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FILE No. OPA-PA 09-010

OFFICE OF PUBLIC ACCOUNTABILITY - GUAM

IN THE APPEAL OF
ASC TRUST CORPORATION,

Appellant.

APPEAL NO. OPA-PA-09-010

AGENCY REPORT

Appellee Government of Guam Retirement Fund (the "Fund"), by and through its counsel of record, Maria Teresa B. Cenzon, Esq., of Carlsmith Ball LLP, hereby submits its Agency Report in the form required under 2 GAR §12105:

(a) A copy of the protest: *Please see Tab 61 of Procurement Record previously filed with the Office of Public Accountability on November 9, 2009;*

(b) A copy of the bid or offer submitted by the Appellant and a copy of the bid or offer that is being considered for award or whose bid or offer is being protested, if any had been submitted prior to the protest: *Please see Tab 3 of Procurement Record*

(c) A copy of the solicitation, including the specifications or portions thereof relevant to the protest: *Please see Tab 1 of Procurement Record;*

(d) A copy of the abstract of bids or offers or relevant or portions thereof relevant to the protest: *Please see Tab 7 of Procurement Record;*

(e) Any other documents which are relevant to the protest, including the contract, if one has been awarded, pertinent amendments, and plans and drawings: *Please see Tab 61 of Procurement Record and documents filed therein;*

(f) The decision from which the Appeal is taken, if different than the decision submitted by Appellant: *Please see Tab 63 of Procurement Record;*

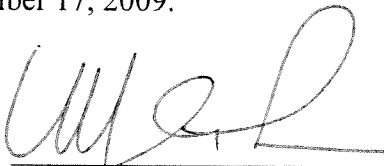
(g) A statement answering the allegation of the Appeal and setting forth findings, actions, and recommendations in the matter together with any additional evidence or information deemed necessary in determining the validity of the Appeal. The statement shall be fully responsive to the allegations of the Appeal: *Tab A of the instant Agency Report;*

(h) If the award was made after receipt of the protest, the report will include the determination required under 2 GAR §9101(e): *Not applicable.*

(i) A statement in substantially the same format as Appendix B to this Chapter, indicating whether the matter is the subject of a court proceeding: *Tab B of the instant Agency Report.*

DATED: Hagåtña, Guam, November 17, 2009.

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OFFICE OF PUBLIC ACCOUNTABILITY - GUAM

IN THE APPEAL OF
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AGENCY STATEMENT

I. INTRODUCTION

As part of the Agency Report required under 2 G.A.R., Div. 4, Chap. 12, Sections 12104-12105, the Government of Guam Retirement Fund (the "Fund" or "GGRF" as the Purchasing Agency) submits this Agency Statement answering the allegations, and setting forth additional evidence and information necessary to determine the validity of the appeal taken by ASC Trust Corporation ("ASC") from the Fund's denial of its protest to the contract awarded to Great-West Retirement Services under RFP No. GGRF-028-06. Documents required under 2 G.A.R., Div. 4, Chap. 12, Section 12105 were timely submitted to the Office of the Public Accountability ("OPA") as part of the official procurement record on November 9, 2009.

ASC's appeal from the denial of its untimely protest is more than a day late and a dollar

short. ASC is asking the OPA to ignore the law and policy underlying Guam's procurement code.¹ Instead of timely challenging its second place ranking during the pre-award phase of the procurement process, ASC sat on its rights through an entire protest and appeal, through an initial award of contract, and through negotiations with a competitor -- a period spanning over two years. ASC protested its ranking only after the contract was executed with a competitor, and the Fund denied its protest on the grounds of untimeliness. The Fund's denial was proper under the law, is in the best interests of the government of Guam, and should be affirmed by the OPA.

II. RELEVANT BACKGROUND

A. Request for Proposals.

On September 28, 2006, the Fund issued RFP No. GGRF-028-06 "Request for Proposals for Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan" (the "RFP", see Tab #1 of the Procurement Record ("P.R.")). On November 6, 2006, the RFP closed with a total of three proposals timely submitted to the Fund by the following offerors: ASC, Great-West Retirement Services ("GWRS") and Lincoln Financial Group/Bank of Hawaii ("Lincoln"). The Fund's selection panel consisted of three of its Trustees, who reviewed and evaluated the offerors and their proposals.

Using a weighted scoring system, with a specific weight given to each evaluation factor set forth in the RFP, each member of the selection panel scored each offeror and its proposal. Based on the scoring, GWRS was chosen as the best qualified offeror with an average total score of 22.42. ASC and Lincoln received scores of 21.64 and 18.76, respectively.

B. Negotiations with and Administrative Proceedings involving GWRS.

¹ Title 5, Chapter 5 of the Guam Code Annotated, which was adopted from the Model Procurement Code approved by the American Bar Association in 1979 (see comment to 5 G.C.A. § 5030).

By letter dated March 6, 2007, the Fund notified GWRS that it was chosen as the best qualified offeror. (P.R. at Tab 9). Those negotiations became the subject of an agency protest and an OPA matter, *In re Great-West Retirement Servs.*, Appeal No. 07 - 006. Briefly, the issue at the time was GWRS's pricing. After negotiations were initially unsuccessful, the Fund's selection panel terminated negotiations with GWRS on April 27, 2007. On May 9, 2007, GWRS submitted a protest to the termination of negotiations, which the Fund later denied. (P.R. at Tab 17).

C. Negotiations with ASC.

In the meantime, the Fund notified ASC that it had been evaluated and deemed to be the next qualified to provide the required services [under RFP No. GGRF-028-06].” (P.R. at Tab 16). However, shortly thereafter, on May 11, 2007, GGRF advised ASC and Lincoln that it had executed a “Stay of Procurement” on the RFP as a result of GWRS's protest, and that the stay would continue until a final resolution had been reached. (P.R. at Tab 18).

After the Fund denied GWRS's protest on June 1, 2007, on June 8, 2007, the Fund advised Lincoln and ASC that GWRS's protest was determined to be without merit and that it “anticipate[d] making an award relative to the subject Request for Proposal.” (P.R. at Tab 22). On June 15, 2007, the Fund commenced its negotiations with ASC, seeking its “best and final offer for all services to be provided” and further requesting that all information be provided by no later than June 25, 2007. (P.R. at Tab 23). On June 18, 2007, by letter to the Fund, ASC sought an update of the solicitation and acknowledged, without protest, that it had been “evaluated and deemed to be the *next qualified* to provide the required services. ” (P.R. at Tab 24 (Emphasis added)). On June 21, 2007, ASC submitted cost and pricing data to the Fund; however, on June 22, 2007, GWRS timely submitted its appeal to the OPA (then the Office of

the Public Auditor, now the Office of Public Accountability). The Fund notified all offerors of GWRS's appeal to the OPA. On July 6, 2007, ASC filed an "Entry of Appearance and Request for Notice" with the OPA's office and participated throughout GWRS's appeal proceedings before the OPA. (Exhibit 1 to Agency Statement).

D. GWRS's Protest and Appeal to the OPA.

A formal hearing on GWRS's appeal was held before the OPA on January 21, 2008. Present and "making arguments on behalf of their clients" were counsel for GGRF, GWRS and ASC, respectively. (Exhibit 3 to Agency Statement). The OPA ruled in favor of GWRS and ordered the Fund to "continue negotiating with GWRS in an attempt to reach an agreement to provide Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan." (OPA Amended Decision at p. 3). ASC received the ruling and did not protest or appeal the finding that GWRS had received a higher ranking than ASC. The OPA's Amended Decision also informed the interested parties, including ASC, of their right to appeal the decision, stating:

This is a final administrative Decision. Parties are hereby informed of their right to appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of Article 9 of 5 G.C.A. Section 5481(a) within fourteen (14) days. A copy of this Decision shall be provided to the parties and their respective attorneys in accordance with 5 G.C.A. Section 5702 and shall be made available for review on the OPA website www.guamopa.org.

E. The Fund Enters Into a Contract with GWRS.

On August 21, 2009, negotiations between the Fund and GWRS resulted in a written contract for the RFP and ASC was advised thereof through a Notification of Award sent on the same day. ASC's protest was filed six *weeks* later, well after the 14-day time period required by

statute and regulations.

F. ASC's Protest and Appeal.

Despite having been fully involved and an active participant in the protracted protest and OPA appeal by GWRS of this procurement – during which time ASC was informed and acknowledged that it was ranked behind GWRS in the evaluation of the proposals – ASC filed a protest of the award and contract to GWRS on October 15, 2009 on the basis that it was unfairly evaluated. ASC asserts in its protest that its proposed pricing was “substantially lower than initially proposed by GWRS” and, therefore, “[g]iving ASC a lower rating for a lower, more favorable price was necessarily arbitrary and capricious.” (Exhibit 1 to ASC's Notice of Appeal). On October 26, 2009, the Fund denied ASC's protest as being made untimely. (Exhibit 2 to ASC's Notice of Appeal). ASC appealed the Fund's denial of the protest on October 29, 2009.

III. STATEMENT ANSWERING ALLEGATIONS ON APPEAL AND IN SUPPORT OF DENIAL OF ASC'S PROTEST

A. Timeliness Requirements Ensure Fairness and Expedient Resolution of Protests.

Guam's procurement statute, 5 G.C.A. § 5425(a), provides that a protest "shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." The regulations, 2 G.A.R. Div. 4, § 9101(c)(1), prohibit an agency from considering untimely protests, stating as follows:

(c) Filing of Protest. (1) When Filed. Protests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto. A protest is considered filed when received by the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency. Protests filed after the 14 day period shall not be considered.

(Emphases added).

Guam's procurement regulations are based upon the Model Procurement Regulations², which, like the federal regulations, contain similar mandates governing the timing of the filing of protests. Under the federal counterpart, for protests other than solicitation challenges, the basic rule is that a protester must file its challenge within 10 days after the facts which form the basis of the protest are known or should have been known, whichever is earlier. 4 C.F.R. §21.2(a)(2). This deadline has been applied strictly by federal agencies and is supported by the General Accounting Office's ("GAO") policy, articulated as follows: "[T]imeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process."³ Locally, the Guam Supreme Court has recognized a "timely protest" as one which is filed within the statutory 14-day deadline. *Guam Imaging Consultants, Inc. v. GMHA*, 2004 Guam 15, ¶ 25 (citing 5 G.C.A. § 5425(a))(protest is timely if received by Hospital Administrator within 14 days of when the protester knew or should have known of the facts giving rise to the protest). Protests filed after the 14 day deadline may not be considered by the procuring agency. 2 G.A.R. Div. 4 §9101(c)(1).

There is a legitimate governmental interest in strict adherence to the 14-day time period in which to protest. The government, in this case the Fund, must be able to proceed to contract in the most expeditious and cost-effective manner. ASC essentially claims that it did not need to protest (that is, spend any of its own money) while it waited to see if the negotiations with GWRS would somehow fail on their own. The law and policy underlying the procurement

² 5 G.C.A. § 5030 (Cont. ("This Chapter is essentially the Medel Procurement Code approved by the American Bar Association in 1979))

³ Steven W. Feldman, *Government Contract Awards: Negotiation and Sealed Bidding*, Part VII Bid Protest Practice and Procedure for Award, Chapter 30, §30:3 at fn.7 (2009 update) (quoting *Computerized Drafting /Designers*, Comp. Gen. B-246390, 91-2 CPD 385)).

process provide otherwise. If ASC chose to “wait and see” if the GWRS negotiations would fail, then that was ASC’s low-cost choice to save its own money; therefore, it must bear the consequences of that choice to the extent that negotiations with GWRS succeeded and a contract was executed. Instead, ASC wants the Fund to bear the monetary consequences of ASC’s choice to “wait and see” if the GWRS negotiations would fail. The procurement law is designed to protect the government from such a result, and its strict deadlines are meant to minimize or avoid unnecessary expenditures (here, the fees and costs related to the first protest and the underlying contract negotiation process with GWRS) if in fact the underlying evaluation process was improperly conducted (which it was not). If the evaluations were improper (which they were not) then ASC should have identified them as early as possible in the process so that the Fund could address the selection panel’s rankings immediately, reach a proper result through the protest process, and move forward to contract with the best qualified offeror. Allowing ASC to “wait and see” while the Fund continued the procurement process with GWRS would severely prejudice the Fund by rendering unnecessary all of the expenditures incurred following the selection of GWRS as the best qualified offeror.

B. ASC Fails to Meet Its Burden of Establishing the Timeliness of its Protest or Demonstrating that the Fund Maliciously Caused Its Untimeliness.

As the interested party – “an actual or prospective bidder, offeror, or contractor that may be aggrieved by the solicitation or award of a contract and who files a protest”⁴ – ASC has the burden of establishing that its protest is timely.⁵ The gravamen of ASC's protest is that ASC should have been determined "to be best qualified to provide the required services, not GWRS." (Notice of Appeal at p. 10). In support of its assertion that the protest was timely filed,

⁴ 2 G.A.R. Div. 4 §9101(a)(1)(a).

⁵ Feldman, *Government Contract Awards*, §30:3(4) at fn. 35, citing *Datametrics Corp.*, Comp. Gen. B-251566, 93-1 CPD 120; *Robinson Engineering & Construction, Inc.*, Comp. Gen. B-245995, 92-1 CPD 145.

ASC claims that it received documents from GGRF relating to the evaluation process on October 6, 2009, only after it filed its writ petition, and therefore its untimely filing of its petition should be excused. Such a result, however, is completely unsupported in fact and by the procurement laws, for the following reasons.

First, ASC received the information in 2009 because it requested the information in 2009, and not in 2007 when it should have requested the information as soon as it was aware or should have been aware during the pre-award process that it was not the best qualified offeror. ASC has known since May 7, 2007, that it was not evaluated to be the most qualified offeror. Actually, ASC *declares* that it was aware it was ranked lower than GWRS: “Of course ASC knew this fact.”⁶ As discussed further below, there is nothing in the record that demonstrates why ASC should be excused for failing to timely protest in 2007 given its awareness in 2007 that it was not the best qualified offeror.

Second, although Section 9101(c)(1) of the Procurement Regulations and Section 5425(a) of the Guam Procurement Law each impose a strict 14-day time period, the regulations clearly contemplate that a protester may not have all of the documents or information to support its protest within that short time period, so the regulations provide for the protester to obtain and submit supporting exhibits, evidence or documents “to substantiate claims unless not available within the filing time in which case the expected availability date shall be indicated.” 2 G.A.R. Div. 4 §9101(c)(3).⁷ Had ASC timely filed its protest in 2007, when it knew that it was not ranked the best qualified offeror, it would have been able to later obtain any information needed to support its protest as contemplated by Section 9101(f) of the Procurement Regulations. That

⁶ Notice of Appeal at p. 13.

⁷ Had ASC filed its protest timely and prior to the award of the contract, 2 G.A.R. Div. 4 §9101(e) provides for a stay of the procurement during which time ASC could have obtained additional information. ASC failed to avail of this opportunity by its delay.

section provides:

Making Information on Protests Available. The Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency shall upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation. Persons who wish to keep such information submitted by them confidential should so request by specifically identifying such information within documents submitted, and indicating on the front page of each document that it contains such information.

ASC cannot now blame the Fund for its own ignorance of the law and its own failure to timely protest and seek additional information as needed to support its claim of superior ranking. ASC's attempt to "toll" the time period because it failed to timely protest and seek information has no basis in the law, and its protest was properly denied by the Fund.⁸ To allow its protest and appeal more than two years after it first knew or should have known about this determination is directly in contravention of the Procurement Laws and attendant Regulations.

Third, ASC devotes pages upon pages of its Appeal to an irrelevant discussion of how it was denied access to information about the evaluation process conducted under the RFP until after the August 21, 2009 award of contract to GWRS, claiming that it only "now" discovered that it had a basis to protest the solicitation. Even assuming that ASC is not time-barred as a result of its inactions in 2007 (which it is), ASC received the information it requested in 2009 not because it filed a Petition for Writ, but because it finally requested the information properly after first improperly requesting the information under the Freedom of Information Act ("FOIA"), Title 5, Guam Code Annotated Chapter 10.⁹ ASC claims that it is *not* protesting the fact of the

⁸ See, e.g., *Matter of Miranda Assoc. - Reconsideration*, 1992 WL 29800 (Comp.Gen.1992)(protest filed more than 10 days after protester received notification was insufficient; protester's continued discussions with agency instead of filing protest did not toll timeliness requirements.)

⁹ Compare Letter from W. Blair on behalf of ASC dated September 21, 2009 (P.R. at Tab 55 (seeking information

ranking but “*why it was rated lower*, the truth about which was not learned until October 6, 2009.”¹⁰ Not only is this splitting hairs, but it was not the Fund’s fault that ASC failed to timely learn of the procedure by which ranking was established. Had ASC simply *asked* for the information as an *interested party*, under Section 9101(f), the Fund would have provided it; yet, ASC never asked until it improperly sought the information as part of a FOIA request more than two years after it should have filed its protest.¹¹

The Comptroller General has ruled that where a protester alleges an intention to preclude the protester from receiving the award, the protester must submit “virtually irrefutable proof that contracting officials had a specific and malicious intent to harm the protester, since contracting officials are presumed to act in good faith.” *Matter of Microtonics, Inc.*, 1988 WL 2277188 at p. *3 (Comp. Gen. 1988). ASC has proffered nothing more than pure speculation with regard to allegations of impropriety on the part of the Fund. Absent the “virtually irrefutable proof” of the evaluator’s specific and malicious intent, the Fund’s denial of ASC’s request for information under the FOIA was proper, is irrelevant to the issue of whether ASC should have requested information in 2007, and thus should be affirmed on appeal.

Under the FOIA, the public may not access confidential records or other information expressly protected by law. 5 G.C.A. § 10108(i). The Retirement Fund’s position *under the Freedom of Information Act* was and is that the evaluation sheets of offerors’ proposals necessarily reflect information contained in the proposals, and therefore, like proposals, would

pursuant to the FOIA) with Email from W.Blair on behalf of ASC dated October 6, 2009 (Exhibit 4 to Agency Statement) (seeking information as an offeror under the RFP).

¹⁰ Notice of Appeal at p. 13 (Emphasis in original).

¹¹ In response to ASC’s request for information under the FOIA, the Fund informed ASC that its FOIA request would be treated as a FOIA request such that ASC would stand the shoes of the public and as a result, was not entitled to information that the public would not be entitled to under Guam’s procurement laws. (Exhibit 9 to Notice of Appeal, *Letter to W. Blair from E. McDonald* dated September 29, 2009). The Fund did not hinder ASC’s protest of the contract or its request for information that it would have been entitled to if requested as an offeror. Any delay resulting in ASC’s untimely protest was attributable solely to ASC’s own acts and omissions, and not to the Fund.

fall under the exception to disclosure as "confidential documents or other information expressly protected under the law."¹² If the information would not be disclosed to the public under the FOIA, it would not be disclosed to ASC. The record demonstrates that the Fund alerted ASC about requesting information under the FOIA, and after ASC requested the information as an offeror and not a member of the public under the FOIA, GGRF immediately provided the information.¹³ Thus, the Fund had no role in hindering the information sought by ASC.

Applying the most lenient standard to the "*known or should have known*" requirement, as illustrated below, ASC has had ample opportunity to bring a timely protest, as determined on any of four "triggering" dates: May 7, 2007, May 11, 2007, July 6, 2007, and August 21, 2009. Instead, it simply rested on the hope that GWRS would lose its appeal and ASC would be awarded the contract as the "next" highest ranked offeror – a risk that proved to be detrimental to ASC's interest.

a. **May 7, 2007.**

On May 7, 2007, the Fund sent ASC a letter advising it that ASC "has been evaluated and deemed to be the *next* qualified to provide the required services" under the RFP. (P.R. at Tab 16)(Emphasis Added). As set forth in the Fund's letter denying ASC's protest, it was at this time that ASC first knew or should have known that it had grounds to protest the ranking. ASC implies that the Fund would not have provided ASC with the evaluation sheets; however, by filing the protest, Section 9101(f) of the Procurement Regulations would have mandated that the Fund provide documents that described the *how* and the *why* that determination was reached.

¹² See Also 2 G.A.R. Div. 4 §3114(i) ("[T]he agency conducting the procurement shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be opened to *public* inspection except as otherwise provided in the contract." (Emphasis added.)

¹³ In the letter dated October 6, 2009, counsel for the Fund explains to ASC's counsel that procurement documents were not provided because they were requested pursuant to the Freedom of Information Act, not the Procurement Laws and Regulations. See Exhibit 11 to ASC's Notice of Appeal.

ASC did not assert any claims or challenges or seek information regarding the determination of ranking among the offerors until well after 14 days from May 7, 2007. On this basis alone, the protest is untimely; however, for the sake of argument only, additional dates that ASC “knew or should have known” of the facts which form the basis of its protest are addressed.

b. May 11, 2007.

On May 11, 2007, when the Fund sent a Stay of Procurement notice to ASC as a result of GWRS’s protest, ASC was again informed that it was *not* the “best offeror” and on the same basis as the May 7, 2007 protest, ASC should have filed a protest and requested the evaluation information. ASC again proclaims that it was “no secret” that GWRS was rated higher than it. (Notice of Appeal at p. 11). Nevertheless, ASC did nothing with this knowledge but lay in wait for the protest to be resolved against GWRS in hopes that it would be awarded the contract.

c. July 6, 2007.

By July 6, 2007, ASC was well aware of the grounds for GWRS’s appeal and, at this point, there can be no contending that ASC was identified as an “interested party” in the GWRS protest appeal. (“Appellee’s Statement of Interested Parties,” *In the Appeal of Great West Retirement Services*, Appeal No. OPA-PA-07-006 (6/27/07)). As an interested party, ASC was served with a copy of GGRF’s Agency Report which was filed and served upon it on July 6, 2007. The Agency Report discussed the evaluation procedure as follows:

At noon of February 7, 2007, the selection panel met to evaluate the offerors based on technical merits and price. Using a weighted scoring scheme, with a specific weight given to each evaluation factor, each member of the selection panel scored each offeror. Based on the scoring, GWRS was chosen as the best qualified offeror.¹⁴

¹⁴ See Agency Report in *In re Great-West Retirement Services*, Appeal No. 07-006.(7/06/2007)(Attached hereto as Exhibit 2). This report was served upon ASC’s counsel on July 6, 2007, as indicated by the “Received” stamp of The Law Offices of Arriola, Cowan, Arriola.

As an *interested party* to the GWRS protest which was filed on June 22, 2007, pursuant to Section 9101(f) of the Procurement Regulations, ASC was entitled to receive the information if only it had thought to ask – a notion which it now dismisses as “unreasonable.” (See Notice of Appeal at p. 11 (“Given the lengths to which the Fund has gone to avoid having to provide this information, it is patently unreasonable to assume that ASC would have been provided the information, if only ASC had thought to ask.”)) . At no time during the GWRS protest or appeal thereof – during which time ASC was represented by counsel¹⁵ -- did ASC simply request the evaluation documents when it knew it had not been selected the “best qualified” offeror. Instead, it chose to sit on its rights for over two years and only until *after* an award had been made and contract had already been executed to assert its protest.¹⁶

d. **August 21, 2009.**

Again, for the purposes of argument only and not as an admission that August 21, 2009 was the date that ASC first “knew or should have known” of facts that formed the basis of its protest, ASC could have filed its protest on September 4, 2009 -- 14 days from August 21, 2009 which is the date on which ASC was notified of the Fund’s contract with GWRS. However, it did not file its protest until October 15, 2009 – *six weeks* beyond the deadline. ASC seems incredulous that the Fund would require it to “have asked for the evaluation sheets ...so it could have learned the true facts and then filed timely protest, all within 14 days.” (Notice of Appeal at p. 13). Actually, *yes*; ASC should have asked for the information as an *interested party* in 2007, when it was identified as such and informed it was “next best qualified.” It did not,

¹⁵ Exhibit 1 to Agency Statement, “Entry of Appearance and Request for Notice” filed by Arriola Cowan Arriola on behalf of ASC (7/6/07).

¹⁶ See Feldman, [*Government Contract Awards*,] §30:3 at ¶ 4 (“Very commonly, the protester will receive notice of the grounds for complaint from the agency report made in response to the initial protest. In fact, many protester’s attorneys treat the supplemental protest stemming from the agency report as the “real protest” with the initial grounds functioning as the primary means of receiving access to the agency’s contemporaneous procurement record.”).

however, do so and cannot now complain that its protest was ruled by the Fund to be untimely.

C. Attorneys Fees May be Recovered by the Fund from ASC.

ASC's decision to "wait and see" what would happen to GWRS's protest before asserting its own grounds for protest when it should have done so should be viewed not only as a waiver of its right to protest based on the timeliness requirements, but also as conduct clearly calculated to hinder the Fund's procurement of these services. Instead of resolving questions of how or why it was ranked second when it first learned of that fact in 2007, it wasted over two years deliberately waiting for a ruling on of GWRS's protest and appeal that would be in ASC's favor. Under the circumstances, ASC's conduct can only be construed as having been made fraudulently, frivolously or solely to disrupt the procurement process. In this instance, the Fund is entitled to recover its costs, including attorneys' fees in the defense of this fraudulent, frivolous and disruptive protest and appeal. In this regard, 5 G.C.A. §5425(h) grants to the OPA the "power to assess reasonable costs including reasonable attorney fees incurred by the government, including its autonomous agencies and public corporations, against a protestant upon its finding that the protest was made fraudulently, frivolously or solely to disrupt the procurement process."

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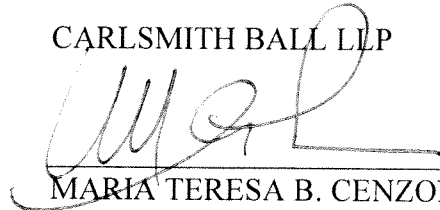
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IV. CONCLUSION

All of the Fund's decisions and actions in this solicitation are well documented, supported by factual evidence, and are not controverted by evidence of specific malice, bias or bad faith in the evaluation of the proposals received in response to the RFP. ASC's protest was untimely, the Fund properly denied its protest on the grounds of untimeliness, and ASC's Appeal should be denied.

DATED: Hagåtña, Guam, November 17, 2009.

CARLSMITH BALL LLP



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EXHIBIT

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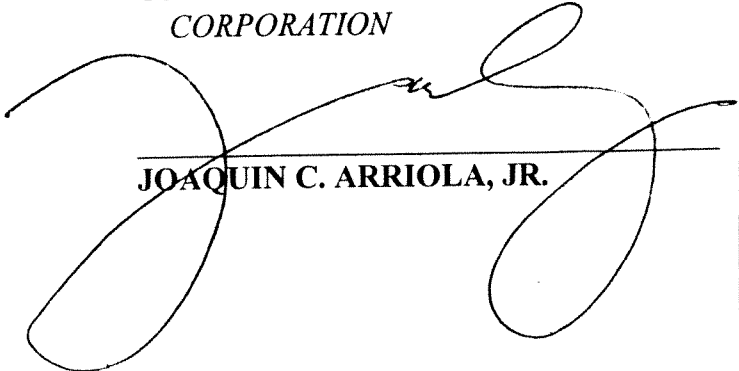
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IN THE APPEAL OF) Procurement Appeal No.
GREAT-WESTERN RETIREMENT SERVICES,) OPA-PA-07-006
Appellant.) **ENTRY OF APPEARANCE**
) **AND REQUEST FOR NOTICE**

The Law Firm of ARRIOLA, COWAN & ARRIOLA, by Joaquin C. Arriola, Jr., Esq., hereby enters its appearance herein on behalf of **ADMINISTRATIVE SERVICES CORPORATION**, an Interested Party in the above appeal. Arriola, Cowan & Arriola request that they be served with all papers and pleadings filed in this matter, and be given notice of any and all proceedings or hearings herein.

Dated at Hagåtña, Guam: July 6, 2007.

ARRIOLA, COWAN & ARRIOLA
Counsel for *ADMINISTRATIVE SERVICES CORPORATION*



JOAQUIN C. ARRIOLA, JR.

RECEIVED
JUL 11 2007
MAYOR'S OFFICE

EXHIBIT

2

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Attorneys for Appellee
Government of Guam Retirement Fund

OFFICE OF THE PUBLIC AUDITOR
GUAM

406
07-006
Law Offices
ARRIOLA, COWAN, ARRIOLA

JUL 06 2007

RECEIVED
BY: [Signature] TIME: 4:25p

IN THE APPEAL OF
GREAT-WEST RETIREMENT SERVICES,
Appellant.

DOCKET NO. OPA-PA-07-006
AGENCY REPORT

INTRODUCTION

Pursuant to 2 GAR, Div. 4, Chapter 12 §§ 12104-12105, the Government of Guam Retirement Fund ("GGRF") hereby submits its Agency Report answering all allegations set forth in the Appeal filed by Great-West Retirement Services ("Great-West"). All documents required under 2 GAR, Div. 4, Chapter 12 § 12105 were submitted to the Office of the Public Auditor as part of the official procurement record.

BACKGROUND

On September 28, 2006, GGRF issued RFP No. GGRF-028-06 in search of professional services related to providing Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan, to GGRF as described in detail under Section IV, Scope of Work of RFP No. GGRF-028-06. (See Tab #1 of the Procurement Record.)

RECEIVED
Date: 7/6/07
Time: 4:50pm
LAW OFFICE OF ANTHONY R. CAMACHO, ESQ.
By: [Signature]

ORIGINAL

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OFFICE OF THE PUBLIC AUDITOR
JUL 28 2007
TIME: 4:06 pm
BY: [Signature]
FILE NO. 07-006

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GOVT OF GUAM
OFFICE OF THE PUBLIC AUDITOR

OFFICE OF THE PUBLIC AUDITOR
GUAM

IN THE APPEAL OF
GREAT-WEST RETIREMENT SERVICES,
Appellant.

DOCKET NO. OPA-PA-07-006
AGENCY REPORT

INTRODUCTION

Pursuant to 2 GAR, Div. 4, Chapter 12 §§ 12104-12105, the Government of Guam Retirement Fund ("GGRF") hereby submits its Agency Report answering all allegations set forth in the Appeal filed by Great-West Retirement Services ("Great-West"). All documents required under 2 GAR, Div. 4, Chapter 12 § 12105 were submitted to the Office of the Public Auditor as part of the official procurement record.

BACKGROUND

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On November 6, 2006, the RFP closed with a total of three (3) proposals submitted to GGRF. All submitted proposals met the deadline stated in the RFP. After reviewing the three (3) proposals, the Procurement Officer determined that all three (3) offerors met the qualifications and were eligible for further evaluation. On January 23, 2007, the selection panel of the GGRF conducted individual discussions with all offerors regarding their proposals.

At noon on February 7, 2007, the selection panel met to evaluate the offerors based on technical merits and price. Using a weighted scoring scheme, with a specific weight given to each evaluation factor, each member of the selection panel scored each offeror. Based on the scoring, Great-West was chosen as the best qualified offeror. The meeting of the selection panel concluded at 2:50 p.m.

GGRF notified Great-West that it was chosen as the best qualified offeror by letter dated March 6, 2007. The letter also requested that Great-West submit pricing data for negotiation, specifically including the following information:

1. the independent custodian selected to provide trust services, preferably a local trust company;
2. that no fees would be assessed to participant account balances;
3. that Great-West's fee would be .25% of the total assets; and
4. that all re-allowances and rebates of 12b-1 fees received from the investment option managers would be remitted to GGRF.

Great-West responded by letter dated March 12, 2007 to GGRF's requests. This letter was deemed non-responsive as it did not sufficiently address any of the four (4) items requested by GGRF. The letter did not confirm an independent custodian licensed on Guam to provide trust services; it did not specifically address the fees for participant account balances under "Option 1" of its proposals; it simply re-stated its prior offer of fees at .27-.33%, basing such fees on assumptions that were not part of its original proposal; and it did not indicate remittance of re-

allowances and 12b-1 fee rebates to GGRF.

By letter dated March 18, 2007, GGRF notified Great-West that its pricing had not been accepted, and requested Great-West's "best and final offer" in an attempt to reach a successful negotiation. In Great-West's response letter dated March 21, 2007, it again ignored three of the four requests made by GGRF and simply reiterated a fee of .27% of total plan assets.

After considering Great-West's responses, GGRF's selection panel decided to terminate negotiations on April 27, 2007 because it deemed the offer not fair or reasonable given the estimated value, scope, complexity, and professional nature of the services required. Immediately upon making said decision, a letter was drafted and dated April 27, 2007 notifying Great-West of GGRF's decision. Great-West acknowledged receipt of this letter by fax on April 30, 2007.

Great-West submitted a protest on May 9, 2007 asserting that it is the number one provider of services to U.S. states and territories, that its pricing is "fair and reasonable" based on comparison with services it renders in the State of Montana, and that GGRF did not provide a factual basis for its decision to terminate negotiations. The protest was fully considered and denied by Paula Blas at GGRF on June 1, 2007. Great-West filed its Notice of Appeal as to Ms. Blas' decision with the Office of the Public Auditor on June 22, 2007.

RESPONSE TO STATED GROUNDS FOR APPEAL

a. GGRF conducted proper price analysis of the fees offered by Great West and found them not to be fair or reasonable: On page four (4) of its Appeal, Great-West states that GGRF "did not make any specific finding that the cost and pricing data submitted by GWRS. ... was inaccurate, incomplete, or non-current." It cites 2 G.A.R., Div. 4, Chap. 3, § 3118(f) to support its assertion that such findings be made. This support is misplaced. 2 G.A.R., Div. 4, Chap. 3, § 3118(f) applies to adjustments in contract prices which have already been

awarded if certified cost or pricing data is later found to be inaccurate, incomplete, or non-current. As the contract has never been awarded, this regulation does not apply.

The applicable regulation to price analysis is 2 G.A.R., Div. 4, Chap. 3, § 3118(g). When considering pricing, the agency should look at various factors, including but not limited to, the price submission of other bidders, prices in catalogue or price lists, prior quotes of the bidder, prices available on the open market and in-house estimates. 2 G.A.R., Div. 4, Chap. 3, § 3118(g). Great-West would like GGRF to ignore all of the pricing elements other than its own prior price quotes or contract prices.

Instead, GGRF conducted extensive research into the marketplace, using both in house resources and price lists from industry organizations of which it is a member. (See Tab #11 of the Procurement Record.) These price lists and in-house resources reflected the going-rate for the services sought on the open market. Furthermore, GGRF determined that transparency would be one of their primary goals under the new contract and having a clearly delineated fee structure is a major part of accomplishing this goal. Based upon the performance of GGRF's past investment, they determined it would no longer be necessary to charge fees to participant accounts. This too became part of the negotiation. Finally, GGRF considered the pricing quotes of the remaining bidders. As these bids remain proprietary and confidential, they cannot be disclosed to Great-West or the public at large at this time; however, they can be submitted to the Auditor for confidential, in camera review upon request.

Based on the price analysis factors, GGRF decided that Great-West's price quote was not fair and reasonable. Award of a contract under 5 GCA § 5216(e) and 2 G.A.R., Div. 4, Chap. 3, § 3114(k) requires two elements: (1) a determination that an offeror is the best qualified and (2) successful negotiation of a fair and reasonable compensation. If a successful negotiation does

not occur, the statute provides that negotiation will be terminated and negotiations will begin with the next best qualified offeror. *Id.* Because it was obvious that negotiations would not be successful with Great-West, GGRF terminated negotiations and sought to begin negotiations with the next best qualified offeror.

b. GGRF afforded Great-West the opportunity to negotiate, but Great-West failed to properly respond to GGRF's requests and negotiate a fair and reasonable fee: Although Great-West was chosen as the best qualified offeror initially, they were unresponsive to requests made in negotiations. In particular, although GGRF specifically requested cost or pricing data on four items, Great-West failed to address these four items and instead re-submitted its initial proposal. As stated in the background facts, no option under Great-West's proposal addressed all four items concurrently as requested. Great-West submitted two pricing options. Pricing Option One did not meet any of the four items requested as it included a fee to participant accounts, did not remit 12(b)(1) fees to GGRF, and stated a fixed fee. (See Tab #6 of Procurement Record.) Although Pricing Option Two did propose a zero fee to participant accounts, it conditioned this not only on not remitting 12(b)(1) fees, but also required GGRF or its plan participants to make up any short fall in one of several listed ways, including charging participant accounts. *Id.*

While Great-West accuses GGRF of not negotiating, the fact is that Great-West was given multiple opportunities to respond with pricing data and information supporting their quote, but instead chose to be non-responsive by either ignoring the request or re-submitting quotes nearly identical to their initial proposal. No option presented by Great-West addressed all of the requests by GGRF and those options presented did not move toward accomplishing GGRF's goals for its plan administration in the coming years.

Furthermore, negotiations come in many varieties. Negotiation does not necessarily mean that a fair and reasonable price is somewhere in the middle of the initial quotes of each party. Negotiation also contemplates affording a qualified, but over-priced competitor the opportunity to make a more reasonable and competitive offer. Unfortunately, Great-West did not seize their opportunity to negotiate and apparently assumed that they would be awarded the contract because they were chosen as the initial best qualified offeror. While it is unfortunate that Great-West misjudged their position in these negotiations, Guam's procurement law clearly states that the award of the contract is based on successful negotiations. GGRF indicated the prior offer was unacceptable and requested a "best and final offer", Great-West made its final offer, which was basically unchanged from its previous unacceptable offer. Therefore, it risked the fact that it may be rejected and negotiations terminated as provided by law. This is, in fact, what happened.

c. GGRF's actions are supported by the facts and the record: GGRF's actions in terminating negotiations was not arbitrary or capricious, but based on research, the marketplace, and most importantly, the bids and pricing from the pool of other offerors. GGRF gave Great-West ample opportunity to negotiate. The fact that the negotiations were not successful does not indicate an arbitrary decision.

2 G.A.R., Div. 4, Chap. 3, (1)(4)(A) requires that upon deciding to terminate negotiations, the agency place a written record stating the reasons therefore in the file. It also requires the offeror to be notified of the termination within three days of such decision. The written record supporting GGRF's decision to terminate negotiations was placed in the file. (See Tab #10 of the Procurement Record.) Such statement is not required to be given to the offeror as it may contain proprietary information. The offeror only receives notice of the termination itself.

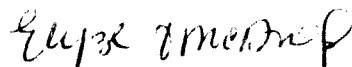
not the statement of supporting reasons. The decision to terminate negotiations was made on April 27, 2007 and a letter notifying Great-West of the termination was sent on that same day. Not only was notification sent within three days of the decision to terminate in accordance with the statutory requirement, it was received by Great-West within three days, as evidenced by GGRF's fax confirmation dated April 27, 2007, attached hereto as Exhibit A.

After notifying Great-West that negotiations had been terminated and prior to receiving Great-West's protest, GGRF notified the next best qualified offeror, ASC Trust Corporation ("ASC"), that it intended to begin negotiations with ASC and requested the same pricing data it had previously requested from Great-West. (See Tab #12 of the Procurement Record.) GGRF has received and initial response from ASC which, although confidential at present, is more favorable to GGRF than Great-West's "best and final offer."

d. Conclusion: All of GGRF's decisions and actions are well-documented, supported by factual evidence, and in accordance with Guam's procurement procedures. GGRF acted in good faith in initially choosing Great-West and in its later termination of negotiations. Therefore, Great-West's Appeal should be denied.

SUBMITTED this 13th day of July, 2007, Hagåtña, Guam.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
CAREY MCALISTER AUSTIN

Attorneys for Appellee
GOVERNMENT OF GUAM RETIREMENT
FUND

EXHIBIT A

Confirmation Report - Memory Send

Page : 001
Date & Time: Apr-27-07 04:26pm
Line 1 : +6714779491
Machine ID : Gov Guam Retirement Employee

Job number : 378
Date : Apr-27 04:25pm
To : 8101648319494741707
Number of pages : 002
Start time : Apr-27 04:25pm
End time : Apr-27 04:26pm
Pages sent : 002
Status : OK

Job number : 378

*** SEND SUCCESSFUL ***

424 Route 8
Mahe, Guam 96910
Tel: 671.475.8951/52
Fax: 671.475.8922



Fax Transmittal

To:	Gregory E. Seller Great-West Retirement Services	From:	Debbie Ulloa
Fax:	949.474.1707	Date:	April 27, 2007
Phone:	800.933.9808	No. of Pages:	Two (2)
Re:	RFP No. GGRF-028-06		
<input checked="" type="checkbox"/> Urgent <input checked="" type="checkbox"/> For Review <input type="checkbox"/> Please Comment <input type="checkbox"/> Please Reply			

• Message:

Dear Mr. Seller:

Please find copy of letter regarding RFP No. GGRF-028-06 for Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan. Original letter will be mailed to your office.

Thank You,
Debbie Ulloa
Debbie Ulloa
Administrative Assistant

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EXHIBIT

3

PROCUREMENT APPEALS

Appeal No. OPA-PA-07-006

IN THE APPEAL OF
GREAT WEST RETIREMENT SERVICES,
APPELLANT.

AMENDED DECISION

I. INTRODUCTION

This is a Decision by the Public Auditor on a procurement appeal filed on June 22, 2007, by Great-West Retirement Services (hereafter "GWRS"), regarding the Government of Guam Retirement Fund (hereafter "GGRF"). A formal hearing was held on January 21, 2008. Present and making arguments on behalf of their clients were Elyze J. McDonald, Esq., Carlsmith Ball, LLP, representing GGRF, Thomas M. Tarpley, Esq., representing GWRS, and Joaquin C. Arriola Jr. Esq., Arriola, Cowan & Arriola, representing Administrative Services Corporation, (hereafter "ASC").

II. FINDINGS OF FACT

In reaching this Decision, the Public Auditor has considered and incorporates by reference herein the findings of the Hearing Officer, ROBERT G.P. CRUZ, ESQ.

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II. ANALYSIS

1. GWRS contends that GGRF was arbitrary and capricious in terminating negotiations with GWRS. GGRF requested that GWRS provide its offer in a two-part format addressing custodial arrangements and pricing data. GWRS submitted its response, which was not satisfactory to GGRF which said that its proposal was not acceptable.

2 After being informed that its custodial and pricing proposal was not accepted, GWRS submitted its best and final offer which was rejected by GGRF as not being fair and reasonable. No analysis was provided by GGRF why GWRS's fee proposal of .27% of valued assets was not fair and reasonable, while .25% of valued assets would be fair and reasonable.

3. GWRS's Motion to Lift Seal and Produce Documents was an inappropriate motion during negotiations. Such details are normally public record after an award of a contract during a procurement process, not during the negotiation stages. GWRS argued that the GGRF should have revealed details of the procurement that were confidential during negotiations.

IV. CONCLUSION

Based on the above, the Public Auditor determines that:

1. GGRF analyzed bid documents, decided GWRS to be the best offeror, and initiated negotiations. Award of a contract under 5 GCA Section 5216(3) and 2 GAR, Div. 4, Chap. 3, Section 3114(k) requires two elements: a determination that the offeror is the best qualified, and successful negotiations of fair and reasonable compensation.

2. GGRF appears to have been arbitrary and capricious in ending negotiations with GWRS.

3. GGRF did not show that the best and final offer of GWRS was not fair and reasonable.

1 If GWRS's best and final offer is fair and reasonable compensation for the work to be
2 performed, then GWRS meets the requirements of law to be awarded the contract.

3 4. If GGRF did not show that it was reasonable to terminate negotiations with GWRS,
4 then it is not acceptable to begin negotiations with the next best offeror, ASC.

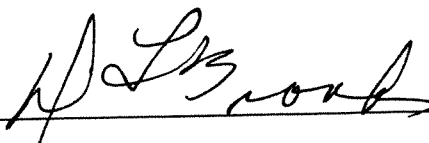
5 5. GWRS's Appeal is hereby sustained and GGRF's Decision denying GWRS's protest is
6 thus overruled.

7 6. GGRF should continue negotiating with GWRS in an attempt to reach an agreement to
8 provide Investment Management and Plan Administration Services related to the 401(a) Defined
9 Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan.

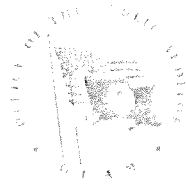
10 7. In the event that renewed negotiations are terminated with GWRS, it should be noted
11 that the Chairman of the GGRF Fund serves as a member of the Board of Directors of the
12 proposed Trustee for ASC. Therefore, he should not participate in negotiations with ASC and a
13 substitute negotiator should be appointed by GGRF.

14 This is a final administrative Decision. Parties are hereby informed of their right to
15 appeal from a Decision by the Public Auditor to the Superior Court of Guam, in accordance with
16 Part D of Article 9 of 5 GCA Section 5481(a) within fourteen (14) days. A copy of this Decision
17 shall be provided to the parties and their respective attorneys in accordance with 5 GCA Section
18 5702 and shall be made available for review on the OPA website www.guamopa.org.

19 Dated this 11th day of April 2008

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DORIS FLORES BROOKS, CPA, CGFM
PUBLIC AUDITOR



OFFICE OF THE PUBLIC AUDITOR

April 11, 2008

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Attorneys for Administrative Services Corporation – Interested Party

Messers & Mses Tarpley, McDonald, Blas and Arriola,

Transmitted herewith is a copy of the Amended Decision on appeal OPA-PA-07-006 in the appeal of Great West Retirement Services relative to the procurement of RFP No. GGRF-028-06 Government of Guam Retirement Fund Investment Management and Plan Administration related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan.

The Amended Decision is in response to the Government of Guam Retirement Fund's Motion to Amend Final Administrative Decision filed on March 20, 2008. I considered the Motion, determined it was a reasonable request, and secured the approval of Public

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CARLSMITH BALL

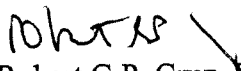
DATE: 04/14/08 TIME: 9:53am

Auditor Doris Flores Brooks to issue an Amended Decision. This Motion is being granted under my authority as Hearing Officer.

A complete copy of the Amended Decision will be posted on our website within the next day and available for public view at www.guamopa.org.

Should you have any questions please feel free to contact me at 475-0390 ext. 202 or Theresa Gumataotao at ext. 207.

Senseramente,


Robert G.P. Cruz, Esq.
Hearing Officer
Procurement Appeals

EXHIBIT

4

Elyze J. McDonald

From: William J. Blair [wjblair@kbsjlaw.com]
Sent: Tuesday, October 06, 2009 12:08 PM
To: Elyze J. McDonald
Subject: ASC Trust Corp. Request for Information

Elyze,

Thank you for your call, but I am confused. I have reread your September 29 letter several times, and I can see nothing in it that remotely suggests that the Fund might provide ASC with a copy of the documents it seeks if it makes the request under the procurement law as opposed to the Sunshine Act. To the contrary, the regulation on which the Fund bases its claim that the documents are exempt from the Sunshine Act is a regulation promulgated under the procurement law. Moreover, your letter took pains to emphasize that ASC's status as a proponent did not differentiate it from any other member of the public.

As a disappointed bidder, ASC is naturally interested in learning what were the perceived areas of deficiency or weakness in its proposal from the perspectives of the Fund's evaluators. This reason is irrelevant under the Sunshine Act, but perfectly understandable. ASC may desire to offer its services to the Fund in the future in response to future solicitations.

ASC did not want to be forced to petition for a writ, but it felt it was being wrongfully stonewalled. ASC would be quite willing to drop its petition if it is provided with the requested information regarding the evaluation of its own proposal. We are only asking for the raw scores, not any other information reflecting the views of the evaluators.

Please consider this email a request by ASC under the procurement law in its capacity as the proponent, not as a request under the Sunshine Act. If we receive the requested information, we will dismiss the petition.

David John is leaving on a trip tomorrow, so if we could get the information today, that would be best.

Bill

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E-mail: wjblair@kbsjlaw.com

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BB

CARLSMITH BALL LLP

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Attorneys for Purchasing Agency
Government of Guam Retirement Fund

OFFICE OF THE PUBLIC ACCOUNTABILITY - GUAM

IN THE APPEAL OF

ASC TRUST CORPORATION,

Appellant.

DOCKET NO. OPA-PA-09-010

**DECLARATION REGARDING COURT
ACTION**

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to, and the undersigned party agrees to, notify the Office of the Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

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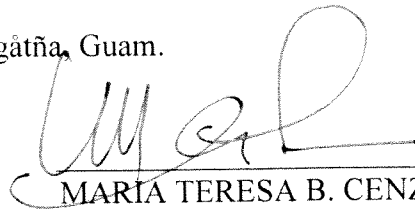
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EXECUTED this 17th day of November, Hagåtña, Guam.

CARLSMITH BALL LLP



MARIA TERESA B. CENZON
ELYZE J. MCDONALD

Attorneys for Purchasing Agency
Government of Guam Retirement Fund