision, SH violated the Ethical Standards² contrary to the CPO's
23 determination. Further, SH was ordered to show cause on why it should not be debarred or
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28 ¹ OPA-PA-19-011 Decision dated December 11, 2020 at 13-16.

² *Id.*, at 15-16.

1 suspended for the Ethical Standards violation.³ This Appeal continues the *de novo* review of Basil's
2 Protest seeking SH's debarment or suspension for the Ethical Standards.

3
4 **A. This Appeal's Protest included a petition to debar or suspend SH for violation of the**
5 **Procurement Law Ethical Standards.**

6 Basil petitioned properly before the CPO for debarment or suspension. In its Protest Letter,
7 Basil cited 5 G.C.A. § 5425 (a) to challenge the award of the *Manamku'* meals contract to SH.⁴ Basil
8 alleged violations of 5 G.C.A. § 5630 (d) Favors to the Territory and 2 G.A.R. § 11107(4) Favors
9 to the Government of Guam ("GovGuam").⁵ These violations articulate that SH violated the Ethical
10 Standards. Basil also requested, "[GSA] debar or suspend S.H. Enterprises from being a
11 government contractor".⁶ The petition is cognizable under 5 G.C.A. § 5426 (f):

13 Any member of the public may petition the CPO, the Director of Public Works or
14 the head of a purchasing agency to take action to debar or suspend pursuant to
15 Subsection (a) of this Section. An investigation of each petition shall be conducted
promptly and a written report should be made of findings of fact and action taken.

16 **B. The CPO issued her decision denying Basil's petition.**

17 Once any member of the public seeks a petition for debarment or suspension, 5 G.C.A.
18 § 5426 (a) provides for the CPO's authority to act on the petition:

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

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³ OPA-PA-19-011 Decision dated December 11, 2020 at 18.

27 ⁴ Appellant's Notice of Appeal Appendix F, February 7, 2020 Basil Protest Letter to CPO at 38.

28 ⁵ *Id.*, at 40-41.

⁶ *Id.*, at 42.

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2 Section 5426 (b) (6) specifically provides that an ethical standards violation is cause for debarment
3 or suspension, and § 5426 (d) states that the CPO’s decision shall be sent to the subject of the petition
4 and any party other party intervening.⁷ Therefore, the CPO has sufficient authority to issue a
5 decision regarding Basil’s petition to debar or suspend SH for violation of the Procurement Law
6 Ethical Standards.⁸ The Memorandum Response shows that the CPO acknowledged Basil’s
7 February 7, 2020 protest letter and reasoned that the free use of the Hakubotan Building was a
8 donation accepted by the Governor and not a violation of the ethical standards.⁹ As a result, the
9 CPO’s decision was to deny Basil’s petition to debar or suspend SH.
10

11 **C. Section 5705 authorizes the Public Auditor to review CPO’s decisions regarding**
12 **debarment or suspension.**

13 Under § 5426 (e), an appeal to the Public Auditor of the CPO’s decision regarding debarment
14 or suspension is authorized. The Procurement Law gives the procedures for protests to the CPO and
15 those, which authorize the Public Auditor to review of such decisions by the CPO. However, in
16 reviewing the Procurement Law statutes, it is apparent that there may have been a scrivener’s error.
17 The Compiler’s codification of § 5426 (e) references 5 G.C.A. § 5706, which authorizes the Public
18 Auditor to review a CPO’s decision on debarment or suspension:
19

20 **Finality of Decision.** A decision under Subsections (c) or (f) of this Section shall
21 be final and conclusive, unless fraudulent, or an appeal is taken to the Public
22 Auditor in accordance with **§ 5706** of this Chapter. (Emphasis supplied).

23 Section 5706, however, applies to contract and breach of contract controversies:

24 **Contract and Breach of Contract Controversies. (a) Scope.** This §5706 applies
25 to a review by the Public Auditor of a decision under **§ 5427** of this Chapter.
(Emphasis supplied).

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27 ⁷ 5 G.C.A. §5426(d) “[A] copy of the decision under Subsection (c) of this Section shall be mailed or otherwise furnished
immediately to the debarred or suspended person and any other party intervening.

28 ⁸ Notice of Appeal Exhibit K, February 8, 2020 Memorandum Response to Protest from CPO to Basil.

⁹ Id.

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2 It is actually § 5705 that applies to the Public Auditor’s review of a debarment or suspension:

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

5 Plainly, § 5705 applies to a Public Auditor’s review of a decision under the procedures for
6 debarment or suspension, and not §5706, as referenced in § 5426 (e). Accordingly, the Public
7 Auditor takes jurisdiction over the CPO’s denial of Basil’s petition for debarment or suspension
8 pursuant to the authority granted under 5 GCA § 5705 to review such decisions.

9 **D. Articulation of Jurisdiction.**

10 In challenging jurisdiction, GSA asks OPA as a threshold issue to address how it derives
11 jurisdiction over the CPO’s decision not to debar or suspend for cause.¹⁰

12
13 The Appeal’s protest arose out of Basil’s petition to debar or suspend SH, as authorized by
14 5 G.C.A. § 5426 (f). Under the authority of 5 G.C.A. §5426 (a), the CPO was to decide whether
15 there was cause to debar or suspend SH for violating 5 G.C.A. § 5630 (d) when it gave a favor to
16 the territory. However, the CPO was in error and failed to find cause in her 5 G.C.A. § 5426 (c)
17 decision. Basil’s Appeal of the CPO’s decision is authorized by 5 G.C.A. § 5426 (e). The review
18 is of the CPO’s 5 G.C.A. § 5426 (c) decision not to debar or suspend SH for violation of the
19 Procurement Law Ethical Standards. OPA is mandated by 5 G.C.A. § 5705 (c) to decide whether,
20 or the extent to which, the debarment or suspension was in accordance with the statutes, regulations,
21 and the best interest of the government or any autonomous agency or public corporation, and was
22 fair.
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¹⁰ Purchasing Agency GSA’s Trial Brief at 9.

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III. DISCUSSION

A. Authority to review the CPO’s decision denying debarment; Due process afforded Interested Party SH where the CPO in error to debar or suspend.

Interested Party SH and GSA made several arguments that the Public Auditor has no jurisdiction or authority over this Appeal. Basil maintained that jurisdiction is proper and that OPA has the authority to debar or suspend. The parties’ arguments are discussed below.

1. CPO took original jurisdiction over Basil’s petition for debarment or suspension.

SH argued that the Legislature limited authority to debar or suspend to the CPO and the Procurement Policy Office (“PPO”).¹¹ The thrust of SH’s argument is that the Public Auditor, when taking jurisdiction pursuant to 5 G.C.A. § 5705, over a denial of a petition for debarment, does not itself have jurisdiction to commence an original debarment proceeding under 5 G.C.A. § 5426 (f). GSA also adopted this argument and cited *Guam Federation of Teachers v. Rector*, 2005 Guam 25 ¶¶ 25, 46-47, 51¹² and argued that OPA does not have jurisdiction to debar or suspend a vendor and cannot compel GSA to do so.

In OPA-PA-20-003, the Public Auditor is not taking original jurisdiction over a decision to debar or suspend in response to a petition under 5 G.C.A. § 5426 (f). The CPO took original jurisdiction and denied Basil’s petition by her Memorandum Response of February 8, 2020. The OPA-PA-20-003 review is of the CPO’s decision to deny Basil’s petition for debarment or suspension. Appeal therefrom is authorized by § 5426 (e), and OPA’s jurisdiction to review the CPO’s decision is authorized by § 5705.

¹¹ Interested Party SH Enterprises, Inc.’s Trial Brief at 4.

¹² Purchasing Agency GSA’s Trial Brief at 3.

1 **2. Jurisdiction in this Appeal shall be utilized to promote integrity of the**
2 **procurement process and the purposes of the Procurement Law.**

3
4 SH next argued that the PPO, with concurrence of the Attorney General (“AG”), has the
5 authority to debar or suspend as given by 5 G.C.A. § 5651 (d):

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

9 This argument supported SH’s position that the Public Auditor may not use its jurisdiction to
10 commence an original debarment or suspension as only the CPO and PPO are authorized to do so.¹³

11 SH alleged that the PPO was reactivated on April 2, 2019 by Executive Order 2019-10.¹⁴
12 GSA argued that Ethics complaints on non-employees be filed with the PPO and must be brought
13 under 5 G.C.A. § 5651.¹⁵ Neither GSA, SH, nor Basil put forth evidence at the February 8 - 9, 2021
14 hearing that the PPO was actively functioning as an administrative review or policymaking body at
15 the time of Basil’s February 7, 2020 protest or at any time. Nor did they put forth evidence that the
16 PPO was entertaining petitions for debarment or suspension.

17
18 Title 5 G.C.A. § 5703 (f) makes it incumbent on the Public Auditor to exercise jurisdiction
19 to promote the integrity of the procurement process and the purposes of the Procurement Law.¹⁶
20 There is little integrity in an administrative process that requires protestors to petition to a non-
21 reactivated administrative body that is not administering debarment or suspension petitions.
22 Moreover, the Public Auditor’s jurisdiction is used to review a decision denying Basil’s petition for
23 debarment or suspension, not an original debarment or suspension as the stead of the CPO or PPO.
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¹³ Interested Party SH Enterprises, Inc.’s Trial Brief at 4-5.

27 ¹⁴ Id., Footnote 1.

28 ¹⁵ Purchasing Agency GSA’s Trial Brief at 8-9.

¹⁶ 5 G.C.A. § 5703 (f). “The Public Auditor’s jurisdiction shall be utilized to promote the integrity of the procurement process and the purposes of 5 G.C.A. Chapter 5.”

1 **3. The Public Auditor reviewed a CPO decision regarding a petition for**
2 **debarment or suspension through 5 G.C.A. § 5705 (c) and 2 G.A.R. § 12114.**
3

4 SH and GSA both argued that the Public Auditor may not review a decision by the CPO to
5 deny debarment or suspension. The review is limited to instances when the CPO actually decides
6 to debar.¹⁷ GSA cited 2 G.A.R. § 12114 to support its argument:

7 **Appeal to Public Auditor of Debarment or Suspension.** This section applies to
8 Appeals of debarment or suspensions of persons from consideration for award of
9 contracts imposed by the Chief Procurement Officer, the Director of Public Works,
10 or the head of a Purchasing Agency. Pursuant to 5 G.C.A. § 5705 an aggrieved
11 person may Appeal a suspension or debarment action within 60 days of receipt of
12 a decision under subsection (c) of 5 G.C.A. § 5426. The Public Auditor shall review
13 actions between the territory and a person who is subject to a suspension or
debarment proceeding, 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.

14 A decision on Appeal of a suspension or debarment shall set for the reasons for
15 such action and shall inform the debarred or suspended person involved of his right
16 to judicial review as provided in these regulations and 5 G.C.A. Chapter 5, Article
9 (Legal and Contractual Remedies) of the Guam Procurement Law.

17 There is nothing in the plain reading of 5 G.C.A. § 5705 or 2 G.A.R. § 12114 to suggest that
18 OPA has no authority to review the CPO’s § 5426 (c) decision to deny debarment or suspension.
19 To argue lack of jurisdiction to review the CPO’s decision, SH cited the *Appeal of Teleguam*
20 *Holdings*, OPA-PA-13-016, where the Public Auditor decided against an appeal asking for review
21 of the CPO’s decision not to debar. In *Teleguam*, the Public Auditor declined jurisdiction by
22 construing § 5705 to require an actual debarment by the CPO for the Public Auditor to take
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27 ¹⁷ Interested Party SH Enterprises, Inc.’s Trial Brief at 5; Purchasing Agency GSA’s Trial Brief at 4-6.
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1 jurisdiction.¹⁸ Title 5 G.C.A. § 5703 (c) provides that no prior determination shall be final or
2 conclusive on the Public Auditor or upon any appeal from the Public Auditor.¹⁹
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4 SH and GSA’s arguments and the jurisdiction exercised in *Teleguam* place a bar on review
5 of a decision where the petitioner under § 5426 (f) alleges serious wrongdoing. However, the CPO
6 commits error by not finding cause. In considering *Teleguam*, there conceivably are situations
7 where such a bar would be wholly inconsistent with the mandate under § 5703 (f) for the Public
8 Auditor to exercise jurisdiction to promote the integrity of the procurement process and the purposes
9 of the Procurement Law. A review under § 5705 requires weighing the conduct that allegedly
10 violated the Ethical Standards. The integrity of the procurement process and purposes of the
11 Procurement Law are served by a review of an allegation that the CPO erred in finding no cause to
12 debar or suspend. Otherwise, the conduct may continue unabated. In such case, there is no
13 mechanism to correct the Ethical Standards violations.
14

15 The rule for exercising jurisdiction to review the CPO’s § 5426 (c) Decision must consider
16 what the review of that decision entails. Title 5 G.C.A. § 5705 (c) and 2 G.A.R. § 12114 provides
17 that the Public Auditor must review whether the CPO’s decision regarding debarment or suspension
18 was in accordance with the Procurement Law’s statutes and regulations, in the best interest of the
19 government, and fair.
20

21 In the OPA-PA-19-011 Decision, it was decided that the CPO erred in her conclusion that
22 SH did not violate the Ethical Standards.²⁰ A review of the extent to which SH may be held to
23 account is taken in this case’s Order to Show Cause, as is a review of whether the CPO’s decision
24 was in the best interest of the government and it was fair. It is not in the best interest of the
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18 *Id.*, at ¶ 4

27 19 § 5703 (c) “Notwithstanding § 5245 of this Chapter, no prior determination shall be final or conclusive on the Public
Auditor or upon any appeal from the Public Auditor.”

28 20 OPA-PA-19-011 Decision dated December 11, 2020 at 13-16.

1 government nor is it fair to allow Ethical Standards violations to go unaddressed because the CPO
2 exercised her discretion and refused to do so. The Public Auditor is required to exercise jurisdiction
3 to promote the integrity of the procurement process and the purposes of the Procurement Law. The
4 review of the CPO’s decision to deny debarment or suspension is mandated by § 5705 (c).
5

6 **4. The jurisdiction to review the CPO’s § 5426 (c) decision is analogous to the**
7 **jurisdiction exercised in *Data Management Resources* (“DMR”) where the Public Auditor’s**
8 **authority is not overly limited, and he may review any matter properly before him.**

9 SH’s next argument is that the Public Auditor’s jurisdiction over debarment is limited to
10 what is expressly permitted by regulation. SH argued that in *DMR v. OPA*, 2013 Guam 27, OPA
11 may not review a decision not to debar since attempts by the Legislature to expressly include a
12 review of a decision denying debarment have failed. Thus, SH’s argument goes, OPA’s § 5705
13 authority is limited to review of whether, or the extent to which, the actual debarment or suspension
14 was in accordance with the statutes, regulations and the best interest of the government or any
15 autonomous agency or public corporation, and was fair. SH concluded that OPA is in error to review
16 a decision not to debar since the Procurement Law does not expressly provide for it as such review
17 is reserved for the PPO.²¹
18

19
20 SH misread *DMR*. The case stands for the proposition that limits OPA’s jurisdiction are not
21 to be “overly constrictive,” *DMR* ¶ 48 (“The trial court’s interpretation of OPA’s authority to remedy
22 errors in procurement bids is overly constrictive ... OPA was entitled to make a factual interpretation
23 of the terms of the bid solicitation pursuant to its authority provided in Guam’s Procurement Law
24 ...”), and OPA’s jurisdiction in a review of a contract controversy under § 5706 is not circumscribed
25 to the CPO’s decision or determination. *DMR* thus authorized OPA to apply 2 G.A.R. § 12112 to
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²¹ Interested Party SH Enterprises, Inc.’s Trial Brief at 5-7.

1 reverse the CPO’s decision and exercise jurisdiction consistent with 5 G.C.A. 5706. Therefore,
2 OPA did not exceed its jurisdiction when the Public Auditor decided “[t]he propriety of terms and
3 conditions of the bid solicitation at issue ..., to determine whether [the protestor] qualified for the
4 bid as a manufacturer authorized reseller, and to revise the proposed award to comply with the law”.
5 2013 Guam 27 ¶ 49.
6

7 In OPA-PA-20-003, the exercise of jurisdiction is consistent with *DMR* insofar as OPA’s
8 review pursuant to § 5426 (e) – analogously to § 5425 (e) – of a decision pursuant to § 5426 (c) –
9 analogously to § 5425 (c) – is in accordance with § 5705 – like it was under § 5706, as held in *DMR*.
10 Under *DMR*, the review would be whether, or the extent to which, the debarment or suspension was
11 in accordance with the statutes, regulations and the best interest of the government or any
12 autonomous agency or public corporation, and was fair. Note that substantially the same analysis
13 applied in *DMR* at ¶ 48 may be applied. *C.f.* “[F]or example, as provided in Guam’s Administrative
14 Rules and Regulations (“GAR”), when a dissatisfied bidder appeals to OPA after an unsuccessful
15 protest, OPA ‘shall determine whether a decision on the protest of method of selection, solicitation
16 or award of a contract ... **is in accordance with the statutes, regulations,** and the terms and
17 conditions of the solicitation. 2 Guam Admin. R. & Regs. Div. 4 § 12201 (2006),” *DMR* ¶ 48, with
18 “The Public Auditor shall decide whether, or the extent to which, the debarment or suspension **was**
19 **in accordance with the statutes, regulations** and the best interest of the government or any
20 autonomous agency or public corporation, and was fair.” 5 G.C.A. § 5705 (c) (emphases supplied
21 to both clauses). Accordingly, a review under § 5705 (c) of the CPO’s § 5426 (c) decision not to
22 debar is proper when applying the jurisdictional boundaries afforded OPA under *DMR*. In brief,
23 whereas jurisdiction in *DMR* was over a contract controversy, this case’s jurisdiction is over a
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1 debarment and is proper under 5 G.C.A. § 5705, where the matter is properly before the Public
2 Auditor.

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4 **5. That the Legislature was unsuccessful in its attempts to give the Public Auditor**
5 **the authority to commence debarment proceedings does not limit the Public Auditor's**
6 **authority under 5705 (c) to review the CPO's decision not to debar.**

7 SH argued that the Public Auditor has no express legislative authority to debar.²² SH's
8 argument is again incorrectly premised on OPA's review being an original debarment when it is a
9 review of the CPO's decision not to debar. In support of their argument, SH provided examples of
10 failed legislative efforts to implement greater access to debarment proceedings and alleged that
11 OPA's review was limited to 5 G.C.A. § 5426 (c) decisions to debar, but not decisions not to debar.
12 *E.g.* Bill 224-32 failed to expand OPA review to include petitions under 5 G.C.A. § 5426 (f).

14 SH's construction of OPA's jurisdiction is essentially that the issue was decided against
15 debarment, and there is no injury to Basil which can be redressed through the Procurement Law.
16 That is to say, there being no debarment, the appeal to OPA is of no recourse – it is moot. Where,
17 as here, the administrative error is capable of repetition, but evades review, *e.g. Sloan v. Dept. of*
18 *Transport*, 666 S.E.2d 236, 240 (S.C. 2015), appellate review is appropriate. This is the second
19 OPA procurement appeal on record where an appellant sought review of the CPO's decision not to
20 debar or suspend. If jurisdiction is denied here, there is no review of a CPO's denial, even if in error
21 or if the denial diminishes the integrity of the procurement process and the purposes of the
22 Procurement Law. OPA may thus take jurisdiction over Basil's appeal of the CPO's denial of
23 debarment because the denial is capable of repetition, but evading review.
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²² Interested Party SH Enterprises, Inc.'s Trial Brief at 6.

1 **6. Basil’s petition for debarment or suspension of SH’s violation of the Ethical**
2 **Standards is properly before OPA.**
3

4 SH also broadly attacked jurisdiction by arguing that the debarment is not properly before
5 OPA.²³ According to SH, the Public Auditor’s jurisdiction over a procurement appeal is limited by
6 whether the appeal and issues are “properly submitted” to him in the first instance.²⁴ SH then
7 concluded that Basil did not properly appeal the issue of the debarment in OPA-PA-20-003 because
8 it brought appeal of the CPO’s § 5426 (c) Decision under 5 G.C.A. §§ 5706 and 5425 while seeking
9 award of contract remedies.
10

11 Section 5426(f) states that any member of the public may petition the CPO for debarment or
12 suspension. On February 7, 2020, Basil protested the award of IFB GSA 56-19 under 5 G.C.A. §
13 5425 (a). As a remedy, Basil sought relief through debarment:

14 In assessing the appropriate remedy for this violation, we must hone in on the purpose
15 and policies of Guam’s Procurement Law, which were implemented to ensure the fair
16 and equitable treatment of all those who participate in the procurement system, to
17 increase individual’s confidence in the public procurement process, to encourage
18 healthy competition, to ensure the quality and integrity of the procurement system ...
19 Based on the foregoing, Basil respectfully requests the following ... 3. That GSA
20 debar or suspend S.H. Enterprises from being a government contractor ... ”²⁵

21 Basil plainly sought debarment even though the appeal was brought in the context of an
22 award under 5 GCA § 5425. In *DMR*, 2013 Guam 27, our Supreme Court permitted a petition for
23 judicial review with an alternative writ of review to be substantively pled together as a complaint,
24 so as to allow a complainant to proceed under 5 GCA § 5480 at the Superior Court. This result
25 came despite the holding in *Town House Dep’t Sores, Inc. v. Dept of Educ.*, 2012 Guam 25 that, a

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27 ²³ Interested Party SH Enterprise, Inc.’s Trial Brief at 7-9.

28 ²⁴ *Data Mgmt Resources*, OPA-PA12-007, Decision and Order, p.3 (Jul. 13, 2012) (“[A]n issue that is not presented in accordance with either procurement regulations or the Guam code is not ‘properly submitted.’ It is well settled that an appeal the OPA of a procurement protest is dependent upon the existence of an agency level protest and Decision regarding that protest.”).

²⁵ Notice of Appeal Exhibit F, February 7, 2020 Protest Letter from Basil to CPO at 5, pdf. 42.

1 petition pled as extraordinary relief without a defendant was not cognizable in judicial review of
2 OPA’s decision. *See DMR*, 2013 Guam 27 ¶¶ 19-30. The substance of an averment, allegation, or
3 pleading controls the focus of procurement appeals review. *Id.* ¶ 30 (focus is substance over form
4 in analyzing allegations and pleadings).
5

6 Although Basil did not expressly allege its protest under §§ 5426 and 5705, 5 G.C.A.
7 § 5703 (a) confers jurisdiction on OPA to review and determine *de novo* any matter properly
8 submitted. Applied here, when debarment for violation of ethical standards was alleged by Basil,
9 the CPO was to promptly conduct an investigation, consult with the AG, and memorialize her
10 decision—as prescribed in § 5426. Nevertheless, on February 8, 2020, the CPO acknowledged,
11 reviewed, and denied Basil’s February 7, 2020 Protest Letter. The CPO concluded that there was no
12 violation of procurement law, rules, or regulations, or of the purchase order awarded to SH. Without
13 fully addressing whether SH granted a prohibited favor to the territory (whether through
14 inadvertence or Basil’s failure to specifically invoke 5 G.C.A. § 5426 (f)), the CPO found the
15 allegations in the letter to be without merit, denied the Protest, and informed Basil of its right to
16 seek administrative or judicial review.²⁶ On February 27, 2020, Basil filed this appeal and alleged
17 error on the CPO’s decision to deny its protest due to her letter of February 8, 2020. In its Notice
18 of Appeal, Basil alleged *inter alia* that the CPO failed to address whether a prohibited favor was
19 granted to the government.
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22 Basil in its appeal also cited debarment under 5 G.C.A. § 5651:

23 **Civil and Administrative Remedies Against Non-Employees Who Breach**
24 **Ethical Standards. (a) Existing Remedies Not Impaired.** Civil and administrative
25 remedies against non-employees which are in existence on the effective date of this
26 Chapter shall not be impaired.
27

28 ²⁶ Notice of Appeal Exhibit. K, Memorandum Response at pdf 75-76.

1 Section 5651 applies by its terms to institution of debarment or suspension by and through the PPO
2 and include remedies for debarment or suspension. 5 GCA § 5651 (b). Nevertheless, under § 5651,
3 existing remedies for debarment of non-employees are not impaired, and that other remedy may be
4 under § 5426 (e) upon appeal to the Public Auditor.
5

6 Under *DFS Guam LP v. A.B. Won Pat Int'l Airport Auth*, 2020 Guam 20, appellants must
7 administratively exhaust each and every claim. Construing jurisdiction to require Basil to strictly
8 plead under § 5426 does not work integrity into the procurement process and does not achieve the
9 purposes of the Procurement Law. Where the administrative body charged with review has recused,
10 the recusal excuses the exhaustion of remedies requirement. 2020 Guam 20 ¶ 58. Administrative
11 exhaustion may also be excused where compliance would be futile. *E.g. Ward v. Chavez*, 678 F.3d
12 1042, 1045-46 (9th Cir. 2012). The CPO denied debarment in her February 8, 2020 Letter because
13 she did not find that SH gave a prohibited favor to the Territory. GSA, under representation by the
14 Attorney General, continued to maintain that there was no prohibited favor throughout this appeal
15 and has not altered its position in its Brief for this Appeal. A technically pled petition for debarment
16 under § 5426 (f) would be futile because the CPO and the AG would maintain that there was no
17 prohibited favor to the Territory and thus no cause for debarment. The requirement under *DFS*
18 *Guam LP v. A.B. Won Pat Int'l Airport Auth*, 2020 Guam 20 for exhaustion of administrative
19 remedies for each and every claim is thus excused as regards for a protest or petition under
20 § 5426 (f). Even under *DFS*' requirement to exhaust each and every administrative remedy, the
21 issue is properly before OPA.
22
23

24 **8. There is no *Accardi* due process violation.**

25 SH next argued that the Procurement Law requires three levels of review—by the CPO, the
26 using agency, and the AG—as the administrative process for debarment. SH concluded that the
27
28

1 manner in which review of the CPO’s decision in this appeal is not affording SH sufficient due
2 process because that three-level review was denied. SH cited to *United States ex rel. Accardi v.*
3 *Shaughnessy*, 347 U.S. 260 (1954) for the proposition that, “[W]hen statutorily prescribed procedure
4 exceeds minimum due process standards, the statute must be followed,” and argued insufficient
5 process on appeal here.²⁷

7 First, there is no three-level review requirement, like there was in *Accardi*. *Accardi* involved
8 a writ of habeas corpus in connection with a deportation of an Italian immigrant who was in the U.S.
9 illegally and who was summarily deportable. Under the regulatory framework at the time, the U.S.
10 Attorney General (“USAG”) was to commence a proceeding to suspend deportation once the
11 immigrant sought administrative review. That administrative review called for decisions at three
12 separate administrative levels below the USAG: the hearing officer, Commissioner of Immigration,
13 and USAG at the Board of Immigration Appeals. However, the USAG had earlier placed the
14 immigrant on a deportation list of “unsavory characters”, which the Court decided biased the
15 administrative review. Instead of the above-mentioned three-level independent review, the USAG’s
16 list amounted to a predetermined outcome of deportation proceedings. *See* 347 U.S. 260, 264 (“[t]he
17 Attorney General announced at a press conference that he planned to deport certain ‘unsavory
18 characters’; on or about that date the Attorney General prepared a confidential list of one hundred
19 individuals, including petitioner, whose deportation he wished; the list was circulated by the
20 Department of Justice among all employees in the Immigration Service and on the Board of
21 Immigration Appeals; and that issuance of the list and related publicity amounted to public
22 prejudice by the Attorney General so that fair consideration of petitioner's case by the Board of
23
24
25

26 _____
27 ²⁷ Interested Party SH Enterprises, Inc.’s Trial Brief at 10-12.
28

1 Immigration Appeals was made impossible”). Title 2 G.A.R. § 9102 (b) requires the CPO to consult
2 with the purchasing agency and the AG and render a decision.²⁸ Unlike the administrative review
3 scheme in *Accardi*, § 9102 requires the CPO to make a probable cause determination after
4 consultation with the AG and the purchasing agency and makes it clear that debarment or suspension
5 shall be imposed in coordination with the purchasing agency imposing the debarment or suspension.
6

7 SH argued that it did not go through the full set of administrative proceedings prescribed
8 under 2 G.A.R. § 9102, and so, further proceedings to debar are violative of *Accardi*. It is thus
9 entitled to a “three-level review” by the CPO, purchasing agency, and AG. This conclusion is
10 incorrect because by her February 8, 2020 written decision on Basil’s petition for debarment, the
11 CPO in her review exercised discretion and found no probable cause, leading her to deny suspension
12 or debarment in her decision under § 5426 (c). Section 5426 (e) is available to Basil to seek *de novo*
13 review of the CPO’s decision to deny debarment. The Public Auditor may then review, pursuant to
14 § 5705, the CPO’s § 5426 (c) denial of the debarment.
15

16 *Accardi* does not change the result, but emphatically reinforces taking jurisdiction. There
17 was in fact an independent review by the CPO who in error found no probable cause. Application
18 of *Accardi* would mean that Basil would be forced to initiate debarment proceedings to a CPO who
19 decided the issue, and an AG who does not maintain there was an Ethical Standards violation. This
20 is not what *Accardi* stands for where the administrative review was to guarantee an unbiased review.
21 Requiring Basil to proceed again to a CPO and AG who continue to maintain there was no violation
22 is what *Accardi* was trying to avoid. SH conflates *Accardi*’s requirement for unbiased
23
24
25

26 ²⁸ 2 GAR § 9102 (b) “After consultation with the affected using agency, the Attorney General, and, where practicable,
27 the contractor or prospective contractor who is to be suspended, and upon written determination by the Chief
28 Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency that probable cause exists for
debarment as set forth in §5426 (Authority to Debar or Suspend) of the Guam Procurement Act, a contractor or
prospective contractor shall be suspended.”.

1 administrative review with how discretion is exercised, which is not what *Accardi* was intended to
2 do. *See* 347 U.S. 260, 268 (“It is important to emphasize that we are not here reviewing and
3 reversing how discretion was exercised. If such were the case we would be discussing the evidence
4 in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object
5 to the Board's alleged failure to exercise its discretion, contrary to existing valid regulations.”).

6 There was no failure to exercise discretion here.

7
8 Further emphasizing the unintended result from applying *Accardi* to the facts here is *Doster*
9 *v. County of San Diego*, 251 Cal.Rptr. 507 (Cal. Ct. App. 1988):

10
11 There is no reasonable basis to believe the sheriff, as the final decision-maker, would
12 have changed his mind and removed *Doster's* restrictions when the evidence
13 available to him in the review hearing is the same evidence used to reach his
14 decision. Administrative review to challenge a decision made earlier by the final
15 decision-maker where the decision-maker will not be called upon to consider
16 different evidence on the ultimate issue is truly a waste of time. We therefore
conclude *Doster's* failure to timely seek administrative review is not a bar to his legal
action. It is much more efficient for the court to review the narrow question of
whether the sheriff properly imposed restrictions on *Doster* on
the administrative record made before the Civil Service Commission rather than
requiring needless administrative review to determine whether there is a legal basis
for the sheriff's action.

17 Insisting that Basil petition the CPO for debarment or suspension when the CPO has already denied
18 it would require a review that would lead nowhere since each administrative level reviewer
19 continues to maintain there was no violation of the Ethical Standards.

20
21 **9. SH's due process requirements were not violated by a review of the CPO's**
22 **decision to deny debarment.**

23 SH argued that the procedures, which have brought review of the CPO's decision and its
24 potential to be debarred or suspended in this Appeal, violated the due process rights afforded it by
25 the Procurement Law, Regulations and the Administrative Adjudication Law (“AAL”). *See*
26 Interested Party Trial Brief at 12-15 (“Reasonable notice and hearing before the Public Auditor is
27 insufficient due process for government contractors facing debarment or suspension.”); Purchasing
28

1 Agency GSA Trial Brief at 8-9.²⁹ SH’s argument here can be best understood as 5 G.C.A. § 5426
2 (a) and 2 G.A.R. § 9102 (g) giving it rights to the procedures at 5 G.C.A. §§ 9202, 9203, 9216, 9218,
3 and 9235.
4

5 OPA declines to follow this rationale. The matter of SH’s debarment or suspension is before
6 OPA because of this review under § 5705 (c) of the CPO’s § 5426 (c) decision to deny Basil’s
7 petition for debarment or suspension. The procedures employed at appeal to OPA are found at 2
8 G.A.R. § 12101 *et. seq.* Those procedures provide the following concerning the AAL:

9 **§12108 (d) Hearing Proceedings.** Hearings shall be as informal as may be
10 reasonable and appropriate under the circumstances and shall not be bound by
11 statutory rules of evidence or by technical or formal rules of procedure except as
12 provided by the Guam Procurement Law, Chapter 5 of Title 5, Guam Code
13 Annotated, and with these procurement appeals regulations. The testimony
14 presented shall be written, oral or otherwise. The weight to be attached to evidence
15 presented in any particular form will be within the discretion of the Hearing Officer.
16 Stipulations of fact agreed upon by the parties may be regarded and used as
17 evidence at the hearing. The parties may stipulate the testimony that would be
18 given by a witness if the witness were present. The Hearing Officer may require
19 evidence in addition to that offered by the parties. Where not otherwise provided
20 for by these rules and regulations or statute, and where not inconsistent herewith,
21 hearings shall be conducted in accordance with the Administrative Adjudication
22 Law in Chapter 9 of Title 5, Guam Code Annotated, including those provisions on
23 subpoenas and contempt.

24 2 G.A.R. § 12108 (d) (emphasis supplied). Thus, where not otherwise provided by the Rules of
25 Procedure for Procurement Appeals (“RPPAs”), and where not inconsistent with the RPPAs,
26 hearings shall be conducted in accordance with the AAL. SH thus complained this Appeal lacks
27 the procedures found prescribed by 5 G.C.A. §§ 9202, 9203, 9216, 9218, and 9235.
28

29 In OPA-PA-19-011, OPA referenced Basil instead of SH when it was stated that, “Basil will receive a reasonable notice and meaningful opportunity to be heard ...” regarding any action taken by the Public Auditor to debar or suspend SH for violation of the Procurement Law Ethical Standards. *See* OPA-PA-19-011 Decision at 17. For the avoidance of doubt, it is SH that is to be afforded due process in this Appeal and any action taken in it to debar or suspend.

1 *Statement of the Issues.* SH complained it has not been charged in an instrument that sets
2 out the acts or omissions that constitute a violation of statutes and regulations of the Procurement
3 Law as guaranteed under 5 G.C.A. § 9202:
4

5 **Statement of Issues.** A hearing to determine whether an authority, license privilege
6 or right should be granted, issued or renewed shall be initiated by filing a statement
7 of issues. The statement of issues shall be a written statement specifying the statutes
8 and regulations with which the respondent must show compliance by producing
9 proof at the hearing, and in addition, any particular matters which have come to the
10 attention of the initiating party and which would authorize a denial of the agency
11 action sought.

12 Title 2 G.A.R. § 12104 provides for the contents of a Notice of Procurement Appeal. Basil's Notice
13 of Procurement Appeal provided a statement specifying that SH violated the Ethical Standards of
14 the Procurement Law by giving a Favor to the Territory – free use of the *Hakubotan* Building. Basil
15 further alleged that the CPO's denial was error.³⁰ Basil thus alleged the requirements authorizing
16 the Public Auditor's review, which would authorize denial of the right to bid on procurements.

17 *Verification.* SH complained that the charging instrument was not verified.³¹ The Notice of
18 Procurement Appeal contained a verification by Basil's President after its attorney's signature.

19 *Notice of hearing.* SH objected that it has not received a notice of a hearing at which its
20 debarment will be decided.³² Title 2 G.A.R. § 12108 requires a hearing be conducted when the

21 _____
³⁰ Notice of Procurement Appeal at 4.

22 ³¹ 5 GCA § 9203.

23 ³² **5 GCA § 9216. Hearing: Notice: Form.** The agency shall deliver or mail a notice of hearing to all parties at least
24 ten (10) days prior to the hearing. The hearing shall not be prior to the expiration of the time within which the respondent
25 is entitled to file a notice of defense. The notice to respondent shall be substantially in the following form but may
26 include other information:

27 You are hereby notified that a hearing will be held before (here insert name of agency) at (here insert
28 place of hearing) on the _____ day of _____, 20____, at the hour of _____, upon
the charges made in the accusation served upon you. You may be present at the hearing, may be
but need not be represented by counsel, may present any relevant evidence, and will be given full
opportunity to cross-examine all witnesses testifying against you. You are entitled to the issuance
of subpoenas to compel the attendance of witnesses and the production of books, documents or other
things by applying to (here insert appropriate office of agency).

1 matter concerns suspension or debarment. A notice like that prescribed in § 9216 was provided to
2 SH on January 11, 2021.³³

3
4 *Deposition of witnesses.* Although SH argued that it has a right to depose witnesses under 5
6 G.A.R. § 9218, it did not make any such petition, raised no objection at the hearings held on
7 February 8 and 9, and has stated no grounds for prejudice by a failure to depose.

8 *Reconsideration.* The RPPAs do not expressly provide for reconsideration of a debarment.
9 Where not inconsistent with the RPPAs, SH may have the right to reconsideration of a debarment
10 or suspension.

11 GSA joined the argument that SH's AAL due process rights were violated because SH was
12 ordered to show cause and not subjected to an administrative hearing.³⁴ GSA also argued, because
13 the CPO's decision to deny disbarment is unreviewable and any debarment or suspension must have
14 the AG's concurrence, there is no jurisdiction in this Appeal. Ethical complaints against non-
15 employees fall under the province of the Procurement Policy Board and not the Public Auditor.³⁵
16 GSA complained, then, that there is nothing in the Procurement Law that allows an ethics complaint
17 to be filed with OPA to commence a debarment, presumably as an original matter. This argument
18 fails to recognize that a review under § 5705 (c) is not an original debarment proceeding of a petition
19 under § 5426 (f).
20

21 **10. Review that reverses a CPO decision not to debar is not violative of the**
22 **separation of powers doctrine.**

23 GSA assumed wrongly that this review encroached on the CPO's or PPO's original
24 debarment powers. It argued that the CPO is afforded a high degree of deference where she has
25

26
27 ³³ OPA-PA-20-003, Scheduling Order dated January 11, 2021.

28 ³⁴ Purchasing Agency GSA's Trial Brief at 7.

³⁵ Id., at 8-9.

1 specialized knowledge in the area and cannot be compelled to debar, not even through extraordinary
2 relief. *See* Purchasing Agency GSA’s Trial Brief at 3-4 (“To compel a discretionary action [by
3 mandamus or otherwise] could violate the separation of powers doctrine this Court strives to uphold.
4 Nonetheless, where the exercise of discretion, or the failure to exercise discretion is so fraudulent,
5 arbitrary, or palpably unreasonable that it constitutes an abuse of discretion as a matter of law,
6 mandamus may issue ... This abuse of discretion is highly deferential”) citing *Holmes v. TLUC*,
7 1998 Guam 8 ¶ 12; *Carlson v. Guam Tel. Auth.*, 2002 Guam 15 ¶ 8.
8

9 No prior determination shall be final or conclusive on the Public Auditor or upon any appeal
10 from the Public Auditor. 5 G.C.A. § 5703 (c). “[A]ny determination of an issue or a finding of
11 fact by the Public Auditor shall be final and conclusive unless arbitrary, capricious, fraudulent,
12 clearly erroneous, or contrary to law ... Any decision of the Public Auditor, including any
13 determination regarding the application or interpretation of the procurement law or regulations, shall
14 be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive
15 on any court having competent jurisdiction.” 5 G.C.A. §§ 5704 (a), (b). GSA is not compelled to
16 debar as the CPO’s decision under § 5426 (c) is under review. There is no encroachment on the
17 CPO’s powers or a violation of the separation of powers.
18
19

20 **11. Requiring the Attorney General’s concurrence in OPA’s review of the CPO’s**
21 **decision not to debar is violative of the separation of powers doctrine.**

22 The AG representing GSA argued that debarment may only be with his concurrence.³⁶ The
23 AG does not see how giving the Governor’s administration favors undermines the integrity of the
24 Procurement Law and is a red flag. This Appeal’s review jurisdiction may be necessary to maintain
25 the integrity of the procurement process and the purposes of the Procurement Law.
26

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28

³⁶ Purchasing Agency GSA’s Trial Brief at 6.

1 Nevertheless, a requirement for the AG’s concurrence, if imposed on OPA, would itself be
2 a violation of the separation of powers.³⁷ As *DMR* would allow OPA to remedy errors permitted by
3 law, including where the CPO has failed to act, GSA’s position is substantively, that, jurisdiction
4 over the review of decisions to deny debarments is only available where the AG concurs. That
5 construction is overly constrictive of OPA’s authority and violative of *DMR*. OPA in exercising his
6 jurisdiction may fashion a remedy outside of action taken by the CPO. 2013 Guam 27 ¶ 48.

8 **12. Title 5 G.C.A. § 5630 (f) applies to prohibit favors during any matter related to**
9 **procurement, notwithstanding application of 5 G.C.A. § 22704.**

10 GSA argued that SH did not act unethically when it allowed *gratis* use of the Hakubotan
11 building because the Procurement Law does not apply when the value of the lease is less than
12 \$10,000 or the lease is for a term of less than five (5) years.³⁸ Section 5630 (d) provides that the
13 prohibition on favors applies “during the pendency of any matter related to procurement, including
14 contract performance warranty periods.” *Id.*

15 The record showed that on October 24, 2019, GSA opened IFB No. GSA 056-19 and
16 awarded it to SH on or around November 8, 2019 for \$3,789,211. *See* Notice of Procurement Appeal
17 Exhibit A, Notice of Bid Status, pdf. 16; Appellant’s Exhibit List Exhibit 3, Notice of Intent of
18

19
20
21 ³⁷ **1 GCA § 1900.** There is an instrumentality of the government of Guam, independent of the executive, legislative
and judicial branches, known as the Office of Public Accountability.

22 ³⁸ **5 GCA § § 22704. Acquisition of Office Space & Other Facilities.** (a) The Governor is authorized to acquire on
23 behalf of the government of Guam, by lease or lease-purchase agreement, office space and other facilities for the purpose
of providing office and other space for the departments and agencies of the Judicial and Executive Branches of the
24 government of Guam. Such leases and lease-purchase agreements may be negotiated and entered into by the Governor
with any person, partnership, corporation, or public or private entity, provided that no such lease or lease-purchase
agreement shall exceed 50 years.

25 (b) The Governor is further authorized to sublease space and facilities acquired pursuant to (a) hereof, and to
lease other available space and facilities, to authorized federal agencies.

26 (c) All lease or lease-purchase agreements that are proposed to be entered into pursuant to (a) hereof, where
27 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
28 Guam, 14 days prior to the formal bid opening, and then only to the lowest responsible bidder.

1 Possible Award, pdf 48. The War Claims Processing Center at the Hakubotan building began
2 receiving claims on January 24, 2020, approximately two months after SH was awarded the
3 *Manâmkû* meals contract.³⁹ Three weeks later, on February 17, 2020, GSA recommended award
4 of IFB No. GSA-001-20 to SH for \$5,978,700 of meals services for the Department of Corrections
5 (the “DOC meals IFB”).⁴⁰ SH thus provided a favor to the government during performance of the
6 *Manâmkû* meals contract, which was about two months after receiving that contract and about three
7 weeks before SH received the award of the DOC meals contract. Although it may have been
8 procured as an exception to the requirement for competitive bidding, the favor was in fact
9 sandwiched between two bids.
10

11
12 **B. Exercise of discretion to debar or suspend.**

13 Title 5 G.C.A. § 5426 (b) (6) authorizes debarment or suspension for violation of the Ethical
14 Standards. Debarment or suspension is not to be used to punish bidders, but may be appropriate
15 where necessary to protect the public interest and to promote the policy of conducting business only
16 with responsible persons. Debarment serves the public interest by protecting the government from
17 the business risk of dealing with an individual who lacks business integrity or business honesty.
18 While the initiation of debarment proceedings requires past misconduct, the final decision to debar
19 must focus on the contractor’s present business responsibility. Finally, the debarring official must
20 determine whether any mitigating factors show that the business risk to the government has been
21 eliminated to an extent that makes debarment unnecessary.⁴¹ These considerations go to whether
22 the CPO’s decision was in the best interest of the government and was fair. In exercising discretion
23
24

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26 ³⁹ Appellant Basil Food Industrial Services Corporation’s Exhibit List Exhibit 5, Pacific Daily News pp. 1-2, pdf. 52-53.

27 ⁴⁰ *Id.* Exhibit 7, Bid Status from GSA to Basil (notifying of rejection of Basil’s bid and award to SH).

28 ⁴¹ *Burke v. United States Environmental Protection Agency*, 127 F.Supp.2d, 238-39 (D.D.C. 2001); *Caiola v. Carroll*, 851 F.2d 395, 399 (D.C.Cir.1988).

1 as to whether it is appropriate to debar or suspend for violation of the Ethical Standards, then, the
2 following considerations are thus taken into account:

- 3 (1) The purpose of debarment or suspension is not to punish a vendor—the
4 intent must be to protect the public interest;
- 5 (2) Debarments or suspensions are to be used to promote the policy of the
6 government doing business with responsible persons;
- 7 (3) The decision to debar or suspend must focus on the contractor’s present
8 business responsibility; and
- 9 (4) Debarment or suspension is not appropriate where the risk to the
10 government has been eliminated to an extent that makes it unnecessary.⁴²

11 Review of these considerations indicates that debarment of SH may be appropriate to protect the
12 public interest in a procurement system that is free from favor-giving and promote the policy of
13 doing business with responsible persons. Furthermore, the debarment is supported by SH’s own
14 testimony that it would grant another favor if the opportunity presented itself. Finally, it is apparent
15 that risk of favors to the government has not been eliminated.

16
17 **1. Procurement Law Policy Objectives for Ethical Standards.**

18 Title 5 G.C.A. § 5625 provides imperatives for the policy of imposing Ethical Standards:

19 **Statement of Policy.** Public employment is a public trust. It is the policy of the
20 Territory to promote and balance the objective of protecting government integrity
21 and the objective of facilitating the recruitment and retention of personnel needed
22 by the Territory. Such policy is implemented by prescribing essential standards of
23 ethical conduct without creating unnecessary obstacles to entering public service.

24 Public employees must discharge their duties impartially so as to assure fair
25 competitive access to governmental procurement by responsible contractors.
26 Moreover, they should conduct themselves in such a manner as to foster public
27 confidence in the integrity of the territorial procurement organization.

28 ⁴² *Burke v. United States Environmental Protection Agency*, 127 F.Supp.2d, 238-39 (D.D.C. 2001); *Caiola v. Carroll*,
851 F.2d 395, 399 (D.C.Cir.1988).

1 To achieve the purpose of this Chapter, it is essential that those doing business with
2 the Territory also observe the ethical standards prescribed herein.

3 Contractors must observe the Ethical Standards to foster public confidence in the integrity of the
4 government procurement organization.

5 Prohibitions on gratuities and kickbacks are easily understood. Gratuities may not be
6 demanded, solicited, accepted, or agreed to in connection with “[a]ny decision, approval,
7 disapproval, recommendation, preparation of any part of a program requirement or a purchase
8 request, influencing the content of any specification or procurement standard, rendering of advice,
9 investigation, auditing, or in any other advisory capacity in any proceeding or application, request
10 for ruling, determination, claim or controversy, or other particular matter, pertaining to any program
11 requirement or a contract or subcontract; or to any solicitation or proposal therefor.” 5 G.C.A.
12 § 5630 (a). Kickbacks prohibit payment, gratuity or offer of employment ... by or on behalf of a
13 subcontractor ... or any person associated therewith, as an inducement for the award of a subcontract
14 or order.” 5 G.C.A. § 5630 (b). The prohibition on Gratuities and Kickbacks help ensure against
15 improper influences on government employees and contractors in a procurement.
16
17

18 **2. Favors undermine the public’s confidence in the integrity of the procurement**
19 **organization.**

20 The case’s evidence shows that the prohibition on favors is similarly warranted. SH
21 President Mr. Tae Hong Min and SH Vice President Mrs. Hui Sook Min testified that they provided
22 food services to the government since 2004. Mrs. Min acknowledged signing affidavits regarding
23 Ethical Standards included in the bid packages since that time. Although staff helped prepare bid
24 responses, the Mins both testified their familiarity with the requirements of the procurement process
25 and the Procurement Law and believed it was their duty to comply with the law.
26
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1 According to the Mins, the portion of the *Hakubotan* building used as the War Claims
2 Processing Center consisted of a dedicated space that was formerly occupied by LG Business
3 Solutions. The space rented for \$4,000 to \$5,000 per month, but was vacant since 2018. There was
4 no interest in the space until mid-January 2020, when the Governor’s office called SH and inquired
5 whether space was available in the building. They informed the caller that space was available, but
6 it needed cleaning, renovation, and repairs to the ceiling, walls, and floors. There was also no air
7 conditioning and no working restrooms. The next day a team of officials inspected the space,
8 including the Governor’s Deputy Chief of Staff Jon Junior Calvo, Department of Public Works
9 (“DPW”) officials, and Guam Fire Department officials. SH was told that the government would
10 need the space for two weeks and take care of cleaning, repairs, and other work needed for the War
11 Claims Processing Center to be ready and open to the public. Mr. Min explained that the company
12 decided against charging for the rental space because it was vacant for so long and would only be
13 used for two weeks.

14 Soon after the visit, DPW returned to the *Hakubotan* building with a crew to begin cleaning,
15 repairs, and renovations including replacement of ceiling panels and floor tiles and painting the
16 walls. The government also supplied fluorescent lighting, did electrical work including for the air
17 conditioning, constructed concrete footings for the air conditioning units installation, and brought
18 portable restrooms to the site. DPW Deputy Jesse Garcia testified that 12 DPW employees plus
19 employees from other agencies assisted at the Hakubotan building to clean and ready the space. He
20 estimated that it took about two weeks to complete the project. Mr. Garcia testified that the work
21 was at the direction of the Governor’s Deputy Chief of Staff Jon Junior Calvo and that these types
22 of undertakings were typically at his direction. The air conditioning units used to cool the
23 Processing Center were taken from the Department of Health and Social Services (“DPHSS”)
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1 Mangilao office and were brought to the DPHSS' Dededo office after the government completed its
2 work at the Processing Center. The government retrieved the portable restrooms after its use as
3 testimony showed that the government packed up all that was brought to the site after it vacated the
4 Hakubotan building.
5

6 SH argued that "The use of the *Hakubotan* building was not *gratis* because SH received
7 consideration of substantially equal or greater value from the Governor's use."⁴³ Mr. Min testified
8 that he possesses a contractor's license and believed that the government's expenses amounted to a
9 few thousand dollars. GSA argued that the use of the space at the *Hakubotan* building was a
10 donation worth less than \$10,000. However, no invoices or other documentation supporting the
11 value of the work put into the *Hakubotan* building was put into evidence. This absence coupled
12 with testimony of witnesses makes issue of the value of the short-term use of the space in the
13 *Hakubotan* building.
14

15 Review indicates that 12 employees potentially earning \$10 per hour and working for 80
16 hours amounted to \$9,600. Add the value of the time of an unaccounted number of employees from
17 other agencies; the time spent by the Governor's Deputy Chief of Staff and the DPW Deputy
18 Director to initiate and complete the project; the value of the concrete pads for the air conditioners;
19 the materials and supplies used to clean, repair and renovate the space; the value of removing,
20 transporting, and installing the air conditioners at the *Hakubotan* building; reinstalling the air
21 conditioners at DPHSS Dededo office; and the value of the use of the portable restrooms for two
22 weeks; and it is likely that the amount of taxpayer funded work, use of equipment, and materials is
23 well in excess of \$10,000 for a lease interest that Mrs. Min testified was worth as much as \$2,500.
24 It is inescapable that SH's "donation" of half a month's rent was very likely supported by
25
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⁴³ Interested Party SH Enterprises, Inc.'s Trial Brief at 15.

1 consideration of much greater value. Valuation (lack of it) aside, it is concerning the government
2 invested valuable time and resources into private property, evidently without documentation.
3

4 Thus, the review shows that SH, a government vendor for 15 years, was awarded a contract
5 for \$3,789,211 in late November 2019. The award was based on the waiver of a health inspection
6 requirement that was not waived for Basil for an earlier procurement.⁴⁴ Basil's Excerpts of Record
7 for the DOC meals IFB shows that SH picked up that bid package on January 7, 2020. Mrs. Min
8 testified that it took about 20-30 days to prepare that bid package, indicating that, at around the same
9 time in mid-January 2020, more than a dozen government employees using government resources
10 on government time cleaned, repaired and made several thousand dollars' worth of renovations to
11 SH's private commercial building. The employees and resources were under the direction of the
12 Governor's Deputy Chief of Staff. The news story of the opening of the War Claims Processing
13 Center was the first story on the front-page of the Pacific Daily News, and testimony from Mrs. Min
14 was that there was a ribbon-cutting ceremony where the Governor, Lt. Governor, Legislative
15 Speaker, other senators, members of the media, and general public attended. Two weeks after
16 opening, on or about February 7, 2020, the Processing Center would cease operations. The next
17 day, on February 8, GSA denied Basil's Protest, which is appealed here. Nine days after that, on
18 February 17, GSA awarded a \$5,978,700 contract to SH.
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21 The indeterminate values exchanged between SH and the government during the evaluation,
22 selection, and award of \$5,978,700 in government contracts was within three months of SH's
23 receiving a \$3,789,211 contract does little to facilitate public confidence in the integrity of
24 government procurement, especially when there was a protest wrongfully denied on that basis. It is
25 not difficult to see how delivering on promises to compensate CHamorus for atrocities suffered
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⁴⁴ OPA-PA-19-011 and OPA-PA-20-003 Decision at 12.

1 during World War II is valuable to politicians and how favors that help facilitate war claims pose
2 risks to fair competitive access to the procurement system by responsible contractors. Without a
3 policy that forbids favors, contractors are motivated to provide valuable things to the government
4 through acts that may place it in a favorable light. Placing these favors away from a tit-for-tat
5 exchange may structure individual transactions in a way that helps avoid criminal prosecution, but
6 in a sense, favors are more insidious because they seem disconnected from an official act on the
7 surface. They may create conflict between a desire to receive the favor and an objective and fair
8 handling of a procurement. Moreover, when the favor is granted to high-ranking officials, they are
9 imbued with greater levels of prestige and power that these officials enjoy. Lower-level government
10 actors are thus incentivized or simply acquiesce into accepting the favor. Favors, therefore, risk fair
11 competitive access to government procurement and do not promote the objective of protecting
12 government integrity.

15 **3. Debarment here is required to protect the public interest and promote**
16 **procurements with responsible persons.**

17 As seen by the Ethical Standards policy, at the heart of the process envisioned in the
18 Procurement Law is a governmental-commercial undertaking that is to be conducted under an
19 influence-, gratuity-, kickback-, and favor to the territory-free procurement environment. However,
20 SH's position is that debarment is not warranted when the government gives and receives things of
21 value in an exchange with a vendor. This is troubling. A responsible person has the capability in
22 all respects to perform fully the awarded contract requirements, and the integrity and reliability,
23 which will assure good faith performance. 5 G.C.A. § 5201 (f).

24 As the evidence shows, the government very likely overpaid for a short-term commercial
25 leasehold and had no hesitation in spending taxpayer monies on improving private property, without
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1 a proper accounting. GSA and the AG are willing to allow this environment to pervade the
2 governmental-commercial undertaking for procurement. The manner in which the *Hakubotan* lease
3 was secured is under a cloud, as is the value of resources spent by government officials to secure it
4 and the award of a \$5,978,700 contract to SH. This was within a mere three months of the
5 government awarding a \$3,789,211 contract by granting a waiver of a bid requirement that it did
6 not grant to Basil. The risk to the policy underpinning the Ethics Standards is serious and palpable.
7 Debarment here is required to protect the public interest and promote procurements with responsible
8 vendors.
9

10
11 **4. SH's present business responsibility and the continuing risk to the government**
12 **make debarment or suspension necessary.**

13 Basil argued that prior testimony in OPA-PA-19-011 and testimony in this Appeal show SH
14 would continue to provide favors to the government. OPA agrees.

15 SH argued that Basil's conduct (failing to obtain passing health inspection grades) was much
16 worse than its own, and all that happened was that Basil's contract was cancelled.⁴⁵ This is a false
17 analogy because Basil's conduct is not at issue. Even if it were, unsanitary conditions leading to
18 cancellation of a contract versus a Procurement Law violation of the Ethical Standards leading to
19 debarment is an apples-to-oranges comparison.
20

21 SH also argued proportionality.⁴⁶ Here SH argued the unfairness of a debarment or
22 suspension in comparison to the government's only cancelling Basil's contract for unsanitary
23 conditions. Remedies for debarment are in addition to other criminal, civil or administrative
24 remedies. 5 GCA §§ 5627, 5651. Basil was sanctioned for its failures to perform under contract.
25 In OPA-PA-19-011, the contractual remedy for violation of the Ethical Standards was cancellation
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⁴⁵ Interested Party SH Enterprises, Inc.'s Trial Brief at 18.

28 ⁴⁶ *Id* at 18.

1 of the contract. Here in OPA-PA-20-003, the remedy sought is debarment. The Procurement Law
2 clearly contemplates cumulative sanctions for violations of the Ethical Standards.
3

4 SH also claimed that it was the Governor's fault SH gave a prohibited favor because the
5 Governor's office contacted SH about using the Hakubotan building. Moreover, SH did not intend
6 to violate the Ethical Standards. The language proscribing the conduct of giving a favor or gratuity
7 does not require a specific mental state. It is a strict liability statute. SH is also charged with
8 knowledge of the regulations, especially since it concerns contracting with the government for
9 public monies. It would be required to make some reasonable inquiry to make sure it did not conflict
10 with the Procurement Law by giving a commercial leasehold to the Governor's office. However, it
11 did not and maintains there is no harm in providing favors for the government's worthwhile causes.
12

13 SH argued that its conduct only warrants a warning or written reprimand. The exercise of
14 discretion in the final analysis rests on whether debarment is unnecessary because the risk to the
15 government was eliminated to an extent that makes debarment or suspension unnecessary.
16

17 OPA is concerned from review of the testimony and evidence that the risk to the integrity of
18 government procurement suffers under a governmental-commercial business culture that freely
19 gives and accepts favors. The risk grows considerably if the government is willing to return
20 significant value to obtain the favor. That the AG is content to let this environment fester
21 exacerbates the risk because there is little to safeguard the process.

22 **5. Failure to show cause.**

23 In OPA-PA-19-011, it was determined that the CPO committed error in her decision
24 pursuant to § 5426 (c). OPA's review is limited here to § 5705 (c). The CPO's failure to debar
25 ignored the Policy Statement's mandate to observe the Ethics Standards and was not in the best
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1 interest of the government. Most importantly, SH failed to show cause why it should not be debarred
2 or suspended.

3
4 Whether debarment was fair was through proper exercise of jurisdiction to debar or suspend,
5 and each of the considerations to the exercise of that discretion is present in this Appeal. The risks
6 to the public interest posed by the culture of giving and receiving favors is present. Debarment
7 promotes the policy of compliance with Ethical Standards. SH presently maintains its willingness
8 to provide favors. Finally, the risk to the government continues through a governmental-commercial
9 culture that accepts favor-giving and receiving, and that risk is exacerbated because the advice and
10 counsel fails to recognize the risks posed from that culture.

11
12 Based on the foregoing, SH is debarred from consideration of an award for any Gov Guam
13 procurement for a one-year period.

14 IV. CONCLUSION

15 Based on the foregoing, the Public Auditor makes the following determinations:

16 A. Jurisdiction here is proper for a review under 5 G.C.A. §5705(c) of the CPO's
17 decision denying debarment.

18 B. Review is limited to whether, or the extent to which, the CPO's decision was in
19 accordance with the statutes, regulations and the best interest of the government or any autonomous
20 agency or public corporation, and was fair.

21 C. The authority and jurisdiction to debar or suspend here is consistent with *DMR*,
22 which held that OPA is authorized to remedy the CPO's errors, reform contracts, and correct the
23 procurement record.

24 D. The considerations for OPA to exercise jurisdiction to debar or suspend SH are
25 present in this Appeal.
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1 E. SH failed to show cause why it should not be debarred or suspended.

2 F. SH shall be debarred from consideration of an award for a government procurement
3 contract for a period of one year.

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

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7 This is a Final Administrative Decision for Appeal No. OPA-PA-20-003. The Parties are
8 hereby informed of their right to appeal the Public Auditor's Decision to the Superior Court of Guam
9 in accordance with Part D of Article 9 of 5 G.C.A. §5481(a) within fourteen (14) days after receipt
10 of a Final Administrative Decision. A copy of this Decision shall be provided to the Parties and their
11 respective attorneys, in accordance with 5 G.C.A. §5702, and shall be made available for review on
12 the OPA website at www.opaguam.org.

13
14 **DATED this 27th day of April, 2021.**

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