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OFFICE OF THE PUBLIC AUDITOR
GUAM

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

APPEAL NO. OPA-PA-07-006

GOVERNMENT OF GUAM
RETIREMENT FUND'S MOTION TO
AMEND FINAL ADMINISTRATIVE
DECISION


GOVERNMENT OF GUAM RETIREMENT FUND'S MOTION TO AMEND FINAL
ADMINISTRATIVE DECISION

Appellee-Movant the Government of Guam Retirement Fund ("GGRF"), by and through its undersigned counsel, hereby GIVES NOTICE that on _____, at _____, or as soon thereafter as may be heard, the GGRF shall move the Office of the Public Auditor ("OPA"), pursuant to Title 2, Division 4, Chapter 12, Section 12109(c) of the Guam Administrative Rules, to amend its final administrative Decision hereunder dated March 13, 2008 ("Decision"). This Motion is based on the following Memorandum of Points and Authorities in Support of the GGRF's Motion to Amend Final Administrative Decision, and any oral arguments, testimony, or evidence brought at hearing in

this matter.

Respectfully submitted this 20th day of March, 2008:

CARLSMITH BALL LLP


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Government of Guam Retirement Fund

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF THE GOVERNMENT OF GUAM RETIREMENT FUND'S
MOTION TO AMEND FINAL ADMINISTRATIVE DECISION**

On March 13, 2008, the OPA issued its Decision hereunder. This Motion is brought by GGRF in the best interests of the GGRF and the government of Guam (i) for purposes of avoiding unnecessary delays and costs in the procurement process; (ii) in accordance with 5 G.C.A. §§ 5480 and 5481(a) and commentary thereto; and (iii) under the legal and equitable authority conferred by Title 2, Division 4, Chapter 12, of the Guam Administrative Rules. This Motion is not intended to delay the underlying procurement process, as the GGRF fully intends to proceed with negotiations in accordance with the Decision. For clarification and guidance in future procurements, the GGRF specifically requests amendment of the OPA's Conclusion No. 7 of the Decision at p. 2 so as to conform, and be limited to, the Conclusion No. 5 in the Findings and Recommendations of the Hearing Officer issued hereunder on March 13, 2008 ("Findings"), which states:

5. The Chairman of the GGRF serves on the Board of Directors of the proposed Trustee for ASC. Thus should renewed negotiations between GWRS and GGRF ultimately fail, the Chairman should find a replacement negotiator so that he is not involved in negotiating with ASC.

Findings at p. 5.

For the reasons set forth herein, GGRF respectfully requests the deletion of the following underscored clause in Conclusion No. 7 of the OPA's Decision, which clause was not contained in the Hearing Officer's above-quoted Conclusion Number 5:

7. In the event that renewed negotiations are terminated with GWRS, it should be noted that the Chairman of the GGRF Fund has a conflict of interest. The Chairman serves on the Board of Directors of the proposed Trustee for ASC. Therefore, he should not participate in negotiations with ASC and a substitute negotiator should be appointed by GGRF.

Decision at p. 3 (emphasis added).

For purposes of this Motion and the underlying appeal hereunder, the Fund does not challenge: (i) the above-quoted Conclusion Number 5 reached by the Hearing Officer or (ii) the non-underscored portion of the above-quoted Conclusion Number 7 reached by the OPA; specifically, that the Chairman of the GGRF serves on the Board of Directors of the proposed Trustee for ASC.¹ In fact, as a practical matter to expedite the procurement process, GGRF already has appointed a substitute for the Chairman for purposes of continuing negotiation in the underlying procurement in RFP No. GGRF-028-06.

GGRF also concedes for purposes of argument and practicality that the Hearing Officer was authorized under Title 2, Division 4, Chapter 12, Section 12109(h)(4) of the Guam Administrative Rules, to take "official notice of any material fact not appearing in evidence in the record, if such fact is among the traditional matters of judicial notice." Accordingly, GGRF acknowledges that the Hearing Officer could find, via official notice, that the Chairman of the GGRF sits on the Board of Directors of the proposed Trustee for ASC. Notwithstanding their authority under Section 12109(h)(4), however, the findings/conclusions reached by the Hearing Officer in his Findings and by the Public Auditor in her Decision should have been limited to the findings in the record or in findings that could be officially noticed, consistent with traditional matters of judicial notice.

In contrast, the first sentence of Conclusion Number 5 in the OPA's Decision reaches a determination of a legal issue -- a conflict of interest -- that was (a) not raised by any party to the appeal; (b) not briefed by any party to the appeal; (c) not based on any findings of fact in the record; and (d) not a material fact among traditional matters of judicial or official notice contemplated by Section 12109(h)(4). The Hearing Officer asked no questions designed to

¹ GGRF submits that the "conclusion" that the Chairman sits on the Board of ASC's proposed Trustee is not a "conclusion" but a "finding of fact" that was not based on any issue raised or briefed by any of parties at any stage of the appeal.

elicit answers to determine the existence of a conflict of interest. GGRF had no opportunity to address or challenge the OPA's determination that the Chairman had a conflict of interest solely because of his status as a Director on the Board of ASC's proposed Trustee. GGRF had no opportunity to present evidence that no party to the appeal had timely filed a protest or challenge to any actions taken by GGRF related to the underlying procurement based solely on the Chairman's role as a Director on the Board of ASC's proposed Trustee.

The OPA's conclusion that the Chairman has a conflict of interest may have significant consequences for the prior actions taken by GGRF in the course of the underlying procurement, if such a conflict were to exist. The Decision, therefore, should not contain a *sua sponte* conclusion that a conflict of interest exists, if such a conclusion is not based on any findings of clearly enumerated factors establishing an actual conflict of interest (for example, whether the Chairman would receive additional remuneration as a Director of the proposed trustee for ASC based on the final pricing of a contract between GGRF and ASC).

If the determination of a conflict of interest was in some way relevant to the underlying appeal (and GGRF submits it was not), then such a significant and material determination should have been raised in the appeal. It was not. No party to the appeal was given the opportunity to submit any evidence on the issue. No party was allowed to frame the relevant factors determinative of a conflict of interest, or the relevant context (e.g., a government procurement? a trust managed by trustees?) under which the factors should be assessed. The practical harm arising from unsolicited and unsupported conclusions in the Decision is that such conclusions could be construed as "final" and used collaterally even for purposes unrelated to the underlying appeal. Section 12111(c) (Standard of Review) states:

Any determination of an issue or a finding of fact by the Public Auditor shall be final and conclusive unless found by a court to be arbitrary, capricious, fraudulent, clearly erroneous, or contrary to

law. Any decision of the Public Auditor, including any determination regarding the application or interpretation of the procurement law or regulations, shall be entitled to great weight and the benefit of reasonable doubt, although it shall not be conclusive on any court having competent jurisdiction.

Title 2, Division 4, Chapter 12, Section 12109(h)(4) of the Guam Administrative Rules.

Although not briefed or litigated, the OPA's "final and conclusive" determination of a conflict of interest might adversely and unnecessarily impact the entire underlying procurement. GGRF believes that an appeal to the Superior Court (on the grounds of being arbitrary, capricious, clearly erroneous and not based on facts in the record or through official notice) on an issue not relevant or necessary to the underlying appeal, would be a waste of government resources, with the potential of delaying the procurement process, yet could be avoided with an amendment that deletes the underscored clause of the above-quoted Conclusion Number 7 at p. 3 of the Decision.

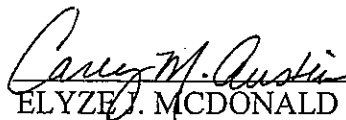
For all of the foregoing reasons, GGRF respectfully requests the granting of this motion and the amendment of the OPA's Conclusion Number 7 to read as follows:

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

Lastly, for purposes of facilitating the underlying procurement, GGRF seeks the Public Auditor's clarification of the appeals process following the Decision. In the Decision, the parties were 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 GCA Section 5702[.]" The cited statutory provision does not inform the parties of the time in which they may appeal. GGRF as the procuring agency has an interest in clarifying the time in which the parties may appeal the OPA's Decision (as may be amended) to the Superior Court.

RESPECTFULLY SUBMITTED this 20th day of March, 2008 by:

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