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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Docket Nos. OPA-PA-16-006 & OPA-
PA-16-008

APPELLANT'S HEARING BRIEF

I. Introduction/Factual Background

Less than two days after receiving a "D" rating which GSA considered to be a default under Appellant Basil Food Industrial Services Corporation's Contracts with GSA, Basil cured its deficiencies and received an "A" rating. Rather than reinstate its elderly nutrition Contracts with Basil, the Government opted to terminate the Contracts based on just two reasons: the recent "D" rating, and the "D" rating received in July of 2015. Ex. 19. The "D" rating received in July 2015 was selectively given to Basil and to no other vendor, showing that the Government unfairly targeted Basil last summer, and now is improperly counting that "D" rating against Basil.

The Government then opted to issue an emergency procurement, and sought

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a quotation from just one vendor: SH Enterprises. Ex. 16. SH Enterprises charges two to three times as much as Basil did. Since June 2016, the Government has not contacted any other vendor for quotations. Meanwhile, the Government continues to this day to pay SH's exorbitant rates.

Moreover, although the Guam Food Code requires vendors who serve elderly populations to have HACCP Plans, the emergency procurement did not require the vendor to have a HACCP Plan, nor does SH possess one. Violating the Food Code and its own policies, the Government looked the other way.

Because the Government did not allow Basil an opportunity to cure, did not consider economic factors before making a termination decision, and conducted an improper emergency procurement that has cost the Government more than \$800,000 dollars above budget, Basil should be reinstated and the emergency procurement should be terminated immediately.

II. The Scope of the OPA's Review

This case presents two main issues: first, GSA's decision to terminate the Basil Contracts rather than allow Basil to provide its emergency menu or to cure its default; and second, GSA's handling of the emergency procurement after Basil's termination. On these issues, the OPA may evaluate GSA's actions and decision on a de novo basis.

III. Termination of Contract

Contract terminations are considered drastic actions to which the government should not lightly resort. *See, e.g., PCL Const. Svcs, Inc. v. U.S.*, 47 Fed. Cl. 745 (2000). Just because a technical default occurred does not mean that the

Government is required to declare a default and terminate a contract. *McDonnell Douglas Corp. v. U.S.*, 35 Fed. Cl. 358, 368 (1996) rev'd, 182 F.2d 1319 (Fed. Cir. 1999) (on reversal, the court remanded to allow the parties to fully litigate whether a default occurred). Procurement officials must not act as "automatons" and blindly follow the instructions from others. *Id.* at 368-69. Instead the Government must consider its interests and the interests of the contractor. If the contractor's defaults can be excused, the contracting officer cannot terminate for default. *Id.* at 370.

A. The Reasons the Government Should Not Have Terminated

As a preliminary note, the Government will likely attempt to justify the termination based on reasons other than the two incidents stated in the Government's termination letter (Ex. 18). These post hoc justifications are improper and should not be considered on this appeal. This appeal focuses on GSA's decision-making at the time of the termination decision.

A number of reasons demonstrate that the Government erred in terminating the contract on June 1, 2016, and not allowing Basil to cure. First, there is no evidence that GSA—the entity that terminated the contract—did so based on factors other than Basil's "D" ratings the prior summer and on May 31, 2016. GSA did not examine whether the prior "D" rating had any merit. Instead, GSA counted against Basil that prior default which unfairly targeted Basil—and no other vendor—for not having a HACCP Plan. As the evidence will show, the Government suspended and tried to revoke Basil's license due to the lack of a HACCP Plan while giving all other vendors more time to submit plans. The evidence will also show that DPHSS recognized on more than one occasion that its HACCP process was flawed, that

Basil was singled out, and that it intended to prevent other vendors from having their permits suspended. As for the May 31, 2016 default, the procurement record contains no evidence that before Ms. Cruz issued her termination letter, she received any information from DPHSS as to Basil's violations or ability to cure, or what other contractual options were available. In other words, it appears she conducted no independent analysis and blindly followed the permit rating.

Second, the Government did not consider that Basil successfully cured the 2016 default within two days. The violations were not so extreme as to warrant a contract termination, particularly if they could be cured so quickly.

Third, the Government failed to consider the economic impact of the termination. To replace Basil's services, the Government chose a vendor at two to three times the price it paid Basil. In fact, the Government chose the bidder (SH) who submitted the highest price when the services were originally solicited in 2014, not even considering the other two vendors who bid lower than SH, and agreed to pay SH even more than what it bid back in 2014. For the three month period after the Government terminated the contract, it has paid \$800,000 above and beyond what it would have paid at the competitively bid price. Because the Government must consider the financial impact of a default decision, and the record is wholly devoid of any indication that the Government undertook this analysis as part of its termination decision, the Government did not properly exercise its discretion to terminate. This is also problematic because the Government is attempting to force Basil to pay the difference between its bid price and SH's inflated price, without having exerted any effort to comply with the Guam Procurement Law or mitigate its

damages. This is patently illegal and unfair.

Fourth, the Government failed to consider the cost-efficient option of allowing Basil to provide meals under the emergency menu provision of the Contracts. Under that option, Basil could provide a dry goods meal for a period of up to three days at the same contract rate.

Fifth, the Government failed to consider Basil's interests. Basil entered into the Contracts understanding that it had an opportunity to cure defaults, and has relied on those contractual provisions. DPHSS informed Basil that it had time to cure the sanitary violations as well. Basil has also invested money into performing under the Contracts, including labor, vehicles, facilities, inventory and equipment tailored to the requirements of the Contracts. The Procurement Record lacks evidence that GSA considered Basil's investments in serving the Government.

Instead of taking these factors into account, Anita Cruz, GSA's Chief Procurement Office, saw two defaults and declared the contract terminated. She failed to examine the underlying merits of those defaults, or the economic impact of her knee-jerk decision. Her analysis was incomplete and in error, and has cost the Government more than \$800,000 over the past three months.

B. Ability to Cure

For instances of default, the Contracts incorporate 2 GAR Div. 4 § 6101(8). That section provides that in such instances,

the Procurement Officer may notify the contractor in writing of the delay or non-performance and if not cured in ten days or any longer time specified in writing by the Procurement Officer, such officer may terminate the contractor's right to proceed with the contract or such

part of the contract as to which there has been delay or a failure to properly perform.

2 GAR Div. 4 § 6101(8). In this case, the Procurement Officer in fact notified Basil of its non-performance. Ex. 18. In addition, Basil was notified by DPHSS that each of its sanitary violations could be corrected by June 10 or 30, 2016. Because notice was given to Basil, the Regulations required the Procurement Officer to give an opportunity to cure. Basil did so cure, within two days, and should have been reinstated as the contract provider.

IV. The Illegal Emergency Procurement

a. Legal Requirements for an Emergency Procurement

Guam Procurement Law requires the following during an emergency procurement process: the Government

must solicit at least three (3) informal price quotations, if time allows 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.

5 GCA § 5215. The Procurement Regulations clarify that the second clause is independent from the first clause: the Government

must solicit at least three informal price quotations, *and* if time allows must give notice to all contractors from the qualified bidders' list who have provided the needed supplies and services to the Government of Guam within the preceding 12 months, and must award the procurement to the firm with the best offer, as determining by evaluating cost and delivery time.

2 GAR Div. 4 § 3113 (emphasis added). Because of that inclusion of the word "and," the language "if time allows" modifies only the requirement on contacting pre-

qualified bidders, but it does not modify how many quotations the Government must secure. The language clearly required GSA to obtain "at least three informal price quotations."

The evidence shows the Government favored SH and slated SH to provide the elderly nutrition services; otherwise the Government would have sought quotes from other bidders who bid even less than SH on the original contract. Why else would the Government single out SH who did not have a HACCP Plan and was the highest bidder for the original contract? Why else would the Government diverge from its policy of unconditionally requiring providers to comply with HACCP requirements? Why else would the Government consider SH "qualified" even though it received a "D" rating during the period in which it was allegedly "qualified" to provide services to the elderly? Why else would the Government allow SH to continue to provide services without complying with the terms of the emergency procurement? There is no rational explanation for the myriad number of times the Government bent the rules to give an expensive contract to SH.

b. GSA Abused the Emergency Procurement Process

As will be shown at the hearing, GSA flagrantly abused the emergency procurement process. Its list of deficiencies are endless, and they are documented in the record. It did not solicit three quotes. It sought emergency services beyond thirty days. It has not sought new quotes for every new set of thirty days. It issued a solicitation in violation of the Guam Food Code. It awarded services to a provider that did not have a HACCP certification. It did not investigate violations of the Food Code or the terms of the emergency procurement.

The end result is that the Government has allowed unsafe food to be served by an unsafe provider at two to three times what it paid Basil. In the Government's critical fiscal state, GSA's disregard of procurement protocols and safety standards puts everyone at risk.

c. GSA Has Not Sought Out More Quotations

Even if the OPA accepts GSA's shortcut of seeking just one quotation for services beginning on June 1, 2016, GSA was required to seek new quotations for services for the months of July and August. According to the Procurement Regulations,

No emergency procurement or combination of emergency procurements may be made for an amount of goods or supplies greater than the amount of such goods and supplies which is necessary to meet the emergency for the 30-day period immediately following the procurement.

2 GAR Div. 4 § 3113. In other words, an emergency period lasts just 30 days. If the emergency continues, the Government must solicit quotes again for the next 30 days.

The Procurement Record contains no evidence that GSA has re-engaged the quotation process in the time since it first issued its emergency procurement in June 2016. For the month of July, 2016, for which GSA had 30 days to prepare, no other informal quotations were solicited. For the month of August, 2016, for which GSA had 61 days to prepare, no other informal quotations were requested. Again, only SH was given the opportunity to provide services to the Government at its astronomical rates.

To boil this down to the figures, comparing what the Government paid Basil

versus what it has been paying SH, Basil submits Exhibit 40. What this chart demonstrates is that over the three months of the illegal and invalid emergency procurement, the Government has footed more than \$800,000 in emergency services over and above what it awarded as the original contract price.

d. Funding issues


Basil questions whether the Government can afford to pay \$800,000 above and beyond what it may have budgeted for the ENP services. Because these services involve federal money, if the Government has not followed Guam Procurement Law and Regulations governing competitive bidding under emergency circumstances, the federal grant may be at stake.

V. Relief Requested.

The emergency procurement is so rigged with flaws that it needs to be immediately addressed and thrown out. The OPA must intervene and instruct GSA on the proper way to procure emergency services at the highest practical level of competition. Basil asks that the OPA order GSA to terminate the existing emergency procurement, and to reinstate Basil's Contracts.

DATED: Hagåtña, GU, 12 August 2016.

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