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In the Appeal of ASC Trust, LLC - Consolidated Appeal OPA-PA-23-005 and 6 - Purchasing Agency Response to ASC Comments on Agency Report

Arsima A. Muller <amuller@carlsmith.com>

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Mr. Hernandez and Mr. Brennan,

Please find attached the Purchasing Agency Response to Appellant's Comments on Agency Report in the above consolidated matter.

Kindly confirm receipt.

Thank you and regards,

Arsima

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Attorneys for
THE GOVERNMENT OF GUAM RETIREMENT FUND

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL
TERRITORY OF GUAM

In the Appeal of
ASC TRUST, LLC,

Appellant

and

THE GOVERNMENT OF GUAM
RETIREMENT FUND,

Purchasing Agency

Consolidated Appeal
Docket No. OPA-PA-23-005
Docket No. OPA-PA-23-006

**PURCHASING AGENCY RESPONSE
TO APPELLANT’S COMMENTS ON
AGENCY REPORT**

**PURCHASING AGENCY RESPONSE TO
APPELLANT’S COMMENTS ON AGENCY REPORT**

Purchasing Agency the Government of Guam Retirement Fund (“GGRF”), by and through its attorneys, Carlsmith Ball LLP, hereby submits its Purchasing Agency Response to Appellant ASC Trust, LLC’s Comments On Agency Report filed herein on November 9, 2023.

I. INTRODUCTION.

The consolidated appeal filed by Appellant ASC Trust, LLC (“ASC”) concerns certain pre-award events that ASC believes to be relevant to the Purchasing Agency’s allegedly

improper negotiations with a competing offeror for an award of contract for professional services under RFP No. GGRF-002-22. The procurement process thereunder ceased upon ASC's first protest, which, along with ASC's second protest, were denied by GGRF, and the consolidated appeals are pending herein.

No contract has been awarded, and no completed procurement record is available for public inspection. Because the Purchasing Agency cannot disclose a complete procurement record at this time, ASC's premature protests and appeal from the denials of its protests are necessarily based on ASC's suppositions about what might have occurred. If negotiations ultimately resume with ASC's competitor, it is possible that the parties (GGRF and the competitor) may not reach an agreement on all of the contract terms, in which case negotiations with ASC would commence. Or, if the parties do reach an agreement on all of the contract terms, then ASC may choose to protest the Purchasing Agency's award of contract, and if the protest is denied, then ASC may appeal that denial to the OPA based on a completed procurement record. Instead, ASC has chosen to engage in a pre-award protest and appeal, with the goal of restarting the procurement process based on its interpretation of a partial, incomplete procurement record. GGRF opposes ASC's premature agency protest and premature OPA appeal because the imaginary grounds on which ASC appeals do not support a restart.

II. ASC'S REQUEST TO RESTART THE PROCUREMENT PROCESS IS UNSUPPORTED BY ASC'S SUPPOSITIONS OF ENTRIES IN GGRF'S COMMUNICATIONS LOG.

ASC imagines a sequence of events, as summarized in the April and May 2023 communications log, to violate procurement law such that the procurement process should be restarted. GGRF disagrees. A restart is unnecessary and unsupported under the circumstances.

The April 28, 2023 entries in the Communications Log concern emails between GGRF and an offeror that its sealed pricing proposal was opened for review (after offerors had been ranked). The May 2023 entries in the Communications Log concern negotiations between GGRF's consultant (Mercer) and the offeror to clarify and negotiate pricing elements, all leading to a request for the offeror to submit a Best and Final Offer (BAFO) by July 13, 2023. The offeror timely submitted its BAFO. *See* GGRF PR000017 – PR000020. GGRF's Board was informed of the procurement status in its July 28, 2023 meeting, in which GGRF "Director Blas stated that no formal award has been made at this time." GGRF PR000478. Subsequently, GGRF informed the offeror that it had been selected for the contract award, subject to conditions, including pricing. GGRF PR000020. The foregoing process as described in the RFP was followed. GGRF PR000029 – PR000030. Upon ASC's first protest on August 25, 2023, the procurement was stayed, so conditions precedent to an award of contract have not occurred.

Without a complete procurement record, ASC attempts "gotcha"-type of accusations based solely on descriptive summary entries in communications and meetings logs to reach erroneous conclusions that GGRF violated the procurement process. ASC's interpretation of what it thinks may have happened during the procurement does not challenge the "method of source selection, solicitation, or the award of a contract" that is the basis for a protest under 5 GCA § 5425(a). Instead, ASC uses its confusion to conclude that something may have gone wrong. GGRF's response to ASC's allegations is constrained because GGRF's position cannot be supported only by the portions of the procurement record available for public inspection. Until there is a complete procurement record to show that negotiations were proper under the RFP, ASC's appeals should be denied.

III. ADDITION OF A MEMBER OF THE SELECTION PANEL WAS PROPER

Section II.C. of RFP states, in pertinent part:

C. Discussions.

In accordance with 2 GAR §3114(i)(1), the Selection Panel (described in Section VI.B of this RFP) shall evaluate all proposals submitted and may, but shall not be required to, conduct discussions with any offeror. The purposes of such discussions shall be to: (1) determine in greater detail such offeror's qualifications; and (2) explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach[.]

GGRF PR000029.

After a member of the initial Selection Panel retired from government employment, another evaluator joined the Selection Panel. That evaluator reviewed the audio-visual recordings of prior discussions between the Selection Panel and each offeror. That evaluator was given a further opportunity to schedule further discussions with offerors if that evaluator deemed it necessary, but that evaluator did not. Adding a member to the Selection Panel does not require offerors to have another opportunity to expand on their proposals.

ASC suggests that it should have been advised about the substitute so it could have then protested the substitution. Even assuming that information about the substitution could have been available for public inspection at the time, ASC's grounds for protest would have to be based on reasons other than identification of the substitute. If ASC wishes to protest an award of contract after the procurement record is complete, based on an addition to the Selection Panel or what the additional member may or may not have done, then ASC may do so at that time.

IV. ASC'S UNTIMELY PROTEST SHOULD BE DENIED.

The RFP issued on August 1, 2022, clearly notified offerors that the Selection Panel may

comprise more than one member of the Board of Trustees. GGRF PR000060. ASC did not protest this disclosure about the process in a timely manner (within 14 days). No questions about this provision were submitted in any pre-proposal submissions (including ASC's). Had this provision been timely protested or raised as a question or concern in pre-proposal submissions, then GGRF could have addressed this concern before engaging in a lengthy procurement process. ASC's decision to protest this point at this late stage of the procurement is untimely under 5 GCA § 5425(a), and ASC's appeal must be denied.

V. CONCLUSION.

No Award of contract has been made. GGRF and the best-qualified offeror have not reached an agreement on all of the contract terms, and conditions precedent to a contract have not occurred. Until an award of contract is made, the procurement record cannot be certified as complete, and the entire procurement record cannot be disclosed. Therefore, ASC's protest and appeal are premature and should be denied. None of the grounds raised by ASC require a re-start of the procurement process. Denial of ASC's appeal will not impact ASC's ability to protest an ultimate award of contract, which may be addressed in a relevant protest at the appropriate time.

RESPECTFULLY SUBMITTED THIS 14TH DAY OF NOVEMBER, 2023

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