

CAMACHO CALVO LAW GROUP LLC

GERI E. DIAZ  
gdiaz@camachocalvo.law  
356 E. Marine Corps Drive, Suite 201  
Hagåtña, GU 96910  
Tel No. 671.472.6813  
Fax No. 671.477.4375

Attorney for Appellant  
BASIL FOOD INDUSTRIAL SERVICES CORPORATION

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS  
DATE: Aug. 3, 2020  
TIME: 4:23 CIAM XPM BY: Chris  
FILE NO OPA-PA: 19-011/20-003

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES  
CORPORATION,

Appellant.

Appeal No. OPA-PA-19-011  
Appeal No. OPA-PA-20-003  
CONSOLIDATED

**APPELLANT BASIL FOOD  
INDUSTRIAL SERVICES  
CORPORATION'S BRIEF ON THE  
ISSUE OF JURISDICTION**

COMES NOW, Basil Food Industrial Services Corporation (hereinafter "Basil"), with its brief on the issue of the Public Auditor and the Office of Public Accountability's jurisdiction to hear Basil's appeal relating to SH Enterprises' ethical violations. As discussed below, there is ample legal authority for the Office of Public Accountability to hear this matter.

**I. INTRODUCTION**

Basil filed a Notice of Procurement Appeal on December 16, 2019 relating to the Chief Procurement Officer's denial of its protest of SH Enterprises' ethical violations related to the donation of the Hakubotan building to the Government of Guam. During the Motion Hearing held on July 29, 2020, SH Enterprises – for the very first time – questioned whether this forum has

jurisdiction over this matter. Basil submits this brief in support the fact that SH Enterprises' ethical violations are properly before the Office of Public Accountability.

## **II. THE PUBLIC AUDITOR HAS JURISDICTION TO ADDRESS THE ETHICAL VIOLATIONS RAISED BY BASIL**

The Public Auditor and the Office of Public Accountability has jurisdiction over this matter pursuant to 5 G.C.A. § 5425 of the Guam Procurement Law. In its February 7, 2020 protest of the award of GSA-056-19 to SH Enterprises, Inc., Basil indicated that it was an aggrieved bidder and that its protest was rooted in 5 G.C.A. § 5425(a). Specifically, Basil stated, "Under Guam procurement law, an actual bidder who has been aggrieved in connection with the method of source selection, solicitation or award of a contract may file a protest to the Chief Procurement Officer in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." *See* Exhibit F, Notice of Procurement Appeal dated February 27, 2020. A review of the facts will show that Basil placed a bid on GSA-056-19 (hereinafter "the Contract"), and after the Contract was awarded to SH Enterprises, it filed a timely protest upon learning of SH Enterprises' breach of its ethical obligations pursuant to that Contract. Here, 5 G.C.A. § 5425(a) is applicable because Basil has been aggrieved due to the continued award of GSA-056-19 to SH Enterprises despite these serious violations.

The facts will further show that upon receipt of the February 12, 2020 response from Claudia Acfalle, the Chief Procurement Officer, denying the protest on the basis that it was allegedly without merit, Basil filed its Notice of Procurement Appeal on February 27, 2020. Pursuant to 5 G.C.A. § 5425(e), Basil had a right to file an appeal to the Public Auditor within fifteen (15) days after receipt of the Chief Procurement Officer's notice of decision, which it did.

Based on Guam law and this timeline of events, Basil's appeal is properly before the Office of Public Accountability.

### III. THE CIVIL SERVICE COMMISSION IS NOT THE PROPER FORUM TO ADDRESS BASIL'S APPEAL

During the Motion Hearing held on hearing held on July 29, 2020, General Services Agency ("GSA") argued that this matter would be properly heard by the Civil Service Commission. However, 5 G.C.A. § 5675 is quite clear that the Civil Service Commission will only handle those ethical violations by government employees, which SH Enterprises is not. Further, this law, including its comment<sup>1</sup>, provides that the Procurement Policy Office<sup>2</sup> (hereinafter "Policy Office") has jurisdiction over non-employee violations.

When assessing the current jurisdictional component for ethical violations, attention should be also given to 5 G.C.A. § 5102 which discusses the role and powers of the Policy Office and the Chief Procurement Officer when it comes to promulgating and enforcing regulations, managing and controlling procured supplies and services, resolving disputes, etc. It states,

"Except as otherwise provided in this Chapter, the Policy Office shall have the authority and responsibility to promulgate regulations, consistent with this Chapter, governing the procurement, management, control and disposal of any and all supplies, services and construction to be procured by the Territory. The Policy Office shall consider and decide matters of policy within the provision of this Chapter including those referred to it by the Chief Procurement Officer or the Director of Public Works. The Policy Office shall have the power [sic] its regulations and the requirements of this Chapter, but shall not exercise authority over the award or administration of any particular contract, or over any dispute, claim, or litigation pertaining thereto, except that the Chief Procurement Officer and the Director of Public Works shall exercise such authority in accordance with the provisions of this Chapter." (Emphasis added.)

5 G.C.A. § 5102.

---

<sup>1</sup> Comment to 5 G.C.A. § 5675 states, "In the interests of continuing the employment structure already established and in not creating unnecessary commissions, the Civil Service Commission has jurisdiction over ethics violations by employees and the Policy Office has jurisdiction over non-employees. Change by Committee on GGO."

<sup>2</sup> 5 G.C.A. § 5101 creates the Procurement Policy Office.

Notably, the last sentence of 5 G.C.A. § 5102 places the authority to resolve issues relating to the award or administration of a contract, which would reasonably include issues regarding ethical violations by non-employees, in the hands of the Chief Procurement Officer. This is the exact scenario that occurred here as Basil first filed its protest with the Chief Procurement Officer, and then, pursuant to 5 G.C.A. § 5425(e), filed its Notice of Appeal with the Office of Public Accountability.

In line with 5 G.C.A. § 5102, which maps out the duties and obligations for the Policy Office and the Chief Procurement Officer, both 5 G.C.A. § 5651 and 5 G.C.A. § 5426 should also be analyzed as they provide additional support for the Chief Procurement Officer's authority to address ethical issues, which, in turn, segues into the Public Auditor's jurisdiction to resolve any related appeals from the Chief Procurement Officer's decision.

In starting this analysis, 5 G.C.A. § 5651(b) states that the Policy Office, in connection with non-employees, may impose any one of three remedies against non-employees who breach ethical standards, such as 1) written warnings or reprimands, 2) termination of transactions, and 3) debarment or suspension from being a contractor or subcontractor under territorial contracts. Also, in discussing the Policy Office's authority, 5 G.C.A. § 5651(d) states that the Policy Office has the authority to debar or suspend non-employees for breach of ethical standards *in accordance with* the procedures set forth in 5 G.C.A. § 5426.

Then, in reviewing 5 G.C.A. § 5426, subsection (a) specifically discusses the Chief Procurement Officer's role in suspension or debarment proceedings. Notably, it provides the Chief Procurement Officer with the authority to debar or suspend a person for cause from consideration for award of contracts pursuant to the regulations promulgated by the Policy Office. Subsection (b)(6) adds that the violation of ethical standards pursuant to Article 11 (Ethics in Public

Contracting) can be a basis for debarment or suspension. Lastly, and equally as important as the other subsections of 5 G.C.A. § 5426, subsection (f) states that any member of the public may petition the Chief Procurement Officer to take action to debar or suspend pursuant to Subsection (a).

As a result of SH Enterprises' violation of 5 G.C.A. 5630(d) Favors to the Territory, which falls within Article 11 of Chapter 5 (Guam Procurement Law), Basil filed its protest to the Chief Procurement Officer and requested several remedies, including a written warning or reprimand, termination of the Contract and debarment or suspension of SH Enterprises per 5 G.C.A. §5651. Significantly, although Basil was not a party to GSA-056-19, it is a member of the public that has a right to petition to Chief Procurement Officer to address this matter pursuant to 5 G.C.A. § 5426(f).

GSA argues that Basil should be protesting the Governor's actions for accepting the donation, and had it done so, this matter should be before the Civil Service Commission. GSA further focuses on the Governor's authority to accept donations and advances the claim that it had no role in procuring the Hakubotan building. In retrospect, GSA has such a one sided view on what it thinks the correct protest should be that it doesn't even address SH Enterprises' actions and the ethical violations flowing from GSA-056-19. By taking this stance, GSA ignores the fact that SH Enterprises, as a government contractor, is also subject to compliance with ethical rules and requirements. This, at best, is a strategical distraction aimed to shift the focus away from the heart of Basil's protest – SH Enterprises' actions.

As stated in its Notice of Procurement Appeal, the focus is on SH Enterprises' unequivocal failure to abide by the ethical standards provided in 5 G.C.A. § 5630(d) and 2 GAR Div. 4, § 11107(4). SH Enterprises was strictly bound to comply with these rules and regulations, including

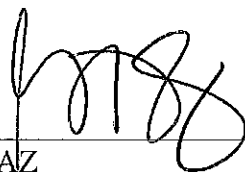
the ethical provisions outlined in GSA-056-19, when it was awarded the Contract. When SH Enterprises knowingly and blatantly breached its obligations, Basil followed the applicable protocol and filed a protest with the Chief Procurement Officer. Now, it properly appeals the Chief Procurement Officer's decision denying its protest with the Office of Public Accountability.

#### IV. CONCLUSION

As a contractor for the Government of Guam, SH Enterprises breached its ethical obligations as promulgated in Guam's Procurement Laws and Regulations and as outlined in GSA-056-19. Since Guam's Procurement Laws provide the Chief Procurement Officer with the power to exercise its authority over the award and administration of the Contract, as well as over any ethical disputes and litigation pertaining to that Contract, Basil complied with the proper channels for its protest with the Chief Procurement Officer and its appeal with the Office of Public Accountability. Accordingly, it is respectfully requested that the Public Auditor find that it does have jurisdiction to hear this matter.

DATED: Hagåtña, GU, August 3, 2020.

CAMACHO CALVO LAW GROUP LLC

  
\_\_\_\_\_  
GERI E. DIAZ  
Attorney for Appellant  
BASIL FOOD INDUSTRIAL SERVICES  
CORPORATION