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IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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HANPA INDUSTRIAL DEVELOPMENT CORPORATION and SOON SEOB HA,	: CIVIL APPEAL NO. 13-007
	: Civil Action No. 12-040
Appellants,	:
	:
v.	: OPINION
	:
REPUBLIC OF PALAU,	:
	:
Appellee.	:
-----X	

Decided: November 29, 2013

Counsel for Appellant: William L. Ridpath
Counsel for Appellee: Sara L. Bloom

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants Hanpa Industrial Development Corporation and its Korean citizen owner, Soon Seob Ha, (hereinafter collectively referred to as "HIDC") appeal from the trial court's judgment dismissing their equal protection challenge to eligibility criteria that limit bidding on projects funded by Republic of China ("ROC") to companies whose

shareholders are of Taiwanese or Palauan nationality. For the following reasons, the decision of the Trial Division is **AFFIRMED**.¹

BACKGROUND

The ROC provides assistance to the Republic of Palau (“the Republic”) in the form of stimulus grants. A document entitled *Grant Assistance: Guidelines & Procedures* (“Guidelines”) “provides the guidelines and procedures for implementing the grant assistance from the [ROC] to the [Republic].” Under the Guidelines, the Republic is responsible for choosing which projects will receive grant money, selecting contractors to complete those projects, and submitting project plans to the ROC Embassy for approval. In completing those tasks, the Republic must comply with the terms and conditions of the ROC grant assistance.

This lawsuit arises out of the contractor eligibility requirements established by the Republic for ROC grant-funded projects. In selecting contractors, the Republic generally uses a sealed bid or competitive negotiation process, in accordance with the Republic of Palau Procurement Act. However, the Guidelines require that “ROC grant assistance projects shall be awarded to and only to enterprise(s) whose majority stakeholder(s) is/are of [Palauan] or ROC nationality.”

In December 2011, the Republic issued a “Fifteen Days Public Notice and Request for Qualifications/Proposals” (“RFP”) soliciting proposals from construction companies

¹ Pursuant to ROP R. App. P. 34(a), we determine that oral argument is unnecessary to resolve this matter.

for the paving of a road in Ngaraard state. The project was funded by an ROC grant, and the RFP included eligibility criteria as follows:

Based on grant conditions imposed by the granting agency/donor country, companies who intend to participate in the Stimulus Program have to be:

- Wholly owned Palauan Construction Company; and/or
- Wholly owned Taiwanese Construction Company; and/or
- Joint Venture between wholly owned Palauan and Taiwanese Construction Companies; and/or
- Partnership between wholly owned Palauan and Taiwanese Construction Companies; and/or
- Wholly owned Palauan construction company subcontracting another wholly owned Palauan company or Taiwanese company; and/or
- Wholly owned Taiwanese construction company subcontracting another Taiwanese company or wholly owned Palauan company.

In short, any company not wholly owned by Palauans and/or Taiwanese are not allowed to participate in the Stimulus Bid Program.²

Despite these criteria, Korean-owned construction company HIDC submitted a bid for the project. The Bureau of Public Works rejected HIDC's bid both because of a technical error and because HIDC was disqualified "in accordance with the current conditions imposed by the granting agency on the stimulus program of the government." The parties do not dispute that HIDC is ineligible to bid on such projects because its owners are not Palauan or Taiwanese.

² The RFP criteria appear to be stricter than the Guidelines in that they require wholly Palauan or Taiwanese ownership, rather than majority ownership. However, this distinction does not affect HIDC's eligibility to bid because it is wholly owned by Korean citizens.

HIDC then filed this action against the Republic, arguing that the eligibility criteria contained in the RFP violated the Equal Protection Clause of the Constitution by discriminating on the basis of national origin. The Republic filed a motion to dismiss, arguing that HIDC had failed to state a cognizable equal protection claim. The trial court denied the Republic's motion to dismiss but invited the parties to submit motions for summary judgment.

In November, the Republic filed a motion for summary judgment. The trial court denied that motion and dismissed the case. HIDC timely appeals.

STANDARD OF REVIEW

We review de novo the trial court's grant of summary judgment and may affirm on any basis supported by the record. *ROP v. Carreon*, 19 ROP 66, 70 (2012). Factual findings are reviewed for clear error. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

ANALYSIS

The Equal Protection Clause of the Constitution provides that “[t]he government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens[.]” Palau Const. art. IV, § 5, cl. 1. To establish an equal protection claim, HIDC must show that it is “in a class of people similarly situated to a group that is treated differently under the law.” *Carreon*, 19 ROP at 71. If HIDC

belongs to a suspect class and alleges that it is treated differently on the basis of its class membership, some form of heightened scrutiny applies. *Id.* at 72. If its class is not suspect, rational basis scrutiny governs the claim. *Id.* at 73.

HIDC argues that the eligibility criteria governing ROC grant-funded projects discriminates on the basis of place of origin by privileging Palauans and Taiwanese over all other nationalities. Accordingly, HIDC asserts that it is a member of a class, namely non-Palauan and non-Taiwanese construction companies and shareholders, which is similarly situated to its Palauan and Taiwanese counterparts but is treated differently by the government because it is ineligible to bid on ROC grant-funded projects. The Republic does not contest HIDC's factual assertions, but it argues that HIDC's equal protection claim fails as a matter of law because (1) HIDC is not constitutionally entitled to bid on government contracts; (2) HIDC is not similarly situated to the privileged class; and (3) even if the eligibility criteria do discriminate on the basis of place of origin, that discrimination passes constitutional muster under the applicable standard of scrutiny.

As an initial matter, it is clear that HIDC need not demonstrate that it has a constitutionally protected right to bid on ROC grant-funded projects in order to sustain its equal protection claim. Such a showing might be necessary if HIDC were asserting a due process claim, but it is not. Instead, the constitutional right at issue in this case is equal protection itself. *See Carreon*, 19 ROP at 72 ("The plain language of § 5 makes equal protection a fundamental right . . . Plaintiffs need not show a violation of an *additional*

fundamental right in order to raise their equal protection claim.”). The Republic’s argument to the contrary is unconvincing.

HIDC has established that the Republic treated it differently than other similarly situated entities on the basis of its membership in a particular class. The Guidelines and the eligibility criteria are discriminatory on their face because they distinguish those who may bid on projects from those who may not solely on the basis of nationality. For example, the Guidelines provide that “ROC grant assistance projects shall be awarded to and only to enterprise(s) whose majority stakeholder(s) is/are of [Palauan] or ROC nationality.” Similarly, the RFP eligibility criteria limit bidding to Palauan or Taiwanese construction companies. Accordingly, it is clear that bidding eligibility is determined by whether the shareholders of the construction company are Palauan or Taiwanese, or whether they are some other nationality. HIDC has thus adequately identified the class to which it belongs (non-Palauan and non-Taiwanese companies and their shareholders) and the class which has been treated differently by the government (Palauan and Taiwanese companies and their shareholders).

Moreover, no meaningful difference, aside from nationality, distinguishes HIDC from the privileged class of Palauan and Taiwanese companies and shareholders. HIDC is licensed to do business in Palau, and the Republic has not suggested that some other nationality-neutral factor renders HIDC ineligible to bid on the projects. Instead, the Republic argues that HIDC is not similarly situated to Palauan companies because it is

not Palauan, and HIDC is not similarly situated to Taiwanese companies because it is not owned by citizens of the nation that provided the grant money. But that explanation still relies on nationality as the key distinguishing factor for determining whether a company is eligible to bid on ROC grant-funded projects. Ultimately, the Republic points to no nationality-neutral characteristic that distinguishes HIDC from the eligible companies, and we can find none. *See Carreon*, 19 ROP at 71 (“If the only difference between the two groups is a protected classification . . . the disadvantaged group may raise an equal protection claim.”).

Finally, the eligibility criteria discriminate on the basis of a classification that is explicitly protected by the Constitution. Although the precise meaning of the word “nationality” as it is used in the Guidelines (or “Palauan” and “Taiwanese” as used in the RFP) is not entirely clear, the most reasonable interpretation is that it refers to a person’s citizenship, and the parties seem to assume as much in their briefing.³ The Equal Protection Clause explicitly singles out discrimination on the basis of “place of origin,” which includes discrimination based on citizenship. *See Carreon*, 19 ROP at 75 (“the phrase ‘place of origin’ includes citizenship”). HIDC has therefore established that the eligibility criteria discriminate on the basis of a protected classification.

³ Alternatively, it might refer to a person’s ancestry or place of birth. However, given the practical difficulties of ascertaining that type of information about company shareholders, this interpretation is unlikely. Moreover, we have previously noted that the concepts of ancestry and citizenship are often difficult to disentangle and would likely all fall under the “place of origin” classification articulated in the Constitution. *Carreon*, 19 ROP at 75.

The question, then, is whether the disparate treatment required by the eligibility criteria passes constitutional muster. We conclude that it does.

With respect to the favor shown to Palauan companies, the answer is simple. The Constitution explicitly allows “for the preferential treatment of [Palauan] citizens.” Palau Const. art. IV, § 5, cl. 1. Accordingly, although the eligibility criteria discriminate against HIRC in favor of Palauans, this type of discrimination is sanctioned by the Constitution itself.

With respect to the preferential treatment of Taiwanese companies, the analysis is more involved. Ordinarily, government action that discriminates on the basis of a protected classification is subject to strict scrutiny. *Carreon*, 19 ROP at 75. But there are exceptions to that rule. In *Carreon*, we concluded that intermediate scrutiny, rather than strict scrutiny, should apply to “review of laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.” *Id.* at 75. Recognizing that the Olbiil Era Kelulau and the President must have the power to “conduct foreign affairs as they see fit,” we held that government action that implicates foreign affairs will survive an equal protection challenge if it “is substantially related to an important government interest.” *Id.* at 80.

Here, the challenged eligibility criteria arise out of significant grants from the ROC to the Republic for important infrastructure projects. The issues in this case implicate the government’s ability to negotiate with other nations to obtain foreign aid for

the benefit of the Republic. In conducting these negotiations and agreeing to the terms under which the Republic may receive grant money from foreign nations, the government is acting within the field of foreign affairs. Accordingly, under *Carreon*, intermediate scrutiny applies.

Under that standard, the Republic must show that the challenged eligibility criteria are substantially related to an important government interest. *Id.* The record in this case shows that foreign financial assistance, particularly from the ROC, is very important to the Republic. Obtaining that financial assistance allows the government to complete vital infrastructure projects that might otherwise go unfinished, to the detriment of Palauan citizens and the Republic as a whole. Accordingly, we conclude that securing foreign aid for infrastructure projects constitutes an important government interest.


We also conclude that the eligibility criteria are substantially related to that interest. The Republic has introduced evidence suggesting that ROC assistance would be placed in jeopardy if the government did not agree to and obey reasonable restrictions placed on grant money under the Guidelines, including the limitation that contracts be awarded only to ROC or Palauan companies. As the trial court observed, it seems reasonable that a nation who provides a large sum of money for another nation's infrastructure projects might wish to benefit its own citizens in doing so. The eligibility criteria provide a privilege to ROC companies in return for significant financial assistance, and they do so without disadvantaging Palauan companies, which are also

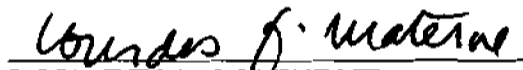
given preferential treatment under the Guidelines. There is no evidence that the ROC would continue to provide financial assistance were the Republic to refuse to limit eligibility to ROC and Palauan companies when awarding the projects. In fact, evidence in the record suggests the contrary. Accordingly, we conclude that the eligibility criteria are substantially related to an important government interest and therefore do not violate equal protection. Because no material facts are in dispute and this conclusion is purely a matter of law, summary judgment in favor of the Republic was appropriate.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

SO ORDERED, this 29th day of November, 2013.


KATHLEEN M. SALII
Associate Justice


LOURDES F. MATERNE
Associate Justice


R. ASHBY PATE
Associate Justice