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In the Appeal of ASC Trust, LLC - Consolidated Appeal OPA-PA-23-005 and 6 - Purchasing Agency Motion to Dismiss

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Mr. Hernandez and Mr. Brennan,

Please find attached the Purchasing Agency's Motion to Dismiss for filing 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

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’S MOTION
TO DISMISS CONSOLIDATED
APPEALS; MEMORANDUM IN
SUPPORT OF MOTION TO DISMISS**

MOTION TO DISMISS CONSOLIDATED APPEALS

Purchasing Agency The Government of Guam Retirement Fund (“GGRF”), through its undersigned counsel, hereby files its Motion to Dismiss Appellant ASC Trust, LLC’s (“ASC’s”) Appeal No. OPA-PA-23-005 dated September 20, 2023 and Appeal No. OPA-PA-23-006 filed on October 13, 2023, which appeals were consolidated pursuant to the Order Consolidating Appeals and Scheduling Order filed herein on October 27, 2023.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

ASC’s appeals are not properly before the OPA and the OPA does not have the jurisdiction to decide them. Generally, the jurisdiction of the OPA is limited to matters properly

submitted to it. 5 GCA § 5703(a); *TRC Environmental Corp. v. OPA*, Superior Court of Guam Special Proceedings Case No. SP0160-07, Decision and Order, p. 5 (Nov. 24, 2008). “Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the *method of source selection, solicitation* or *award* of a contract, may protest to the . . . head of a purchasing agency. The protest shall be submitted in writing *within fourteen (14) days* after such aggrieved person knows or should know of the facts giving rise thereto.” 5 GCA § 5425(a) (emphases added).

In its appeal, ASC raises issues that are either premature or time-barred under 5 GCA § 5425(a). ASC’s protest and appeal of an award of contract and issues related to a purported contract award are premature because no contract award has been made. In addition, ASC’s protest and appeal from “the method of selection, solicitation” is time-barred because ASC knew or should have known of the facts giving rise to its protest yet failed to protest within fourteen (14) days. Moreover, ASC’s claims that GGRF violated Guam’s Open Government Law (“OGL”) are wholly unsupported and are not proper grounds for cancellation of the procurement. Accordingly, the appeals must be dismissed.

A. ASC’S PROTEST AND APPEAL OF AN AWARD OF CONTRACT IS PREMATURE AS NO AWARD HAS BEEN ISSUED.

GGRF issued RFP No. GGRF-002-22 (the “RFP”) on August 1, 2022. The RFP involved a procurement for professional services, specifically, a provider of Plan Administration Services related to the Defined Contribution Retirement System (401(a) Plan) and the 457 Deferred Compensation Plan and Welfare Benefit Plan. *See* GGRF Procurement Record GGRF PR000023 – PR000094.

By letter dated August 16, 2023, GGRF (erroneously) informed ASC that GGRF had awarded the contract to Empower Retirement, LLC. *See* Exhibit J to ASC's September 20, 2023 Notice of Appeal in OPA-PA-23-005. On August 25, 2023, ASC filed its first procurement protest, which GGRF denied on September 5, 2023. GGRF PR000480 – PR000506; PR000508 – PR000511. In its denial, GGRF informed ASC that GGRF's August 16, 2023 letter to ASC was incorrect, as it should have stated that GGRF is negotiating with the best-qualified offeror based on the evaluation factors in the RFP. *See* Exhibit F to ASC's September 20, 2023 Notice of Appeal in OPA-PA-23-005. By letter dated September 7, 2023, GGRF informed ASC that GGRF's August 16, 2023 letter was superseded and that negotiations with the best-qualified offeror would be stayed until the protest was resolved. GGRF PR000002. Since negotiations have been stayed, no contract has been awarded. ASC's protest and appeal from an award of contract, and all issues related to a purported award of contract (such as a purported lack of notice of ASC's ranking), are premature, and therefore not properly before the OPA.

Related but not relevant to ASC's appeals herein, ASC also filed two FOIA requests, asking GGRF to disclose records related to the underlying procurement. GGRF responded with disclosures of records that could be made available under Guam's Sunshine Reform Act of 1999, but did not make available records that could not be publicly inspected while GGRF RFP-002-22 remained in pre-award status. Accordingly, to protect the purposes of Guam's procurement laws, GGRF's Procurement Record (GGRF PR000001 – PR000521) consists only of the records available for public inspection as produced in response to ASC's FOIA requests (plus ASC's protests and GGRF's denials in the consolidated appeals). That the complete record cannot be made public at this time only reiterates that ASC's appeal is premature and must be dismissed.

B. ASC DID NOT TIMELY PROTEST GGRF’S SOURCE SELECTION OR SOLICITATION METHOD.

To the extent ASC protests the source selection or solicitation method related to the RFP, ASC’s protest is time-barred and, therefore, not properly before the OPA. “[A] protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely.” *D.F.S. Guam L.P. vs. A.B. Won Pat. Int’l Airport Auth.*, 2020 Guam 20 ¶ 87. ASC did not timely protest the source selection and solicitation method related to the RFP.

As provided above, GGRF issued the RFP on August 1, 2022. ASC did not protest the RFP within 14 days after it received it. In the RFP, potential offerors were invited to submit pre-proposal questions to GGRF on or before August 15, 2022. ASC did not timely protest GGRF’s answers to pre-proposal questions issued on August 26, 2022. *See* GGRF PR000015. ASC submitted its proposal on September 15, 2022.

The RFP set forth the following relevant provisions:

1. Section I regarding General Information states, in pertinent part:
 - a. “The GGRF Board currently is comprised of seven (7) trustees: Wilfred P. Leon Guerrero, Ed. D., Chairman, Antolina S. Leon Guerrero, Vice-Chair; Katherine T. E. Taitano, Secretary; Artemio R.A. Hernandez, Ph. D., Treasurer; George A. Santos, Thomas H. San Agustin, and David N. Sanford. The Director of the Retirement Fund is Paula M. Blas.” GGRF PR000027 (emphases added).
 - b. Paula M. Blas was identified as the “head of the Purchasing Agency (The Director of GGRF).” GGRF PR000028.
 - c. “Protests under this RFP shall be served on the head of the Purchasing Agency (the Director of GGRF) . . . no later than fourteen (14) days from the date on which the protester should have known of the facts giving rise to the protest. Protests received after that date shall not be considered.” GGRF PR000028.

2. Section II describes the General Procedures to be followed under 2 GAR § 3114. *See* GGRF PR000029 - PR000031.
 - a. Section II.C. regarding Discussions states, in part: “In accordance with 2 GAR § 3114(h)(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 alternative methods of approach. . . .” *See* GGRF PR000029.
 - b. Section II.F regarding Selection of Best Qualified Offerors states, in part: “After conclusion of validation of qualifications, evaluation and discussion as provided in 2 GAR § 3114(h)(1), the head of the Purchasing Agency or their designee shall select, in the order of their respective ranking, no fewer than three acceptable offerors (or such lesser number if less than three acceptable proposals were received) deemed to be the best qualified to provide to provide the required services. *See* GGRF PR000029 - PR000030.
 - c. Section II.G regarding Submission of Cost or Pricing Data states, in part: “Pursuant to 2 GAR § 3114(k), the offeror determined to be the best qualified will be required to submit cost or pricing data to the head of the Purchasing Agency at a time specified prior to the commencement of negotiations in accordance with 2 GAR § 3118 (Cost or Pricing Data). Unless the contract price falls under an exception . . . the offeror or contractor shall certify that the cost or pricing data is accurate, complete and current, using a form of certificate substantially set forth in 2 GAR § 3118(e). Each Offeror must submit a separate cost proposal for the requested services. The offeror is asked to provide costs or pricing data for the services in an unbundled format (separate cost or pricing data . . .). . . . The offerors must enclose the cost or pricing data in a separate sealed envelope marked “RFP No. GGRF-002-22 Fee Schedule” together with its submission.” *See* GGRF PR000030 (emphasis added).
 - d. Section II.J regarding Memorandum of Evaluation and Negotiation states, in part: “At the conclusion of negotiations resulting in the award of the contract, the head of the Purchasing Agency or their designee shall prepare a memorandum setting forth the basis of the award, including how the evaluation factors stated in the Request for Proposals were applied to determine the best qualified offerors, and the principal elements of the negotiations including the significant considerations relating to price and the other terms of the contract.” *See* GGRF PR000031.

3. Section V.D regarding Content of Proposal Requirements asks offerors to describe their Cost Structure under separate sealed cover, [in an unbundled format] for more than thirty (30) specific services. *See* GGRF PR000055.
4. Section VI.B regarding Selection Panel states: "Proposals submitted may be evaluated by a selection panel consisting of the following: • Retirement Fund Management and Board of Trustees." *See* GGRF PR000060.

The RFP disclosed the names of the seven (7) current Trustees and disclosed that the selection panel may consist of more than one trustee ("Trustees" means more than one Trustee). GGRF and ASC held discussions on January 31, 2023, which were attended by three (3) GGRF Trustees (Artemio Hernandez, Antolina Leon Guerrero, and Thomas San Agustin) who had been identified in the RFP, one (1) GGRF employee, and the Purchasing Officer. *See* GGRF PR000008. ASC knew or should have known that the January 31, 2023 discussion was not a government meeting open to public inspection and that three (3) Trustees were participating in the discussions. Yet, ASC did not timely protest the participation of three (3) GGRF Trustees in that January 31, 2023 non-public discussion. If ASC believed that the OGL applied to the January 31, 2023 discussions, it should have timely protested that point rather than trying to invalidate (void) the procurement only after ASC had not been selected for further negotiations. "[A] protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely." *D.F.S. Guam L.P. vs. A.B. Won Pat. Int'l Airport Auth.*, 2020 Guam 20 ¶ 87.

After discussions were held in January 2023, a staff member joined the selection panel and reviewed the offerors' proposals and the audio-visual recordings of all discussions held on January 31, 2023. The new selection panel member was given the opportunity to submit additional questions to the offerors but did not choose to do so. Members of the selection panel then ranked offerors, and in April 2023, GGRF notified an offeror that its sealed pricing proposal

was being opened for review. In May 2023, GGRF's consultant (Mercer) and the offeror communicated to clarify and negotiate the unbundled 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 generally*, GGRF PR000017 – PR000020. GGRF's Board was informed of the RFP's 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.

ASC argues that adding a selection panel member during the evaluation process is prohibited. ASC's position is without merit, particularly when adding a member to an even-number of members would create an odd number of members to resolve potential ranking ties. ASC's position would prohibit adding or substituting panel members in the event of vacancies due to retirement, death, or disability. That would be an impracticable, unnecessary, and unsupported approach to government procurements. GGRF's actions that can be gleaned from the public record at this time show that its actions as a Purchasing Agency were consistent with the disclosed procedures in the RFP and with procurement law. For example, Section VI.B of the RFP stated that the selection panel may be comprised of Trustees (meaning more than one), yet ASC did not question or protest this or any other provision of the RFP in a timely manner. If ASC wished to protest the procedures as they were explicitly described in the RFP, then ASC should have done so within 14 days of receiving the RFP or within 14 days of participating in the January 31, 2023 discussions. To the extent that the evaluation and selection process stated in the RFP was followed, ASC's appeals about multiple Trustees on the selection panel should be denied.

C. **ASC HAS FAILED TO SHOW THAT THE RFP IS VOID FOR VIOLATIONS OF THE OPEN GOVERNMENT LAW.**

In its protest and appeal, ASC alleges violations of the OGL as grounds for the OPA to cancel the procurement. There is no basis for such position. Even if ASC had notice of alleged improper actions to be taken at GGRF Board meetings, ASC would not have had the right to protest or appeal the action. For example, ASC's challenge to extend the incumbent's contract approved at the February 10, 2023 GGRF Board meeting is not grounds for protest under the RFP. Extensions are lawful under the existing contract with the incumbent contractor. The parties have agreed to such legal extensions without protest since the initial contract, and all such lawful contract extensions have been available for public inspection. ASC's challenge to this recent extension of contract appears to be raised only now as a means to support its request to cancel the underlying unrelated procurement.

The remedy sought by ASC (cancellation of the procurement) "must be based, however, on allegations that the procurement is not 'in accordance with the statutes, regulations, and terms and conditions of the solicitation.'" 5 GCA § 5480(a). Thus, a party becomes 'aggrieved' when they become aware of a violation of one of the procurement law's substantive provisions or the terms of the RFP." *D.F.S. Guam L.P. vs. A.B. Won Pat. Int'l Airport Auth.*, 2020 Guam 14 ¶ 84 (citations omitted). Purported OGL violations do not involve the solicitation's statute, regulations, and terms and conditions. ASC's citation to irrelevant sections of the procurement code is also inapplicable. For example, ASC contends that instead of extending the underlying contract with the incumbent, GGRF should have utilized 5 GCA § 5213 (providing for small purchase procurements) or 5 GCA § 5215 (allowing for emergency procurement in appropriate circumstances). *See* ASC's September 20, 2023 Notice of Appeal at Part IV, p.5. Even if the

OPA had jurisdiction to review this issue, neither Section 5213 nor Section 5215 are appropriate or relevant to the lawful extension of an *existing* contract for professional services.

CONCLUSION

ASC fails to identify 5 GCA § 5425(a) factors supporting a timely challenge to the method of source selection, solicitation, or award of a contract. Therefore, ASC's consolidated appeal is not properly before the OPA, and GGRF respectfully requests it be dismissed.

DATED: November 27, 2023.

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