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 OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS
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 CASE NO OPA-PA: 19-011/20-003

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

<p>IN THE APPEAL OF</p> <p>BASIL FOOD INDUSTRIAL SERVICE CORPORATION,</p> <p style="text-align: right;">Appellant.</p> <hr/>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. OPA-PA-19-011</p> <p>OPA-PA-20-003</p> <p>GSA'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES</p>
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MOTION

Appellee GENERAL SERVICES AGENCY (GSA) hereby respectfully moves for an order granting summary judgment on the issues raised by Appellant BASIL FOOD INDUSTRIAL SERVICES CORP. (Basil Food) in its Notice of Procurement Appeal, **OPA-PA-20-003** filed on February 27, 2020.

Argument on all motions is scheduled to be held before the Hearing Officer on July 14, 2020 at 2:00 p.m.

MEMORANDUM OF POINTS AND AUTHORITY

The instant motion specifically addresses and requests summary judgment on the facts and issues raised by Basil Food in its protest appeal number **OPA-PA-20-003**, which has been consolidated with OPA-PA-19-011.¹ Both appeals involve identical parties and, to a certain extent, arise out of the same basic facts and circumstances.

I. FACTUAL BACKGROUND.

The facts as alleged by Basil Food and which are undisputed by GSA for purposes of this motion are as follows:

On September 25, 2019, GSA issued Invitation to Bid No. GSA-056-19 (the ITB) seeking the preparation and delivery of hundreds of daily meals to elderly persons around Guam.² In response to the ITB, both Basil Food and SH Enterprises, Inc. submitted a bid.

On November 8, 2019, GSA awarded a purchase order contract for the ITB to SH Enterprises.³ On December 16, 2019, Basil Food filed procurement appeal number OPA-PA-19-011 protesting the award of the contract.

On January 24, 2020 (three months after the September 2019 award of the ITB to SH Enterprises and one month after the December 2019 filing of OPA-PA-19-011), it was reported in the Pacific Daily News and other media outlets that the Guam war claims processing center was opening in Tamuning at the former Hakubotan building.⁴

1 A motion for summary judgment in OPA-PA-19-011 was previously filed by SH Enterprises to which the Government filed a joinder. Oral argument was had on February 19, 2020, and a decision on the motion is pending.

2 The full name of ITB No. GSA-056-19 is *Nutrition Services for the Comprehensive Management, Operations, and maintenance of the Elderly Nutrition Program, Congregate Meals and Home Delivered Meals Components*.

3 Exhibit B, Basil Food's *Notice of Procurement Appeal*, OPA -PA-20-003.

4 Exhibit C, Basil Food's *Notice of Procurement Appeal*, OPA -PA-20-003.

The owner of the Hakubotan building is SH Enterprises. Understanding this, Basil Food sent a FOIA request to the Office of the Governor of Guam seeking documents related to the government's utilization of the building.⁵ The Governor responded to the FOIA request by producing a letter dated January 22, 2020, from SH Enterprises President Mr. Tae Min, agreeing to donate approximately 5,000 square feet of commercial space in the Hakubotan building for the temporary use of the war claims processing center.⁶

On February 7, 2020, Basil Food filed this second protest appeal number OPA-PA-20-003 alleging that the donation of the Hakubotan building by SH Enterprises for use as the war claims processing center violated the ethical prohibitions against giving gratuities and kickbacks to the Government of Guam. The protest cites to 5 GCA § 5630(d) and its identical procurement regulation at 2 GARR § 11107(4), both of which prohibit a contractor from offering or giving a favor or gratuity to the Territory during the pendency of a procurement matter:

5 GCA § 5630(d) Favors to the Territory. ***** It shall be a breach of ethical standards for any person who is or may become a contractor, a subcontractor under a contract to the prime contractor or higher tier contractor, or any person associated therewith, to offer, give or agree to give any employee or agent of the Territory or for any employee or agent of the Territory to solicit or accept from any such person or entity or agent thereof, a favor or gratuity on behalf of the Territory whether or not such favor or gratuity may be considered a reimbursable expense of the Territory, during the pendency of any matter related to procurement, including contract performance warranty periods. (Omission in original).

Also, 2 GARR Div. 4, § 11107(4) (same).

5 Exhibit D, Basil Food's *Notice of Procurement Appeal*, OPA -PA-20-003.

6 Exhibit E, Basil Food's *Notice of Procurement Appeal*, OPA -PA-20-003.

Because the appeal in OPA-PA-20-003 (Hakubotan building) involves the same parties as in OPA-PA-19-011 (elderly congregate meals), the two appeals were consolidated in a written Order issued by the Hearing Officer on March 12, 2020.

II. LEGAL DISCUSSION

A. Summary Judgment is Appropriate Where the Undisputed Facts Fail to Support an Actionable Claim.

“Procurement appeals are governed by law and rules of procedure of the Superior Court of Guam, which include the Guam Rules of Civil Procedure [GRCP].” *Teleguam Holdings LLC v. Guam*, 2018 Guam 5 ¶ 27.

Rule 56(c) of the GRCP authorizes summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *See also, Hawaiian Rock Prods. Corp. v. Ocean Housing, Inc.*, 2016 Guam 4 ¶¶ 25-27 (establishing standard for summary judgment)

The Government is entitled to summary judgment in this appeal because there are no factual issues in dispute which require resolution by the Hearing Officer, and the claims made by Basil Food fail as a matter of law.

B. GSA is not the Purchasing Agency.

Basil Food does not dispute, and its Exhibit D (FOIA request) and Exhibit E (Mr. Min’s letter to Gov. Leon Guerrero) conclusively establish, that neither GSA nor DPHSS played any role or had any involvement in the “procurement” of the Hakubotan Building for use as the war claims processing center. The donation of the building and its occupation and use were matters handled entirely by the Governor and her office.

According to Basil Food's Exhibit E (Mr. Min's letter to the Governor), SH Enterprises was contacted by the Governor's "team" for a meeting, evidently the purpose of which was to discuss with SH Enterprises the need for a space to set up the war claims program. The letter implies that the Governor's team asked SH Enterprises if it would donate space at the Hakubotan building, and that "after understanding the temporary need" for the building and importance of the war claims program, SH Enterprises agreed to do so.

There is no indication in Mr. Min's letter nor is there any allegation made by Basil Food that GSA or DPHSS knew about or were present at the meeting between the Governor's team and SH Enterprises. A protest must be filed against the purchasing or using agency. "Complainants should seek resolution of their complaints initially with the Procurement Officer or the office that issued the solicitation." 2 GARR Div. 4, § 9101(b).

Here, GSA was not the purchasing agency and DPHSS was not the using agency. Because GSA and DPHSS were not involved in soliciting, procuring, or otherwise taking any steps related to the donation of the Hakubotan building for use as the war claims processing center, Basil Food's protest against these government agencies over the building fails as a matter of law.

C. Guam law Authorizes the Governor of Guam to Accept Donations.

Moreover, even if GSA or DPHSS could somehow be considered as proper appellees or parties in interest to OPA-PA-20-003, the protest must still fail because Guam law expressly authorizes the Governor of Guam to accept donations of money and property:

5 GCA § 22408. Charitable Donations. The Governor is authorized to accept monetary donations, from any individual or organization, which shall be deposited in a separate fund by the Treasurer of Guam. Such donations shall, upon authorization by the Governor, be used and expended in accordance with the

terms and conditions upon which they were made. *Nothing herein shall be construed to prevent the Governor on behalf of the government of Guam from accepting donations of property from any individual or organization.*

Section 22408 was originally enacted in 1968 by P.L. 9-115 as former Government Code Section 6119. By articulating that the Governor may accept charitable donations of property on behalf of the government of Guam, Section 22408 reinforces her executive authority under the Organic Act to supervise and control the government of Guam and to execute the laws of Guam and the United States,⁷ including the federal war claims law.⁸

The Governor's authority to accept donations of property under Section 22408 includes donations of commercial real property such as the Hakubotan building⁹ Because the donation of the Hakubotan building space was handled by the Governor and her team, and because nothing can be construed to prevent her from accepting donations of property, summary judgment as a matter of law is appropriate because there has been no ethical violation of 5 GCA § 5630(d) or of 2 GARR Div. 4, § 11107(4).

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7 Organic Act, 48 USC § 1422 (“The Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam. . . . He shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam.”)

8 GUAM WORLD WAR II LOYALTY RECOGNITION ACT, U.S. Pub. L. 114-328 (2016).

9 *See*, 21 GCA § 1104 defining Guam “property” as either: (a) real or immovable; or (b) personal or movable.

CONCLUSION

Appellee GSA is entitled to summary judgment against Appellant Basil Food as a matter of law. The undisputed evidence establishes that GSA was not the purchasing agency and took no action to obtain the Hakubotan building for use as the war claims processing center. The Hakubotan building was single-handedly negotiated for and secured by a team from the Office of the Governor acting pursuant to the Governor's executive authority under the Organic Act and by 5 GCA Section 22408 which authorizes her to accept donations of property.

For all the foregoing reasons, GSA submits that there are no factual disputes to be resolved and that summary judgment should be granted as a matter of law.

Respectfully submitted on this 10th day of June, 2020.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By:



SANDRA C. MILLER
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