

1 VANESSA L. WILLIAMS, ESQ.
2 LAW OFFICE OF VANESSA L. WILLIAMS, P.C.
3 414 WEST SOLEDAD AVENUE
4 GCIC BLDG., SUITE 500
5 HAGÁTÑA, GUAM 96910
6 TELEPHONE: 477-1389
7 EMAIL: VLW@VLWILLIAMSLAW.COM

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

DATE: Aug. 7, 2020

TIME: 3:57 AM PM BY: Amr

FILE NO OPA-PA: 19-04/20-003

Attorney for Interested Party SH Enterprises, Inc.

BEFORE THE PUBLIC AUDITOR

PROCUREMENT APPEALS

IN THE APPEAL OF:

BASIL FOOD INDUSTRIAL SERVICES CORPORATION,

Appellant.

DOCKET NO. OPA-PA-19-011
OPA-PA-20-003

**INTERESTED PARTY SH
ENTERPRISES, INC.'S
HEARING BRIEF**

INTRODUCTION

Appellant Basil Food Industrial Services Corporation (“Basil”) appealed a November 30, 2019 decision issued by the General Services Agency (“GSA”) denying Basil’s Protest filed on November 22, 2019 (“Protest”) of the November 8, 2019 award of GSA Bid No. GSA-056-19 to Interested Party SH Enterprises (“SH”). Subsequently, on February 27, 2020, Basil filed another Notice of Appeal alleging a violation of 2 GAR Div. 4 § 11107(e). *Notice of Appeal* at 4 (Feb. 27, 2020). On March 13, 2020, the OPA consolidated these two appeals into a single appeal. *Order Consolidating Appeals* (Mar. 13, 2020). The OPA set a hearing for these appeals on August 11, 2020 and SH hereby submits its hearing brief on the remaining issues[?].

BACKGROUND

On September 25, 2019, GSA issued GSA Bid No. GSA-056-19 (the “IFB”) for Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Meals Components. IFB, Procurement Record (“PR”) 1-04 at 3. The term for the contract was three (3) years with the

1 option to renew for two (2) additional one fiscal-year terms at the Department of Health and
2 Social Services' (DPHSS) discretion. *Id.* at 53.

3 Section 2.5(f) of the IFB required bidders who had been awarded a government contract
4 in the preceding three (3) years, to "list citations in the areas of procurement, questioned costs,
5 material weaknesses and [the bidder's] organization's non-compliance with contract provisions."
6 IFB at 56. The IFB further required bidders to complete and include mandatory federal program
7 forms, including a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary
8 Exclusion ("B-4 Certification"). *Id.* at 34. The B-4 Certification includes a certification by the
9 bidder that it "[had] not within a three year period preceding [the] application/proposal had one
10 or more public transactions (Federal, State or local) terminated for cause or default." *Id.* at 38. If
11 a bidder was unable to certify as provided, the bidder was required to attach an explanation to its
12 proposal, which would be considered in determining bidder responsibility. *Id.*

13 On October 24, 2019, representatives from Basil and SH submitted their bids for this IFB
14 procurement and attended the bid opening. *See* Bid Abstract, PRI-06 at 2. The B-4 certification
15 submitted with SH's bid certified that SH had not been terminated for cause or default in the
16 preceding three year period. *See Notice of Appeal*, Ex. B (SH B-4 Certification).

17 On November 8, 2019, GSA served SH with its Notice of Intent of Possible Award
18 ("NOI") of the contract for the IFB to SH. NOI, PRI-09 at 1. GSA also issued Purchase Order
19 Number P206A00841 to SH on November 8, 2019. *See* Purchase Order for GSA-056-19, PRII-
20 14 at 5. On November 22, 2019, Basil filed its Protest challenging GSA's award of the contract
21 to SH. *See Notice of Appeal*, Ex. I (Protest). Basil raised three arguments.

22 Basil challenged the award to SH on the basis that SH was not eligible because it was
23 "neither a responsive nor responsible bidder" because Basil incorrectly assumed that SH "failed
24 to disclose highly pertinent, available information clearly required by the IFB and knowingly
25 provided misrepresentations in its bid." *Id.* at 2. The thrust of Basil's challenge is Basil believes
26 that SH had a March 28, 2019 government contract terminated for cause which was not disclosed
27 in SH's B-4 Certification.

1 The GSA issued a decision denying Basil's Protest on November 30, 2019 ("GSA
2 Decision"). See *Notice of Appeal*, Ex. G (GSA Decision) at 1. The GSA Decision explained SH
3 was not terminated, but, rather, voluntarily withdrew from the award:

4
5 a. You indicated that SH Ent. Was terminated or canceled contract
awarded for 3/28/19

6
7 Response: S.H. Enterprise Inc. withdrew from the emergency award
and was not terminated.

8 *Id.*

9 SH indeed withdrew from the March 28, 2019 emergency award, and was not terminated
10 for cause. On April 5, 2019, Tae Hong Min, President of SH, submitted to the GSA SH's
11 Withdrawal of Purchase Order for Home Delivery of Elderly Food Services under the Department
12 of Public Health and Social Services. In its Withdrawal, SH informed the GSA that it had an
13 insufficient number of drivers to provide the services required in the emergency procurement in
14 a timely manner. SH was not terminated for a "C" rating in the March 28th Emergency
15 Procurement. SH's B-4 certification for this IFB, stating that it had not been terminated in any
16 other Government solicitation in the three-year period preceding the IFB, was true at the time it
17 was submitted and is true today.

18 SH began delivering meals on December 1, 2019. See Purchase Order, PR11-14 at 5. On
19 December 16, 2019, Basil appealed the GSA Decision denying its Protest.

20 Basil then submitted a second appeal on February 27, 2020, alleging that SH had violated
21 2 GAR Div. 4 § 11107(4) by improperly donating space within the Hakubotan building, a
22 commercial building, to the Government of Guam for use as the Guam War Claims Center on
23 January 22, 2020. *Notice of Appeal* at p. 3-4 (Feb. 27, 2020). This action, Basil asserts, constitutes
24 a favor to the government, which violates the prohibition on favors to the government. *Id.* at 4.

25 **DISCUSSION**

26 The main issues in this Appeal are: (1) whether Basil's November 22, 2019 protest in
27 connection with the April 2019 Emergency Procurement is properly before the Public Auditor;
28 (2) whether Basil's November 22, 2019 protest to the award of GSA Bid No. GSA0-056-19 is

1 properly before the Public Auditor because Basil was “aggrieved” more than 14 days before filing
2 its protest; and (3) whether the alleged breach of another’s contract is grounds to protest to the
3 Chief Procurement Officer pursuant to 5 GCA § 5425.

4
5 **I. Basil’s Protest in connection with the April 2019 Emergency Procurement is not
6 properly before the Public Auditor.**

7 The jurisdiction of the Public Auditor is to “review and determine de novo any matter
8 properly submitted to her or him.” 5 G.C.A. § 5702(a). Basil’s challenge to whether Section
9 12.8 of the April 2019 procurement applies is not a matter that has been properly submitted to
10 the Public Auditor and therefore the Public Auditor lacks jurisdiction to resolve this matter.
11 Basil’s protest and appeal in connection with GSA-056-19 actually involves an emergency
12 procurement that predates IFB GSA-056-19 by seven months. Basil brings the protest supposedly
13 in connection with the award of the contract under GSA-056-19 to SH Enterprises. However,
14 Basil’s protest and appeal make clear it is aggrieved by GSA’s interpretation of Section 12.8
15 (Termination of Non-Compliance with regulatory Requirements of Program Specifications) of
16 the April 2019 Procurement Contract. Whether SH breached Section 12.8 of the Program
17 Specification for the emergency procurement contract of the April 2019 Nutrition Program to
18 effectively terminate the contract is not properly before the Public Auditor. *See* Appellant Basil
19 Food Industrial Food Services Corp. List of Issues, 1 (Jul. 31, 2020).

20 Basil is asking the Public Auditor to go back and revisit an agency decision interpreting
21 the alleged violation of specifications of the March 28, 2019 Purchase Order No. P196E00314.
22 *See* Basil’s Exhibits 1 and 2. This is a controversy based upon breach of that contract or other
23 cause for contract modification or rescission. *See* 5 G.C.A. § 5427(a) (“This Section applies to
24 controversies between the Territory and a contractor and which arise under, or by virtue of, a
25 contract between them. This includes without limitation controversies based upon breach of
26 contract, mistake, misrepresentation, or other cause for contract modification or rescission.”).
27 Guam’s Procurement Regulations further emphasis for purposes of 5 G.C.A. § 5247, “The word
28 controversy is meant to be broad and all-encompassing. It includes the full spectrum of
disagreements from pricing of routine contract changes to claims of breach of contract.” 2 GAR,

1 Div. 4, Chap. 9, § 9103(b). Section 5427, not 5425, governs the resolution of such a controversy.
2 Further, Section 5706 provides the appellate review process for an agency decision under Section
3 5427. *See* 5 G.C.A. § 5706.

4 Otherwise, actions “to determine whether a solicitation or award of a contract is in
5 accordance with the statutes, regulations, and the terms and conditions of the solicitation” are
6 governed by the Government Claims Act. 5 G.C.A. § 5480. Pursuant to section 5480, “the
7 Superior Court of Guam shall have jurisdiction over an action between the Territory and a bidder,
8 offeror, or contractor, either actual or prospective, to determine whether a solicitation or award
9 of a contract is in accordance with the statutes, regulations, and the terms and conditions of the
10 solicitation.” 5 G.C.A. § 5480(a). Section 5480 further provides that “[a]ll actions permitted by
11 this Article shall be conducted as provided in the Government Claims Act.” 5 G.C.A. § 5480(f).
12 *See also* 2 GAR, Division 4, Chapter 9, § 9108.

13 Under the Government Claims Act, any complaint against the Government of Guam or
14 an agency thereof must be served on the Attorney General. *See* 5 G.C.A. § 6209 (“Service of
15 process shall be made upon the ... Attorney General”), *Town House Department Stores, Inc. v.*
16 *Department of Education*, 2012 Guam 25 1133 (GRCP 4(i) “requires parties suing an agency or
17 corporation of the government of Guam to serve the Attorney General and send a copy by
18 registered mail to the agency or corporation.”). Either the contract controversy administrative
19 review process or the government claims process was the process Basil should have pursued, not
20 a protest to a subsequent procurement seven months later.

21 Either way, Basil’s protest regarding the award of IFB GSA-056-19 seeks to circumvent
22 the statutory and regulatory schemes provided for contract controversies. If accepted, Basil’s
23 argument opens the door for all future unsuccessful bidders to “timely” bring a protest of an
24 award by alleging a breach or violation of a prior procurement at any time. Basil’s framing of
25 the issue in attempt to come within 5 G.C.A. § 5425 is contrary to the intent of Guam procurement
26 law to facilitate the expeditious resolution of controversies.

1 **II. Basil's protest that SH was a non-responsive or not responsible bidder to GSA-056-**
2 **19 is untimely.**

3 Basil contends that SH was not a responsive nor responsible bidder. This matter is also
4 not properly before the Public Auditor. The Public Auditor has the power to review and determine
5 *do novo* any matter properly submitted to it. 5 G.C.A. § 5703. The Public Auditor has the
6 jurisdiction to review a purchasing agency's decision denying a protest concerning the method of
7 source selection, solicitation, or award of a contract. 5 G.C.A. § 5425(e). However, such protests
8 must be filed with the purchasing agency fourteen (14) days after the protestor knows or should
9 have known of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9,
10 §9101(c)(1). Protests filed after the fourteen (14) day period shall not be considered. 2 G.A.R.
11 Div. 4, Chap. 9, §9101(c)(1). Here, Basil filed its protest after the fourteen (14) days period it had
12 to do so had expired. Therefore, this matter is not properly before the Public Auditor because, in
13 accordance with 2 G.A.R. Div.4, Chap.9, §9101(c)(1), the issue being raised in this appeal shall
14 not be considered because it arises from the issue Basil raised in its untimely protest.

15 Basil argues that SH was a non-responsive or non-responsible bidder is based on their
16 assumption that SH's April 2019 emergency procurement contract was terminated for cause. *See*
17 *Notice of Appeal*, Ex. I (Protest) at 3. In its Protest, Basil admits that it was aware of these "facts"
18 as of September 25, 2019, when the GSA issued its bid¹:

19 At the time GSA issued the present bid, Basil was aware of certain
20 facts related to [SH] previous operations. Primarily, Basil was
21 awarded a similar contract after GSA terminated a contract with SH
22 as a result of SH failing to maintain the proper sanitary rating from
23 the Department of Public Health and Social Services (DPHSS). This
24 contract with SH was terminated for cause. Throughout this IFB,
25 GSA clearly requires all bidders to disclose whether they have had
26 a public contract terminated for cause in the last three years.
27 Additionally, each bidder is to disclose citations related to
28 government contracts in the previous three years.

Id. at 1 (emphasis added).

27 ¹ In its Protest, Basil incorrectly states that "GSA issued Bid Invitation No. GSA-056-19 on
28 October 10, 2019." *Protest* at 1. However, the IFB was issued on September 25, 2019. *See IFB*,
Procurement Record Vol. I — 04 at 3. The original bid opening date was scheduled for October
10, 2019. *Id.*

1 Basil knew or should have known of the facts giving rise to its protest at the bid opening
2 for the IFB, which took place at the GSA conference room on October 24, 2019 at 2:00 p.m. *See*
3 *Bid Abstract*, PRI-06 at 2. The bid opening for this IFB occurred in the presence of representatives
4 of GSA, Basil and SH. Present at the bid opening on behalf of Basil were its program manager
5 Betty Dela Cruz, and directors Michael Zhou, Jerry Li and Guo Qiang Zheng. *Id.* GSA
6 representatives, Buyer Arlene Cruz and Management Analyst Joyce Castro, the tabulator on the
7 bid, were also present. *Id.* There were a total of two (2) bids submitted, one for SH and the other
8 from Basil. *Id.* The bid opening was recorded by the GSA.² *Travis Decl.* at Ex. B.

9 It is clear from the recording of the bid opening that the bid packets were opened one at a
10 time, beginning with Basil's bid packet, followed by SH's bid packet. Buyer Arlene Cruz
11 confirmed that each packet contained all of the required documents and line items, and announced
12 the bid price for each bidder. Basil was therefore made aware during the bid opening on October
13 24, 2019, that SH had submitted its B-4 Certification, certifying that it had not been terminated
14 for cause in the preceding three-year period and that it was the lowest bidder. Therefore, on
15 October 24, 2019, Basil knew or should have known of the "facts" giving rise to its Protest, and
16 the clock began to run on the time within which it was required to file its Protest.

17 Basil contends it was not an aggrieved party eligible to submit a protest until it was made
18 aware that SH, and not Basil, was awarded the contract on November 8, 2019, at which time the
19 fourteen-days to submit a protest would have started. *See Protest* at 2. While superficially
20 appealing, this conclusory argument is illogical and contrary to plain requirements of 5 G.C.A. §
21 5245. The Guam Supreme Court has stated that in connection with 5 GCA § 5425, "[a]n
22 aggrieved party is '[a] party entitled to a remedy.'" *Teleguam Holdings LLC v. Guam*, 2018 Guam
23 5 ¶ 37. In reviewing the language of § 5425, a party "may be aggrieved in connection with the
24 method of source selection, solicitation or award of a contract." Therefore, it is clear that a party
25 is not aggrieved only once it has lost the contract bid but can also be aggrieved during the
26 solicitation of contract, which would include the process of accepting of bids.

27 ² SH obtained a copy of the bid opening recording pursuant to a Sunshine Act request dated
28 December 26, 2019.

1 Further, it is a maxim of jurisprudence that acquiescence in error takes away the right of
2 objecting to it. 20 G.C.A. § 15108. This maxim is applicable to this matter because the record
3 shows that Appellant did not file a protest within fourteen (14) days after known of Basil's alleged
4 termination and lowest bid submission on October 24, 2019 because it assumed that SH's bid
5 would be rejected. This erroneous assumption does not constitute an exception to the fourteen
6 (14) day period to file a protest set forth in 5 G.C.A. Basil's argument should be rejected because
7 it requires an interpretation that no bidder is aggrieved until the purchasing agency has awarded
8 a contract and therefore, there could be no appeal prior to the award of a contract.

9 It is undisputed that Basil knew that SH had not disclosed the alleged April 2019 conduct
10 and contract termination on the day of the bid opening when SH's bid was accepted as complete
11 and responsive. Accordingly, it was at that point that Basil would have been aggrieved by the
12 submission and acceptance of an improper or incomplete bid, triggering the fourteen-day clock.
13 Pursuant to 5 GCA § 5425, Basil was required to file its Protest within 14 days of the bid opening
14 date, or by no later than November 7, 2019. Basil filed its Protest on November 22, 2019, fifteen
15 (15) days after the deadline for raising this claim. Basil's protest was not timely filed and the
16 Appeal should be dismissed.

17
18 **III. SH Enterprises' donation of commercial space is not a method of source selection,**
19 **solicitation or award of contract that Basil may protest pursuant to 5 GCA § 5425**
20 **and is not properly before the OPA.**

21 Like the alleged violation of the April 2019 procurement specifications, Basil also seeks
22 to bring a contract "controversy" by protest pursuant to 5 GCA § 5425. This controversy or matter
23 is not properly before the Public Auditor for the same reasons discussed in Section I *supra*. 5
24 G.C.A. § 5425 gives the right to protest to "[a]ny actual or prospective bidder, offeror, or
25 contractor who may be aggrieved in connection with the method of source selection, solicitation
26 or award of a contract." As Basil admits, this alleged improper donation occurred on January 22,
27 2020, which was two months after the contract award. *Notice of Appeal* at 3. Because the alleged
28 conduct giving rise to this appeal occurred after the award of the contract, it cannot be said to

1 have influenced the “method of source selection, solicitation or award” of the contract, and thus,
2 is not within Basil’s protest rights. Had SH committed these alleged acts prior to the award of the
3 contract and failed to disclose or address it, presumably, it would aggrieve Basil and potentially
4 give Basil a protest right of a subsequent award to SH, assuming that Basil exercises that right in
5 a timely manner. However, those are not the facts of this appeal.

6 Basil attempts to bring this improper matter before the Public Auditor by challenging the
7 “continual award” of the contract to SH despite alleged breaches of contractual ethical
8 obligations. *Basil Br. on the Issues of Jurisdiction* at p. 2 (Aug. 3, 2020). Unfortunately for Basil,
9 this appeal is grounded not on the improper “method of source selection, solicitation, or award of
10 a contract” but on the performance of the already awarded contract, to which Basil has no protest
11 rights. Basil has failed to show any authority that performance of an already-awarded contract
12 would give them the right to protest a breach of the contract. This process, however, is wholly
13 separate and apart from the protest process of § 5425 and is not initiated through a § 5425 protest.
14 The Guam Supreme Court made this exact distinction in *Pacific Rock Corp. v. Dep’t of Educ.*
15 when it stated:

16
17 When a contractor has been aggrieved with respect to a bid award,
18 it must lodge a protest with the contracting officer. 5 GCA § 5425
19 (1996). If a Procurement Law controversy arises with regard to
20 breach, mistake, misrepresentation, or other cause for contract
21 modification or rescission, recourse is to seek resolution with the
22 Chief Procurement Officer (“CPO”), Title 5 GCA § 5427, (1996),
23 because it is the government’s policy to attempt settlement of
24 disputes before resorting to litigation. GSA Procurement Reg. §
25 9.03.01.1, (1984).

26 2000 Guam 19 ¶ 17 (citations in original). This alleged breach of the contract would be the exact
27 type of procurement law controversy over which the CPO would investigate and then preside.

28 Alternatively, Basil’s procurement protest façade is instead seeking to nullify SH’s
contract and exclude them from all future contract procurement, pursuant to 5 GCA § 5426.
Although Basil acknowledges any member of the public may petition the CPO to take action
against SH as a government contractor for an alleged cause for debarment or suspension under §
5426(b), which would also prompt an investigation and decision by the CPO, that is not what

1 Basil did. Neither did Basil follow the process under Section 5427. Neither the process under §§
2 5426(f) nor 5427 are initiated through a § 5425 solicitation or award protest, which is the action
3 currently before the OPA. As such, the OPA does not have the jurisdiction to hear this issue
4 through this § 5425 protest appeal as Basil did not have the right to raise this issue in its appeal
5 in the first place.

6 **CONCLUSION**

7 For the foregoing reasons, Basil's appeals must be denied.

8 Respectfully submitted this 7th day of August, 2020.

9
10 **LAW OFFICE OF VANESSA L. WILLIAMS, P.C.**
Attorney for Appellant

11
12 

13
14

VANESSA L. WILLIAMS, ESQ.