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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

IN THE APPEAL OF: BASIL FOOD INDUSTRIAL SERVICES CORPORATION, Appellant.)))))))	DOCKET NO. OPA-PA-19-002 GENERAL SERVICES AGENCY MOTION TO DISMISS AND REBUTTAL TO COMMENTS ON AGENCY REPORT
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GSA'S MOTION TO DISMISS

Comes now the Guam General Services Agency (“GSA”) by and through its counsel and files this Motion to Dismiss Basil Food Industrial Services Corporation (“Appellant”)’s appeal. GSA moves the Office of Public Accountability (“OPA”) as the OPA has no jurisdiction over this appeal because it was untimely and is based on an insufficient, improper protest, and because, if the merits are reached, Appellant has not alleged any facts that, when the law is applied, amount to wrongdoing. Moreover, the substantive portion of Appellant’s prayer has already been granted by GSA, rendering the appeal moot. The Motion is supported by the Memorandum of Points and Authorities below and is followed by GSA’s Rebuttal to the Appellant’s Comments on the Agency Report.

ORIGINAL

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

In October of 2018, GSA issued an emergency procurement for a three (3) month period with quotes resulting from a 9-25-18 Request for Quotations (“RFQ”) to be firm and stabilized for one hundred eighty (180) days. California Mart was awarded. These are often ninety (90) day contracts in thirty (30) day blocks. In late December 2018, GSA asked the Governor for another three (3)-month emergency procurement because the Department of Corrections (“DOC”) had not finalized yet its long-term food services IFB. Thus, the Governor granted another three (3) months of emergency procurement. GSA did not ask for new quotes in January because the firm, stabilized quotes from October were still valid. As a result, GSA used for January 2019 the quotes considered firm and stabilized in October 2018. On December 29, 2018, Appellant wrote to GSA asking when the long term IFB was coming out. GSA responded on January 3, 2019 that it hoped it would come out soon. Shortly thereafter, Appellant asked for notices, documents, correspondence, and the complete file regarding the food services for January 2019 via FOIA requests on 1-3-19 and 1-8-19. Such documents were given. Appellant then filed a protest of the DOC food services procurement on 1-25-19. GSA wrote back and clarified that Appellant was well beyond the fourteen (14) - day filing period. Appellant then filed the instant OPA Appeal on 2-13-19.

II. SUBJECT MATTER JURISDICTION OF THE OPA

A. Rule

Jurisdictional issues are important enough to be raised at any time, and with the regulations’ attention to promptness, are the first issue being raised here. 2 G.A.R., Div. 4, §12104(c)(9); *Pac. Rock. Corp. v. Dep’t of Educ.*, 2001 Guam 21 ¶ 18.

If the protest is not resolved by mutual agreement, the purchasing agency shall promptly issue a written decision. 5 G.C.A. § 5425(c). Such a decision may be appealed to the OPA within fifteen (15) days after the protestant has received notice of the decision. 5 G.C.A. § 5425(e). The OPA has *de novo* jurisdiction over “any matter **properly submitted to her or him**”. 2 GAR, Div. 4, § 12103. A protestor may appeal a decision “**relative to the protest** of...an award of a contract....” within fifteen (15) days of receiving the decision. 2 GAR, Div.

4, § 12201(a). This goes to show that the appeal is only based on the contents and **sufficiency of the protest**, and the OPA only has jurisdiction over what is **properly submitted**.

An actual or prospective contractor may protest the solicitation or award in writing “within fourteen (14) days after such aggrieved person **knows or should know** of the facts giving rise thereto.” 5 G.C.A. § 5425. Appellant acknowledges that the law is clear in this regard on Page 6 of its Appeal.

B. Fourteen (14) – Day Protest Deadline

The RFQ stated on all four (4) of its pages, and twice on Page 4, that quotations were to be good for one hundred eighty (180) days. Appellant’s Quotation was dated **Sept. 27, 2018**. Appellant filed its protest of the DOC food services procurement on **January 25, 2019**. Yes, this protest was within fourteen (14) days of Appellant’s second (2nd) FOIA dated 1-23-19. However, what essentially were they protesting? They were protesting the fact that the award was for one hundred eighty (180) days. That is the answer to all their questions. That fact was known by the time Appellant’s quotation was submitted (9-27-18). The protest was filed two (2) days shy of four (4) months later. In doing so, Appellant missed the fourteen (14) – day deadline for proper and timely protests. 5 G.C.A. § 5425.

This answers the OPA’s threshold question under 2 GAR, Div. 4, § 12201 because it is “in accordance with the statute” to deny a protest that is untimely. Therefore, with an invalid insufficient protest, this appeal is **not properly submitted** and the OPA has no jurisdiction over this case. Without jurisdiction, this appeal must be dismissed.

C. Aggrieved, Good Faith

To say they weren’t “aggrieved” until they essentially lost or until receiving the results of the 2nd FOIA request is to trigger the bad faith provision of the procurement code because it exemplifies a prime example of protesting not because something is wrong, but because someone lost. 5 G.C.A. § 5003. Section 5003 states “[t]his Chapter requires all parties involved in the negotiation, performance, or administration of territorial contracts to act in good faith”. Actual Notice of the crux of this appeal- the one hundred eighty (180) day provision, clearly occurred

by the time the Appellant submitted its quotation. The purchasing agency's "action" called for by *Guam Imaging Consultants* is its adjustment of quotations to be firm and one hundred eighty (180) days, evidently displayed on all four (4) pages of the RFQ and of Appellant's one hundred eighty (180) – day quotation. *Guam Imaging Consultants, Inc. v. Guam Memorial Hosp. Aug.*, 2004 Guam 15. One cannot have his cake and eat it too by waiting to see if he wins before protesting.

III. MERITS

A. Proceeding To The Merits

A tribunal does not proceed to the merits if it lacks subject matter jurisdiction. *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 422 (4th Cir.1999); *See McGhee v. Guam Community College*, Civil No. 07-00012; 2008 WL 914996 (D. Guam 2008). Indeed, why have a statute (requiring a protestant to protest within fourteen (14) days of when it knew the applicable facts, per 5 G.C.A. § 5425) if it is not going to be applied? However, if the OPA desires to proceed to the merits, then we shall proceed below.

As evidenced by the fact that the Appellant **presents first** at an OPA hearing on the merits, the Appellant has the burden of proving that the solicitation is invalid.

B. The Controlling Statute

The controlling statute is 5 G.C.A. § 5215, which states that the procurement "**shall be made with such competition as is practicable under the circumstances**". Section 5215 also states that no emergency procurement **for goods or supplies** may be made for an amount greater than for **30 days**.

First, the instant procurement is for **services**, not for goods and supplies. Thus, the **30-day limit does not apply**. Moreover, based on the principle of statutory construction, "**expressio unius est exclusio alterius**," (the expression of one thing is the exclusion of the other), the specific mention of goods and supplies being limited to thirty (30) days goes to show that the legislature intended to not put such a cap on the procurement of services. Therefore, any

emergency service procurement for one hundred eighty (180) days is *per se* valid as there are absolutely no limitations on the duration of such procurements in the controlling statute.

Second, the only thing that 5 G.C.A. § 5215 requires regarding price quotations is that the procurement agent informally solicit at least three (3) of them (“and further provided that the procurement agent must solicit at least three (3) informal price quotations...”). Therefore, GSA’s request for quotations that were firm and stabilized for one hundred eighty (180) days was valid and proper per the controlling statute.

We turn now to the next applicable section of that same statute regarding “shall be made with **such competition as is practicable under the circumstances**”. The word “practicable” may not have been defined in Guam case law in this context. However, one can define it by asking whether it is *impracticable* to, **in the knowledge** that everyone involved, most especially all vendors submitting quotations, **knew**¹ that all quotations would be for one hundred eighty (180) days, *and* in the knowledge that the Department of Corrections had been and would likely continue to be **not ready**² yet again for a long-term food services contract, request quotations that are **firm and stabilized** for one hundred eighty (180) days when the statute put absolutely **no limits on the length or firmness of quotations nor on the length of a services emergency procurement**. The answer is that the circumstances here lend themselves to fixing a problem (frequent last-minute emergency procurements) in a legal manner (zero limitations per the controlling statute) which all interested parties had notice of (*See* RFQ instructions).

C. Insufficiency of the Appeal

1. Turning Point

Appellant cites, on Page 6 of its Appeal, its receipt of GSA's response to the 1-8-19 FOIA request as the "turning point" in this case because that was when Appellant "realiz[ed] that GSA failed to issue a bid or meet the requirements of the emergency statute." If by "issu[ing] a bid", Appellant means a long term IFB, then that could not form the basis of a protest because realistically, even if such long term IFB were issued a week before Appellant's first FOIA

¹ Knew: Evidence is in the RFQ instructions.

² Not ready: Once GSA obtains an emergency signed by the Governor, 3 quotes are obtained. However, that is a process requiring intense manpower and is frequently, with *this* using agency and for *these* services, last minute.

request, site visits for new vendors and the usual question and answer period would have prevented an award of that contract before the DOC prisoners actually needed their food. Thus, at that point, an emergency procurement was evidently needed. If by "issu[ing] a bid", Appellant meant sending out a new Request for Quotations ("RFQ"), why should GSA have done so? The October 2018 quotations were still good at that point, and Appellant had full knowledge of that fact since it submitted its one hundred eighty (180) – day firm quotation three (3) days earlier in late September 2018. Regarding "fail[ing] to meet the requirements of the emergency statute", as discussed above, the statute was clearly met, and realization of the only thing different done during such compliance (180 days) would have come in September and October 2018 when the RFQ was issued and responded to.

2. Issuing Long Term IFB Not Mandatory

Appellant asserts that GSA did not issue an IFB as required by 5 G.C.A. Section 5211(b). Although it is advisable to issue an IFB, and although DOC is on the cusp of submitting its long term food services IFB specifications to GSA as we speak, nothing in 5 G.C.A. § 5211(b) requires DOC or GSA to issue it, especially not by a certain date.

3. Misstatement of Controlling Statute, Notice

Appellant misstates 5 G.C.A. Section 5215. Notice to vendors is permissive, not mandatory. Also, to what end would such notice be? Even Appellant on Page 7 of its Appeal ties the notice provision to the quotation requirement. In other words, one is the result of the other. However, the quotations were already obtained in October, so there was no need for such permissive notice, especially in such exigent circumstances. Appellant's assertion that GSA failed to award the vendor with the best offer is speculative at best, and again, stems from notice that is not required.

4. Insufficiency of Prayer, Feigned Ignorance

This Appeal is insufficient because it prays for a determination that GSA failed to properly conduct an emergency procurement and yet, when one applies the only on-point Guam statute, nothing that GSA did was forbidden. A tribunal can conjure up a new rule when the law is silent, but really, that is the role of *I Lehislaturan Guahan*. With an insufficient Appeal, this Motion To Dismiss is warranted and ripe for granting.

Notice that in Michael Zhou's 12-29-18 letter to GSA's Claudia Acfalle, he mentions the 9-20-18 GSA-to-Governor memorandum stating the emergency being effectuated for ninety (90) days in thirty (30) day periods, but he only actually asks about the long-term IFB, and does so twice. This makes sense because to ask about the emergency procurement in the knowledge that the one hundred eighty (180) day quotations were still good would be to feign ignorance.

D. Mootness

In its prayers for relief in its appeal, Appellant first requests an OPA finding that GSA failed emergency procurement requirements. As stated above, there was **no violation** by GSA based on the applicable emergency procurement statute, 5 G.C.A. § 5215. Thus, there is no need to grant this prayer.

Appellant then asks for cancellation of the January 2019 award, especially if it extends to February and March 2019. Yes, the January 2019 award did extend to February and March 2019. However, by issuing a new emergency procurement on March 1, 2019 with a new request for quotations, GSA effectively did cancel the January (and February and March) 2019 emergency procurement, as requested. Therefore, this issue is moot.

Lastly, Appellant prayed for attorney's fees and costs. Attorney's fees are not recoverable against the Government of Guam. 2 GAR, Div. 4, § 9101(g)(2). It is a sovereign immunity issue. *Id.* Reasonable costs, perhaps, of preparing the bid, but the Appellant must first establish that it would have prevailed in the solicitation. *Id.* Proof³ of such prevailing has not been established. *Id.* Therefore, with all three (3) prayers either already provided-for or unwarranted, the Appeal becomes moot.

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³ Proof: If Appellant were the lower, more responsive, more responsible bidder, it would have been awarded on March 1, 2019. Appellant did not receive notice any earlier or later than any other vendor. Inventory not being available is also not a defense Appellant can raise because Appellant requested cancellation of the contract for these periods, so it follows that a prudent vendor would have prepared inventory in order to make such a bid and quotation.

REBUTTAL TO THE APPELLANT'S COMMENTS ON THE AGENCY REPORT

GSA rebuts the applicability of attachments and case law, and certain assertions of procurement participation in Appellant's Comments to the Agency Report.

A. ATTACHMENTS

The attachments to Appellant's Comments on the Agency Report (e.g. resumes, menus, etc.) are non-responsive and distract from the central one hundred eighty (180) - day issue of the Agency Report.

B. CASE LAW

Guam Imaging is distinguishable because RADS based their protest on complex specifics of the negotiations and contract whereas this protest is based on a simple failure to adhere to a statute which, when applied, imposes absolutely no limitations on both service contracts like this one and on the duration of quotations. *Guam Imaging Consultants, Inc. v. Guam Memorial Hosp. Aug.*, 2004 Guam 15.

C. ASSERTIONS

GSA did allow Appellant and other bidders to participate in the January 2019 bidding process via fully-informed, explicitly-requested one hundred eighty (180) day firm quotations in October of 2018. The controlling statute, 5 G.C.A. Section 5215, does not forbid this, nor does any binding case law so forbid.


One hundred eighty (180) days was specified on multiple pages of the RFQ, on Pages 1, 2, 3, and twice on Page 4. Since Appellant's quotation was written onto the RFQ, Appellant's quotation, as well, mentioned one hundred eighty (180) days on all four (4) of its pages, twice on Page 4. This goes to the explicitness and clarity of the emergency RFQ and Appellant's quotation.

Appellant asserts that when it indicated that its prices were good for one hundred eighty (180) days, it was not aware that it would be held to that price for the duration of the one hundred eighty (180) days. What else could one hundred eighty (180) days have meant? It is not a trick because Appellant could have won. One can wager the probability of this Appeal existing if that occurred.

Dated this 15th day of March, 2019.

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