



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

---

**Consolidated Cases OPA PA 23-005 and 006**

---

**William B Brennan** <wbrennan@arriolafirm.com>

Thu, Nov 9, 2023 at 6:39 PM

To: Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

Cc: "Joanne L. Grimes" &lt;jgrimes@carlsmith.com&gt;, "Arsima A. Muller" &lt;amuller@carlsmith.com&gt;

Hafa Adai Mr. Hernandez and Attorneys Grimes and Muller,

Please see ASC's Comments on GGRF's Agency Statement attached hereto. (7 pages)

Kind Regards,

*William Bucky Brennan, Esq.*

**ARRIOLA LAW FIRM**[259 Martyr Street, Suite 201](#)

Calvo-Arriola Building

Hagåtña, Guam 96910

Tel: 671.477.9730/33

Fax: 671.477.9734

Email: [wbrennan@arriolafirm.com](mailto:wbrennan@arriolafirm.com)

This email message, including any attachments, is covered by the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2521, is sent by a law firm, and is intended only for the use of the recipient to whom it is addressed. The message, including any attachments, may contain information that is privileged, confidential, and exempt from disclosure. Any and all rights of privilege, confidentiality and non-disclosure are hereby expressly reserved and not waived. If you are not an intended recipient of this message, please advise the sender by reply email and delete this message and any attachments. Unauthorized use, dissemination, distribution, or reproduction of this message is strictly prohibited and may be unlawful.

---

 **ASC Comments on Agency Report FINAL NOA 006.pdf**

195K

**WILLIAM B. BRENNAN, ESQ.**  
**ARRIOLA LAW FIRM**  
 259 MARTYR STREET, SUITE 201  
 HAGÁTÑA, GUAM 96910  
 TEL: (671) 477-9730/33  
 FAX: (671) 477-9734  
[attorneys@arriolafirm.com](mailto:attorneys@arriolafirm.com)

Attorneys for Appellant  
*ASC Trust, LLC*

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

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

<b>In the Appeal of</b>	)	Consolidated Appeal
	)	Docket No. OPA-PA-23-005
	)	Docket No. OPA-PA-23-006
<b>ASC TRUST, LLC,</b>	)	<b>COMMENTS ON AGENCY REPORT</b>
	)	
Appellant.	)	
_____	)	

**COMES NOW**, ASC Trust, LLC (“ASC”) through the undersigned counsel, who submits ASC’s comments on the Government of Guam Retirement Fund’s (“GGRF”) Agency Report and Statement filed in this matter on October 30, 2023 related to the Notice of Appeal filed in OPA-PA-23-006, prior to consolidation of that matter with OPA-PA-23-005.

**COMMENTS ON AGENCY RESPONSE TO PROTEST**

**I. GGRF’s Statement does not Match its Actions Regarding a “Notice of Conditional Award.”**

In its Agency Statement, GGRF asserts that ASC’s protest related to the sequence of events established by GGRF’s own communication log somehow is not related to the procurement method or solicitation here. ASC disagrees. 5 G.C.A. Section 5216(e) of the procurement law is clear,

“Award shall be made to the offeror determined in writing by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals, and negotiation of compensation determined to be fair and reasonable.”

GGRF does not dispute that a notice of award was issued to ASC dated August 16, 2023, which stated an *award* was made to Empower. OPA-PA-23-005, Notice of Appeal at p. 68 (Sept. 20, 2023). The exact statement in the letter was:

“This letter is to inform you that the Board of Trustees of the Government of Guam Retirement Fund has awarded the contract solicited in RFP No. GGRF-002-22 to Empower Retirement, LLC . . . At the conclusion of [GGRF’s] validation of qualifications, evaluation and discussion, the Board of Trustees determined that Empower Retirement Fund, LLC, was the best qualified offeror based on the evaluation factors stated in [the RFP]. Based on the pricing submitted by Empower Retirement, LLC, subsequent negotiations resulted in a contract at compensation determined to be fair and reasonable.”

Id. After ASC filed a request under the Sunshine Reform Act of 1999 related to the August 16, 2023 letter, GGRF attempted to correct its August 16 letter. GGRF’s second letter dated September 7, 2023 reads that the GGRF superseded its August 16, 2023 letter to “provide corrected information”. OPA-PA-23-005, Notice of Appeal at p. 70 (Sept. 20, 2023). GGRF posited it only “issued a notice of conditional award” and that the Board determined that Empower was the *best qualified offeror*. Id.

Under the RFP a conditional award follows the *completion* of negotiations and finalization of a contract. See OPA-PA-23-005, Notice of Appeal at p. 110 (“The contract will be conditionally awarded to the *successful offeror*. . .” subject to the requirements that within eight weeks, the offeror duly register as an Investment Advisor under 22 G.C.A. Chapter 46, provide a copy of the registration, and be duly authorized to do business on Guam.” (*emphasis added*)). Notably, the RFP clearly states a conditional award is made to a “selected offeror” not the “best qualified offeror.” Id.

The communications log confirms that GGRF was already engaged in fee negotiations as early as April and May of 2023, which again begs the question of what the GGRF Board actually approved in July 2023. GGRF cannot explain why GGRF was already requesting a best and final offer prior to the Board meeting in July 2023, while they now state that negotiations commenced after approval of

the best qualified offeror. The Communications Log indisputably states that GGRF was already in “**fee negotiations**” as of May 5, 2023 through July 11, 2023 when Empower was requested to send their “best and final offer.” OPA-PA-23-005, Notice of Appeal at pp. 59-62. If all the Board did on July 28, 2023 was approve the best qualified offeror, such approval came after price negotiations were already ongoing, in violation of Section 5216(e) which requires the determination of the best qualified offeror, and ranking of offerors to *precede* price negotiations.

The timeline bears this out. If the GGRF Board only approved the best qualified offeror on Wednesday, July 28, 2023, how was a conditional award appropriate by Tuesday, August 1, 2023 with no additional communication between GGRF and Empower except the notice of conditional award. OPA-PA-23-005, Notice of Appeal at p. 62 (Sept. 20, 2023). The price was already negotiated, prior to Board approval.

Price and contract negotiations had to follow the determination of the best qualified offeror, as the law requires. See 2 GARR § 3114(k) (“The offeror determined to be best qualified shall be required to submit cost or pricing data to the head of the agency conducting the procurement at a time specified *prior to the commencement of negotiations*”).

The September 7, 2023 letter stating that a notice of conditional award was issued to Empower therefore does not appear to comply with the terms of the RFP or Guam law. Because ASC has still not seen the “notice of conditional award” issued to Empower, ASC does not know what the notice of conditional award says. If GGRF has issued a notice of conditional award pursuant to Page 35 of the RFP, then negotiations should have already been completed and Empower is the “selected offeror” which does not align with GGRF’s Agency Statement. See OPA-PA-23-006, Agency Statement at p. 4 (Oct. 30, 2023) (disputing *inter alia* that contract negotiations were underway as of May 2023). If some other conditional award is contemplated, then GGRF is not in compliance with

the terms of its own RFP. If price and contract negotiations are still ongoing with Empower, as GGRF's agency statement appears to suggest, then the notice of conditional award was improper as Empower is still not the "selected offeror." GGRF cannot explain why their own Communications Log shows "fee negotiations" with Empower were occurring in April and May 2023, despite it not knowing Empower was the best qualified offeror until its July 28 Board Meeting. GGRF's actions violate the Guam procurement law and the terms of its own RFP. The Public Auditor must find in favor of ASC and cancel the solicitation.

**II. GGRF Improperly Substituted an Evaluator After RFP Presentations Occurred.**

GGRF contends that ASC did not cite to authorities in challenging the substitution of an RFP evaluator after ASC had completed its RFP presentation. GGRF's argument is curious given that GGRF also does not offer citation to authority or to its RFP that shows GGRF is allowed to substitute an evaluator, or that GGRF was allowed to have the substitute evaluator review offeror's proposals and audio-visual tapes of discussions after the fact. GGRF also contends that the substitute evaluator was given further opportunity to hold further discussions with offerors *if deemed necessary*.

First neither GGRF nor any part of its procurement record articulates, *if deemed necessary by whom*. Had ASC received notice of the substitution, perhaps ASC would have deemed it necessary to make its presentation to the substitute, or to protest the substitution outright. GGRF did not inform ASC of the substitution. Additionally, nothing in the procurement record provided to date substantiates that the substitute evaluator was (1) allowed to review the presentations or (2) allowed to have further discussions with ASC.

Second, GGRF is mandated to act deliberately related to procurement and not take action that is erroneous, arbitrary, capricious or contrary to law. See e.g., D.F.S. Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam 20 ¶ 45 n. 12. There is nothing in the record to suggest that GGRF

considered its action in substituting an evaluator post presentation, including whether there was an impact on the procurement solicitation and whether notice should have been given to proposers that an evaluator was substituted. GGRF's RFP does not expressly allow for substituting proposers post evaluation, and GGRF has not demonstrated its decision was not erroneous, arbitrary, capricious or contrary to law. GGRF could have proceeded without the retired evaluator which would not have put one evaluator at a disadvantage of not having been present for ASC's presentation. Instead, GGRF arbitrarily substituted an individual who was unknown to proposers and who did not attend the presentation. GGRF's action in this regard violated the Guam Procurement law and the plain terms of its RFP. The OPA must find in favor of ASC and cancel the solicitation.

**III. THE OGL APPLIES TO THE GGRF BOARD AND EACH OF ITS MEMBERS.**

i. *Application of the OGL.*

GGRF contends that Guam's Open Government Law does not apply to Agency Board Members serving on procurement evaluation committee, absent Board Action. GGRF also claims that ASC's protest on this basis is untimely. GGRF is wrong on the law on both points.

Guam law unambiguously prohibits deliberation of public business during an informal or chance meeting of **two or more** GGRF Board members where public business that will come before such Board is discussed. 5 G.C.A. § 8105 ("No chance meeting, informal assemblage or electronic communication shall be used to decide or *deliberate* public business in circumvention of the spirit or requirements of this Chapter. . .") (*emphasis added*).

If an informal assemblage cannot be used to deliberate public business, GGRF's position that two or more board members can participate in a formal procurement evaluation committee which *deliberates* on an ultimate recommendation to the GGRF Board is somehow not subject the OGL, is absurd. If two or more GGRF Board members cannot meet to deliberate public business of the Board

informally without complying with the OGL, surely a formal procurement evaluation committee weighing a recommendation to ultimately award a multi-million-dollar government contract not in compliance with the OGL is similarly prohibited. This is so especially where the evaluation committee is meeting expressly to provide a recommendation to the greater Board. GGRF Board members are bound by the OGL when they discuss public business related to the GGRF Board business with one or more *other* Board members. GGRF's arguments otherwise are baseless.

ii. ASC's protest was timely.

Procurement protests must be submitted within 14 days after an aggrieved person "knows or should know the facts giving rise to the protest." 5 G.C.A. Section 5425(a). The fourteen days begins from when the protesting party is "entitled to a remedy", that is when they become aware of the violation of the procurement law or RFP they complain of. D.F.S. Guam L.P. vs. A.B. Won Pat. Int'l Airport Auth., 2020 Guam 20 ¶ 84.

To be clear, based on the GGRF's September 5, 2023 disclosure of the procurement Meetings and Communications Logs, ASC suspected that GGRF Board Members were likely participating in greater Board Meetings related to the procurement, while simultaneously being involved in the procurement evaluation committee. ASC's second procurement protest, which included this basis for protest was served on GGRF on September 14, 2023 – nine (9) days after the communications and meetings log were served on ASC in response to ASC's first foia request.

However, GGRF cannot dispute that the minutes for its July 28, 2023 meeting were not provided to ASC until September 25, 2023, when GGRF responded to ASC's second FOIA request. Indeed, that document shows for the first time the *violation* complained of. The minutes confirm Board Vice Chairperson Antolina Leon Guerrero, who sat on the evaluation committee for the procurement *also* made the motion to approve the selection panel's recommendation at the greater GGRF Board level.

Thus, ASC's suspicions of a *violation* were confirmed by the production of the minutes of the July 28, 2023 meeting on September 25, 2023. ASC's preemptive protest was therefore timely because ASC brought the protest within 14 days of both its suspicion and before the later confirmation of the violation of the law ASC complains of.

**CONCLUSION**

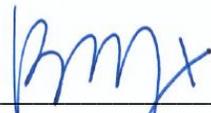
Based on the foregoing, as well as for those reasons set forth in the Notices of Appeal OPA-PA-23-006 and OPA-PA-23-005, ASC requests that the OPA find that:

1. The GGRF August 16, 2023 notice of award and the undisclosed August 1, 2023 notice of conditional award were issued in violation of the Guam procurement law and the RFP.
2. GGRF's substitution of an evaluator after proposer presentations violated the Guam procurement law and the terms of the RFP, and
3. The two GGRF Board Members who were on the RFP evaluation committee and also voted on the Board's approval of the evaluation committee's recommendation, did so in violation of the Guam Open Government Law and thus such Board Action is void.

ASC requests that the OPA cancel the RFP and order the GGRF to restart the process and act in compliance with Guam law.

Respectfully stipulated this 9<sup>th</sup> day of November, 2023.

**ARRIOLA LAW FIRM**  
Attorneys for ASC Trust, LLC

By:   
**WILLIAM B. BRENNAN**

ARRIOLA LAW FIRM HAGATÑA, GUAM 96910