

(2) that the Governor's authority to accept donations of property is "irrelevant" because it was allegedly unethical for SH Enterprises to make the donation during a period when it had an active contract with the Government of Guam; and

(3) the timing of the donation is suspicious when viewed in light of the fact that SH Enterprises was subsequently awarded the food service contract for the Department of Corrections inmates and detainees (Bid No. GSA-001-20).

As discussed below, even after viewing all facts and circumstances in a light most favorable to Basil Foods, summary judgment in favor of GSA is appropriate and must be granted as a matter of law.

II. LEGAL DISCUSSION

A. No Cause of Action is Available or can be Maintained Against GSA for the Hakubotan Building.

Basil Foods does not deny that the procuring agency for the Hakubotan Building was the Governor and not GSA. Despite this critical fact, it nevertheless is adamant in attempting to connect its protest in OPA-PA-19-011 (elderly congregate meals) to the Governor's procurement of the Hakubotan Building, while implicating GSA in between.

This is a dangerous procedural and legal fallacy. It is frivolous and in bad faith to persist in maintaining a legal action against a defendant whom the plaintiff admits had no part in the facts or circumstances giving rise to its complaint, which in this case is the donation of the Hakubotan Building space.

Basil Foods rationalizes that it can maintain its protest over the Hakubotan Building which is owned by SH Enterprises “because GSA was the Purchasing Agency for GSA-056-19”¹ where SH Enterprises was awarded a contract to supply DPHSS with meals for its elderly congregate food service program.

This reasoning is insufficient to defeat a motion for summary judgment. The alleged ethical violations over the Hakubotan Building cannot be mixed up and confused with the procurement for the DPHSS elderly congregate meals. Although the two appeals were consolidated herein for purposes of efficiency, they are two completely different cases with different elements, different standards of proof, and different procuring agencies.

Just because GSA awarded the congregate meal contract in GSA-056-19 to SH Enterprises does not mean that GSA is also responsible or liable for office space provided months later by the same vendor to a different agency. The facts surrounding the Hakubotan Building took place *after* Basil Foods filed its protest in September 2019 over the elderly congregate meal procurement and *after* the contract was awarded in November 2019 to SH Enterprises. As a matter of law and evidence, the Hakubotan Building procurement by the Governor in January 2020 is irrelevant to whether there were any irregularities in the procurement of the DPHSS elderly congregate meal contract between September and November 2019.

Not only has Basil Foods filed its ethical violation complaint about the Hakubotan Building with the wrong agency, but it has also filed it in the wrong forum. The allegations about the Hakubotan Building were brought herein as an appeal of a procurement protest against GSA.

¹ Basil Food’s Opposition memo at p. 3, ¶ 1 (OPA July 1, 2020). (“Basil properly filed the Protest against GSA because GSA was the Purchasing Agency for GSA-056-19.”)

A procurement protest is a remedy for resolving a grievance over “*the method of source selection, solicitation or award of a contract.*”² This means that in order to maintain a cause of action against GSA for anything having to do with the Hakubotan Building procurement, Basil Foods must allege facts, which if proved, show that the GSA wrongfully executed its duties over the method of source selection, solicitation or award of a contract for the building.

It is legally impossible for Basil Foods maintain a cause of action against GSA because again, GSA had no procurement duties at all with respect to the building. GSA’s only connection is that it has a contract with the same company that supplied the Governor with temporary office space. Under the procurement law, if Basil Foods believed that it was unethical for the Governor to solicit or accept a donation of property from SH Enterprises during the term of the congregate meals contract, then its remedy was to direct its complaint to the Civil Service Commission as provided for in 5 GCA § 5650 (Civil and Administrative Remedies Against Employees Who Breach Ethical Standards),³ and not file it here as a procurement protest appeal.

B. The Governor’s authority to accept donations of property is an exception to Title 5 GCA § 5630(d).

In addition to admitting that GSA was not the procuring agency for the Hakubotan Building, Basil Foods also admits that Guam law at 5 GCA § 22408 permits the Governor to accept donations of property. Nevertheless, Basil reasons that the ethical provision of the procurement law at 5 GCA § 5630(d) and 2 GARR Div. 4, § 11107(4) is a strict liability statute

² 5 GCA § 5425.

³ For non-government employees, 5 GCA § 5651 requires that procurement ethic complaints be filed with the **Procurement Policy Office** which is under the control of the Director of the Department of Administration per the Governor’s Executive Order 2019-10. Nothing in 5 GCA § 5650 or § 5651 authorizes an ethical complaint to be filed as a procurement protest appeal with the OPA.

that prohibits donations (or “favors”⁴) from contractors even when they are made to the Governor.⁵

The procurement ethics provision at 5 GCA § 5630(d) cannot be interpreted as a strict liability statute (or even an absolute liability statute) for which, if damages are proven, there is no defense against because the law expressly makes a statutory exception for the Governor at 5 GCA § 22408. The Governor’s authority to accept donations is a legislatively-approved extension of her § 1422 Organic Act authority to supervise and control the government.

To this point, the donation statute at 5 GCA § 22480 makes it clear that *“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”* The law means what it says: The Governor is permitted to accept donations of property of behalf of the government and *nothing* elsewhere in Guam law, *including in the procurement law*, shall be construed to prevent her from doing otherwise.

This is exactly what the Governor did with the Hakubotan Building. Regardless of whether it is called a “donation” or a “favor” the Governor acted entirely within her authority to not only secure a space for the Guam War Claims Processing Center but also to accept the property from an appropriate landlord, even if that landlord was SH Enterprises. And because the space was obtained at no cost to the Government, under 5 GCA § 22704(c) which authorizes the Governor to the lease office space without a formal procurement if the rental cost is less than

⁴ Under 5 GCA § 5630(d), a “favor” to the Territory is defined as anything “of more than de minimus value,” whether intended for the personal enjoyment of the receiver or for the receiver’s department.

⁵ Basil Food’s Opposition memo at p. 4, ¶ 1 (“The procurement ethics provision is a strict liability statute.”)

\$10,000 or the term is less than five years, the procurement laws do not even apply to the Hakubotan Building, and by extension the remedy of a procurement protest appeal likewise does not apply.

C. The Department of Corrections Food Service Contract (Bid No. GSA-001-20) is Irrelevant to This Consolidated Procurement Protest Appeal.

Basil Foods urges the OPA and the Hearing Officer to scrutinize the timing of Bid No. GSA-001-20 for the Department of Corrections (DOC) Inmates and Detainees food contract because that contract was awarded to SH Enterprises on February 25, 2020, or approximately one month after the Governor of Guam opened up the War Claims Processing Center in the Hakubotan Building.

The DOC food service contract in Bid No. GSA-001-20 is not the subject of either of Basil's protests in this consolidated appeal (OPA-19-011 and OPA-20-003), and the record of that DOC contract is not at issue or is otherwise before this administrative tribunal. In a motion for summary judgment such as this, the Hearing Officer's review is limited to the four corners of the complaint and to the contract complained about, which is the elderly congregate meal contract arising from Bid No. GSA-056-19. If there is a "red herring"⁶ anywhere, it is the unsubstantiated innuendo and speculation that Basil Foods continuously attempts to infer into this appeal. GSA requests that the Hearing Officer reject this backdoor evidence tactic and issue a ruling excluding further reference to it as irrelevant, prejudice, and inadmissible for any purpose.

⁶ Basil Food's Opposition memo at p. 3, § III ("GSA's Argument Regarding The Governor's Authorization To Accept Donations Is A Red Herring.")

III. CONCLUSION

Summary judgment is appropriate when even after considering all evidence in the light most favorable to the non-moving party, there exists no genuine issue of material fact. GRCP 56(c); *Camacho v. Perez*, 2017 Guam 16, ¶ 12. A “genuine issue of material fact” exists when there is there is sufficient evidence to establish a factual dispute that is central to the case. *Camacho* at ¶ 13. If the movant (GSA) can demonstrate that there are no genuine issues of material fact, the non-movant (Basil Foods) cannot merely rely on unproven allegations in the complaint, but must produce at least some significant probative evidence tending to support the complaint. *Villalon v. Hawaiian Rock Products, Inc.*, 2001 Guam 5, ¶ 8.

In this protest appeal over whether there has been a violation of the ethical procurement statute because the Hakubotan Building was used for two weeks to house the War Claims Processing Center, there are no factual issues in dispute. The law is clear and unambiguous. For all the reasons discussed above and in its moving papers, GSA submits that summary judgment must be granted as a matter of law.

Respectfully submitted on this 8th day of July, 2020.

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