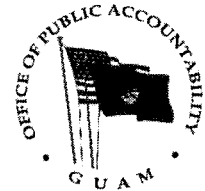


Suite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Ms. Claudia S. Acfalle Chief Procurement Officer General Services Agency Department of Administration 148 Route 1 Marine Drive Piti, Guam 96915 Phone: (671) 475-1707 Fax: (671) 475-1727/472-4217	From:	Benjamin J.F. Cruz Guam Public Auditor Office of Public Accountability
		Pages:	14 (including cover page)
CC:	Geri E. Diaz, Esq. (Attorney for Appellant Basil Food) Camacho Calvo Law Group LLC 134 W Soledad Ave., Suite 401 Hagatna, Guam 96910 Phone: (671) 472-6813 Fax: (671) 477-4375	Date:	December 17, 2019
		Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-19-011 Notice of Receipt of Appeal

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Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910
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December 17, 2019

Ms. Claudia S. Acfalle
Chief Procurement Officer
General Services Agency
Department of Administration
148 Route 1 Marine Drive
Piti, Guam 96915

VIA FACSIMILE: (671) 475-1727

Re: Notice of Receipt of Appeal – OPA-PA-19-011

Dear Ms. Acfalle,

Please be advised that Basil Food Industrial Services Corporation (hereinafter referred to as “Basil Food”) filed an appeal with the Office of Public Accountability (OPA) on December 16, 2019, regarding the General Services Agency’s response to Basil Food’s protest of the contract awarded for Nutrition Services for the Comprehensive Management, Operations, and Maintenance of the Elderly Nutrition Program, Congregate Meals and Home-Delivered Meals Components (GSA Invitation for Bid No. GSA-056-19). OPA has assigned this appeal case number OPA-PA-19-011.

Immediate action is required of GSA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at www.opaguam.org. The first six pages of the notice of appeal filed with OPA is enclosed for your reference.

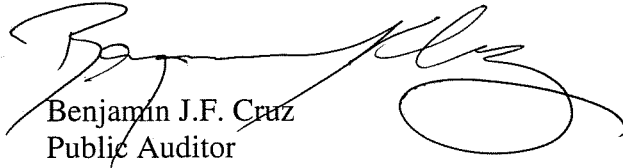
Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Tuesday, December 24, 2019**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Thursday, January 2, 2020**, ten work days following receipt of this notice.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to Basil Food. Although the Guam Procurement Law and Regulations require only one copy of the procurement record, OPA respectfully asks that GSA provide one original and two copies of the said record, which will be distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 208 or jhernandez@guamopa.com should you have any questions regarding this notice.

Sincerely,


Benjamin J.F. Cruz
Public Auditor

Enclosure: First Eleven Pages of the Notice of Appeal – OPA-PA-19-011

Cc: Geri E. Diaz, Attorney for Basil Food

CAMACHO CALVO LAW GROUP LLC

GERI E. DIAZ
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356 E. Marine Corps Drive, Suite 201
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Attorney for Appellant
BASIL FOOD INDUSTRIAL SERVICES CORPORATION

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BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of

BASIL FOOD INDUSTRIAL SERVICES
CORPORATION,

Appellant.

Docket No. OPA-PA- 19-011

NOTICE OF PROCUREMENT APPEAL

Basil Food Industrial Services brings this appeal of a procurement controversy against the General Services Agency of the Department of Administration.

APPELLANT INFORMATION

Name: Basil Food Industrial Services Corporation ("Basil").
Mailing Address: 530 West O'Brien Drive, Hagatna, Guam 96910. For the purposes of this Appeal, please direct filings and correspondence to Basil's legal counsel: Camacho Calvo Law Group LLC, Attn: Geri Diaz, Esq., 356 E. Marine Corps Dr., Ste. 201, Hagåtña, GU 96910.
Business Address: 530 West O'Brien Drive, Hagatna, Guam 96910
Email Address: gdiaz@camachocalvo.law
Contact No.: 671.472.6813
Fax No.: 671.477.4375

APPEAL INFORMATION

- A) **PURCHASING AGENCY:** General Services Agency and Department of Health and Social Services
- B) **IDENTIFICATION OF CONTRACT:** GSA Bid No. 056-19
- C) **DECISION DATE:** The Decision being appealed was made on *Saturday* November 30, 2019 by Chief Procurement Officer Claudia S. Acfalle.
- D) **APPEAL ORIGIN:** Appeal is being made from the Decision denying Basil's protest of a contract recommended to be awarded to a nonresponsive and irresponsible bidder who failed to disclose pertinent information as required by the Bid.
- E) **NAMES OF COMPETING BIDDERS, OFFERORS, OR CONTRACTORS KNOWN TO APPELLANT:** SH Enterprises, Inc.

STATEMENT SUPPORTING THE APPEAL

Under Guam Procurement Law, the Office of Public Accountability has jurisdiction over appeals of decisions rendered by the Chief Procurement Officer on protests of method of source selection, solicitation or award of a contract. 5 G.C.A. § 5425(e).

On October 10, 2019, GSA issued an Invitation for 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. The IFB was for a contract term of three (3) years with the option to renew for two (2) additional fiscal years, one fiscal year at a time, subject to the availability of funds.

The IFB included several requirements mandating bidders to submit specific documents or to make certain disclosures. One of which was whether a bidder had a government contract

terminated for cause in the last three years. Based on information gathered by Basil, Basil contends that SH Enterprises, Inc. (“SH”), the bidder who GSA awarded the contract to, failed to make the necessary disclosures. As such disclosures are directly tied to a proper evaluation of a bidder, Basil argues that SH’s failure to disclose makes it a nonresponsive bidder who should be disqualified.

Other grounds on which Basil bases its Appeal are that GSA has not treated all bidders equally, thereby creating an unfair procurement environment, and that GSA has violated the Procurement Law. With respect to unfair treatment, GSA made specific changes to subsequent IFBs to seemingly accommodate SH and in GSA’s denial of Basil’s protest, GSA explicitly commented on Basil’s conduct that had absolutely no connection to the issues raised in the protest. Instead of responding to the issues raised in the protest, GSA justified SH’s failures by comparing them to Basil’s bid, which was not the subject of the protest. Further, GSA did not provide Basil two days’ notice that it would proceed with the award. Rather, on the same day GSA denied Basil’s protest, GSA notified Basil that it would proceed with awarding the contract to SH, which was to take effect on December 1, 2019, the very next day.

Basil files this appeal within fifteen (15) days of receiving the Notice of Decision, and respectfully requests that the Office of Public Accountability cancel the award made by GSA to SH for GSA-056-19 as SH is a nonresponsive bidder. Additionally, Basil requests that the award be cancelled due to GSA’s failure to comply with the notice requirements under Guam Procurement Law, and that SH be disqualified as a nonresponsive bidder.

LEGAL ARGUMENT

I. SH Enterprises, Inc. is Not a Responsive Bidder and Should be Disqualified

Under Guam Procurement Law, a procurement contract must be awarded to the “lowest responsible bidder whose bid meets the requirements and criteria set forth in the Invitation for

Bids...” 5 G.C.A. § 5211(g). Thus, a bidder whose bid does not meet the requirements demanded in the IFB may not be awarded a procurement contract. Basil contends that SH failed to meet the requirements of the IFB and, as such, should not have been awarded the contract. Moreover, SH should be disqualified as a nonresponsive bidder.

Sections 2.4 and 2.5(f) of the Bid Specifications require each bidder that was awarded a government contract in the last three (3) years to list citations in the areas of procurement, material weaknesses, and its organization’s non-compliance with contract provisions. Additionally, each bidder was required to make a certification as to whether its organization had had a government contract terminated for cause in the preceding three (3) years. On November 12, 2019, Basil submitted a Freedom of Information Act request, seeking documents submitted by SH in response to the IFB. See Exhibit A. Among other documents, the FOIA request specifically called for (i) the complete, full, and entire bid documents submitted by SH in response to IFB GSA-056-19, and (ii) all notices, documents, correspondence, and communications issued by or received by GSA concerning Purchase Order Number P196E00314 – Provision of Nutritional Services for the Comprehensive Management, Operations, and Maintenance for DPHSS Elderly Nutrition Home-Delivered Meal Program issued to SH on March 28, 2019. Basil clearly made known that its request included and was not limited to any and all documents related to the termination or cancellation of the contract.

A review of the documents produced by GSA in response to the FOIA form one of the primary bases of the protest and this instant appeal. While SH has been awarded government contracts in the previous three years, it failed to produce a list of citations noting negative marks in its performance history, information integral to a proper evaluation. Additionally, SH submitted a Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion averring

that SH had not had a government contract terminated for cause or default in the last three years. See Exhibit B.

Basil contends that SH's certification and lack of disclosure are untrue and consequently make SH's bid nonresponsive. GSA and DPHSS issued an Emergency Procurement solicitation for the Elderly Nutrition Program, Home-Delivered Meals for the time frame of April 1, 2019 to and including April 30, 2019. SH and Basil submitted bids, and SH was awarded the contract, as evidenced by a Purchase Order to SH dated March 28, 2019. See Exhibit C. This Purchase Order is for the total amount of \$246,030.00 for the Elderly Nutrition Program, Home-Delivered Meals for the period of April 1, 2019 through April 30, 2019. Thus, this Purchase Order makes clear that SH was awarded a government contract in the three years preceding the IFB at issue. Section 12.8 of the Program Specifications for the Emergency Procurement provides,

Termination for Non-Compliance with Regulatory Requirements.

In the event the Vendor who is awarded this emergency procurement for the provision of ENP Nutrition Services is issued a "C" rating from the Division of Environmental Health, DPH&SS or is issued a "Stop Order" by the Guam Fire Department, the awarded Vendor *shall be terminated as the Vendor of the ENP Nutrition Services.*

(emphasis added). See Ex. D.

On April 3, 2019, within a week of being awarded the Emergency Procurement contract, DPHSS conducted an inspection of SH's operation and issued a Food Establishment Inspection Report. In this Report, SH received a grade of 38 and was given a C Rating, which triggered an automatic termination for cause under the Program Specifications. See Exhibit E. On April 5, 2019, two days after the Inspection, GSA submitted to Basil a Purchase Order for the Emergency Procurement of Elderly Nutrition Program, Home-Delivered Meals for the period of April 8, 2019 through April 30, 2019. See Exhibit F.

The series of events detailed above is unmistakable. SH was awarded the Emergency Procurement contract for the Elderly Nutrition Program. After receiving a C rating, Basil was then awarded the contract. The only logical explanation is that SH was terminated for cause as the Vendor, the exact prescribed consequence under the Program Specifications.

Interestingly, in its denial of Basil's Protest, GSA explains that SH was not terminated, but merely withdrew from the award. See Exhibit G. This explanation is highly suspect for several reasons. First, as SH acknowledged and signed the March 28, 2019 Purchase Order, it cannot argue that it was unaware of the contract specifications or its obligations thereunder. Second, under Guam law, any permitted withdrawal of a bid after an award or cancellation of a contract must be supported by a written determination made by the Chief Procurement Officer or the head of the purchasing agency. 5 G.C.A. § 5211(f). Notwithstanding Basil's FOIA request for all documents or correspondence related to the Emergency Procurement for the Elderly Nutrition Program for the period of April 1, 2019 through April 30, 2019, GSA has not disclosed the required supporting written determination in connection to SH's alleged withdrawal. Additionally, GSA has not disclosed *any* documents detailing SH's sudden removal from the contract after its award or the immediate award to Basil following SH's C rating. Basil posits that no documents were disclosed because these documents simply do not exist. Instead, GSA's claim that SH merely withdrew is a blatant misrepresentation of the facts.

The main reason the April 1, 2019 Emergency Procurement is so important to the present appeal is that it makes SH's bid in IFB 056-19 highly questionable. First, a withdrawal or termination for cause was required to be disclosed in the bid. Second, SH certified that it had not had a government contract terminated for cause in the last three years. However, the circumstances

surrounding the April 2019 Emergency Procurement make clear that pertinent information was either not provided or willfully misrepresented. Basil asserts that both may be true.

Regardless of the true manner in which SH was removed from the April 1, 2019 Emergency Procurement contract, the fact of the matter is that SH did not disclose its removal. Such information is important and necessary to a proper evaluation. SH's failure to disclose pertinent information regarding its history of government contract performance makes it a nonresponsive bidder. Accordingly, SH should be disqualified from this IFB.

II. GSA Violated Guam Procurement Law

Basil also appeals GSA's decision to move forward with the award of the contract for IFB 056-19 as the decision to proceed is in violation of Guam law and made in bad faith. Under Guam law, if a timely protest of the award of a procurement contract is filed, the government may not proceed further with the award until a final resolution of the protest is made unless (i) there is a written determination that the award of the contract without delay is necessary to protect substantial interests of the Territory, and (ii) absent a declaration of emergency by the Governor, the protestant has been given *at least two (2) days' notice (exclusive of territorial holidays)*. 5 G.C.A. § 5245(g).

In this case, the decision denying Basil's protest was provided on *Saturday* November 30, 2019.¹ See Exhibit G. The written determination required by Guam law was submitted on the same day, *Saturday* November 30, 2019. See Exhibit H. The contract was set to being on December 1, 2019 as indicated Purchase Order No. P206A00841. See Exhibit J. As Basil received

¹ It should be noted that GSA's Decision denying Basil's protest was sent to Ms. Alice Mendoza, a legal secretary at Basil's counsel's office. In the protest, Basil clearly requests that all notices be submitted to Basil's counsel of record, Ms. Geri Diaz. See Exhibit I. Submitting its Decision on a *Saturday* is sufficient to raise brows, and submitting the Decision to Ms. Diaz's legal secretary instead of Ms. Diaz makes GSA's conduct more suspicious.

the required written determination with *less than* two days' notice before the contract was to proceed, GSA failed to comply with Guam law. Further, as clearly expressed in the statute, any action to proceed with the award of the contract *is void* unless the government complies with Section 5425(g)(1)-(3). As detailed above, GSA violated Section 5425(g) by proceeding with the protested award of the contract for IFB 056-19 without providing the protestant the requisite two (2) days' notice. Accordingly, the action to move forward with the contract must be found void.

III. GSA did Not Properly Respond to Basil's Protest and has Created an Unfair Procurement Environment

Basil finally appeals GSA's denial of Basil's protest on the grounds that GSA did not properly respond to the issues raised in the protest, and thus did not render a full decision on Basil's protest. Particularly, Basil raised the fact that SH did not provide a list of citations in the area of procurement, material weaknesses, and non-compliance with government provisions, which was required under Sections 2.4 and 2.5 of the IFB Specifications. See Exhibit I. GSA responded with the following:

Although SH Enterprise did not submit inspection reports for the previous three (3) years, they did submit a current inspection report. Basil also submitted only one (1) year of citation report [sic]. It should be noted that you, Basil failed to provide all of your citation reports for your government contracts specifically for the Dept. of Corrections. Moreover, Basil's failure to provide important information relative to its past performance in regards to its on going [sic] court case does effect [sic] its ability to be a responsible and responsive bidder.

See Exhibit G. A simple reading of Basil's Protest indicates that Basil never raised the fact that SH did not provide inspection reports for the last three years. An elementary review of the Bid Specifications (Section 2.5 (a), (b)) indicate that the production of inspection reports for three years is not required; thus, Basil did not provide inspection reports for three years. Further, as inspection reports for three years were not required, Basil did not raise this issue in its Protest.

More importantly, GSA affirmatively commented on issues that *were not raised* in the Protest and were outside the Protest's scope by admonishing Basil for its Bid submissions. Basil's production or alleged lack of production has absolutely nothing to do with its Protest. GSA's duty in resolving the Protest was to review the issues raised, not attempt to justify its decision by pointing out potential shortcomings in the protestant's bid. As Basil was not awarded the contract, its Bid was wholly outside the Protest and completely irrelevant. Again, instead of responding to the simple issues raised by Basil, GSA sought to justify its decision by attacking Basil.

Absent from GSA's admonishment of Basil is a proper response to SH's failure to provide a list of citations regarding its performance history in connection to government contracts and its certification that it had not had a government contract terminated for cause in the preceding three years. These are key issues at the heart of Basil's Protest. Instead of a proper review, Basil received only an unsupported claim that SH withdrew from the Emergency Procurement award *after* SH received a C rating and that SH's failure to provide citations related to its performance of government contracts is only a minor informality that has been waived in part due to Basil's bid submissions. Notwithstanding the important issues raised by Basil and GSA's failure to conduct a proper review, GSA characterized Basil's Protest as one without merit.

Some of the underlying purposes of the Guam Procurement Law include: (i) to provide for increased public confidence in the procedures followed in public procurement, (ii) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory, and (iii) to provide safeguards for the maintenance of a procurement system of quality and integrity. 5 G.C.A. § 5001(b). GSA's response to Basil's Protest does very little, if any, to promote these underlying policies. Failure to properly respond to a valid protest does not increase public

confidence, does not ensure fair or equitable treatment, and does not work to maintain a system of quality and integrity. Further, other measures taken by GSA are highly suspect.

In the Specifications for the Emergency Procurement of Elderly Nutrition Services for April 1, 2019 through April 30, 2019, Section 12.8 states that if an awarded Vendor receives a "C" rating from DPHSS, it shall be terminated as a Vendor for the contract. See Exhibit D. After receiving the award of that contract on March 28, 2019, SH received a C rating following an inspection conducted on April 3, 2019. In the Emergency Procurement Specifications for the same services covering the period of May 1, 2019 through May 31, 2019, the standard was reduced to the following:

In the event the Vendor who is awarded this emergency procurement for the provision of ENP Nutrition Services whose *Sanitary Permit is suspended* by the Division of Environmental Health, DPH&SS... the awarded Vendor shall be terminated as the Vendor of the ENP Nutrition Services.

See Exhibit K, § 12.8. Lowering the standard for a subsequent contract after one vendor could not maintain the proper inspection rating is incongruous with the goals of providing safe, reliable services or fostering competition to prompt bidders to provide better services. Instead, it appears that the standard was lowered to accommodate vendors who have demonstrated that they cannot maintain the proper level of sanitation. At the very least, any time the government actively takes measures to reduce standards or requirements in government contracts, such decision is inherently questionable and should be subject to further review.

IV. Conclusion

In conclusion, Basil appeals GSA's decision to deny Basil's November 22, 2019 Protest of GSA's November 8, 2019 recommendation to award Bid No. IFB 056-19 to SH Enterprises, Inc. Basil protested that GSA awarded the contract to an unresponsive and irresponsible bidder who

did not fully comply with the Bid Specifications and Requirements and made a false misrepresentation regarding its government contract history. After receiving GSA's decision, Basil now raises new grounds in this appeal, namely that GSA did not properly respond to Basil's Protest, that GSA violated Procurement Law by not providing Basil the required notice that GSA would proceed with the award, and that GSA has created an unfair and suspect environment in the arena of Guam government procurement.

REQUESTED REMEDIES

Based on the foregoing, Basil Food Industrial Services requests the following:

1. The Office of Public Accountability conducts a full and proper review of this Appeal in strict compliance with Guam Procurement Law and all applicable rules and regulations;
2. A determination that the notice provided by GSA to Basil on November 30, 2019 is insufficient and void, and further that any action taken by GSA to proceed on the contract at issue is void;
3. The disqualification of SH from this IFB as nonresponsive;
4. The cancellation of the contract;
5. The reissuance of Bid No. IFB 056-19.

DATED: Hagåtña, GU, December 16, 2019.

CAMACHO CALVO LAW GROUP LLC



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

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		Pages:	14 (including cover page)
CC:	Geri E. Diaz, Esq. (Attorney for Appellant Basil Food) Camacho Calvo Law Group LLC 134 W Soledad Ave., Suite 401 Hagatna, Guam 96910 Phone: (671) 472-6813 Fax: (671) 477-4375	Date:	December 17, 2019
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jhernandez@guampua.com

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