

# ORIGINAL

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OFFICE OF PUBLIC ACCOUNTABILITY  
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## IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES  
CORPORATION

Appellant.

**Docket No.** OPA-PA-16-006 & 008

**S.H. ENTERPRISES'S HEARING  
BRIEF**

### I. INTRODUCTION

On January 24, 2014, the General Services Agency (“GSA”) issued Invitations for GSA Bid No. 010-14 and GSA Bid No. 011-14 for the preparing, serving, and home-delivering of meals for the Elderly Nutrition Program (“ENP”). Basil Food Industrial Services Corp. (“Basil”), previously known as Li Qun, was awarded the contract and began providing ENP services under the contracts in July 2014. On May 31, 2016, Basil’s Anigua facility failed a health inspection by receiving a “D” rating with more than 40 demerits, which required the immediate closure of the facility. GSA terminated the contract between GSA and Basil because of this failure.

To ensure that it could continue to provide meals to the approximately 1,960 seniors who rely on ENP for their meals, GSA issued an Emergency Procurement on the afternoon of May 31, 2016, requiring responses that same afternoon for services to begin the next day. S.H. Enterprises was the sole bidder and was awarded the emergency procurement. Basil protested its termination, and the protest was denied on June 3, 2016. Basil subsequently appealed the denial of the breach of contract protest to the OPA on June 7, 2016, in OPA-PA-16-006. On June 14, 2016, Basil filed a protest with GSA arguing the emergency procurement violated various Guam health and procurement laws. The emergency procurement protest was denied on June 22, 2016, and it was appealed on June 28, 2016 in OPA-PA-16-008. The OPA consolidated the appeals on July 7, 2016.

## **II. ISSUES TO BE DETERMINED IN THE CONSOLIDATED APPEALS**

The issues to be determined in the consolidated appeals are as follows:

- A. Whether GSA complied with all terms of the contract between itself and Basil when it terminated the contract for Basil's "D" rating.
- B. Whether GSA was required to provide Basil a ten (10) day period to cure prior to termination.
- C. Whether the emergency procurement and award to SH Enterprises complied with Guam law.

Based on the foregoing, there are sufficient grounds for the Public Auditor to find that the termination of Basil and the Emergency Procurement were proper and complied with Guam Procurement Law.

## **III. DISCUSSION**

### **A. GSA was within its contractual rights to terminate Basil.**

Pursuant to Section 12.9 of the contract and Basil's "D" rating received on May 31, 2015, GSA was within its contractual rights to terminate Basil. In failing to get a better rating than

“C,” Basil breached its contract with GSA, and thus GSA was legally permitted to terminate its contract with Basil.

**B. GSA was not required to give Basil a ten (10) day period to cure its default before termination.**

The ten (10) day period Basil is requesting from GSA is not mandated by the contract or any Guam procurement regulation or law. The plain language of 2 GAR § 6101(8) does not provide a mandatory period to cure in the event of a termination for default because the regulation leaves the decision up to the agency by using the qualifier “*may* notify the contractor.” (Emphasis added.) The agency is within its discretion to notify or decline to notify the contractor, and the regulation does not impose any requirement either way. *See* 2 GAR § 6101(8). On its face, the qualifier “*may* notify the contractor” modifies the entire sentence following the notification to delay, thus, the regulation must be read by the OPA to leave the decision of providing a period to cure up to the agency. *Id.* 2 GAR §1106(13) further confirms that “*May* denotes the permissive.” (Emphasis original.) While GSA had the option of allowing Basil ten days to cure its default, and had exercised that option in the past, GSA was fully within its rights to terminate Basil without giving it the opportunity to cure.

**C. The emergency procurement complied with Guam law.**

The May 31, 2015 closure of Basil’s Anigua facility left GSA without a vendor for the ENP, upon which approximately 1,960 seniors rely for daily meals. At 5:00 p.m. the governor’s office granted the request for emergency, and GSA needed to find a vendor who could deliver meals to the seniors the very next day. 5 GCA §5215, which governs emergency procurement, provides in part:

Notwithstanding any other provision of this Chapter, the Chief Procurement Officer, the Director of Public Works, the head of a purchasing agency, or a designee of either officer may make or authorize others to make

emergency procurements when there exists a threat to public health, welfare, or safety under emergency conditions as defined in regulations promulgated by the Policy Office; provided that such emergency procurements shall be made with such competition as is practicable under the circumstances, and further provided that the procurement agent must solicit at least three (3) informal price quotations, if time allows must give notice to all contractors from the qualified bid list who have provided the needed supplies and services to the government within the preceding twelve (12) months, and must award the procurement to the firm with the best offer, as determined by evaluating cost and delivery time.

*See* 5 GCA §5215. SH Enterprises was the only qualified contractor who had provided the needed services within the past twelve months. The only other contractor who had provided those services was Basil, which had just been terminated for default.

Basil's complaint that SH Enterprises did not have a HAACP plan in place at the time it submitted its bid is a red herring. The fact is, at the time of bid submission, SH Enterprises was not required to have a HAACP Plan, because it did not yet serve a highly susceptible population. Once SH Enterprises was awarded the emergency contract, it was given 60 days within which to complete a HAACP plan, which it accomplished within the 60 day period. It is noteworthy that while Basil had been given a more generous timeframe to develop a HAACP Plan, it did not comply within that timeframe. Basil's demand that GSA punish SH Enterprises for its timely compliance with a requirement that Basil itself did not meet in a timely manner should be disregarded. Similarly, Basil's unfounded accusations against SH Enterprises without providing a shred of evidence should be rejected. In the end, SH Enterprises was the only qualified bidder to step in and cover the ENP after Basil defaulted.

Finally, Basil accuses GSA of unlawfully hiring SH Enterprises for a 90-day period. Contrary to Basil's claims, the emergency contract was for a 30-day period, for which it has received an extension. The extension is necessary because GSA is attempting to resolve the instant protest before issuing a new bid.

**IV. CONCLUSION**

For the foregoing reasons, SH Enterprises requests that Basil's appeals be denied.

**CIVILLE & TANG PLLC**

A large, stylized handwritten signature in black ink, appearing to read 'Joyce C.H. Tang', is written over a horizontal line. The signature is fluid and cursive, with a large loop at the beginning and end.

Joyce C.H. Tang  
*Attorneys for SH Enterprises, Inc.*