

Suite 401 DNA Building  
 238 Archbishop Flores St.  
 Hagåtña, Guam 96910



# TRANSMITTAL

<b>To:</b>	<b>Ms. Paula Blas</b> <b>Director</b> Government of Guam Retirement Fund 424 Route 8 Maite, Guam 96910 Phone: (671) 475-8900/01 Fax: (671) 475-8922 Email: <a href="mailto:pmbblas@ite.net">pmbblas@ite.net</a>	<b>From:</b>	<b>Benjamin J.F. Cruz</b> <b>Public Auditor</b> Office of Public Accountability
		<b>Pages:</b>	14 (including cover page)
<b>CC:</b>	<b>Mr. William B. Brennan, Esq.</b> <b>Attorney for Appellant ASC Trust, LLC</b> Arriola Law Firm 259, Martyr Street, Suite 201 Hagåtña, Guam 96910 Phone: (671) 477-9730/33 Fax: (671) 477-9734 Email: <a href="mailto:attorneys@arriolafirm.com">attorneys@arriolafirm.com</a> ; <a href="mailto:wbrennan@arriolafirm.com">wbrennan@arriolafirm.com</a>	<b>Date:</b>	September 21, 2023
		<b>Phone:</b>	(671) 475-0390 x. 204
		<b>Fax:</b>	(671) 472-7951

**Re:** OPA-PA-23-004 Notice of Receipt of Appeal

**For Review**     
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Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver.

Thank you,  
 Jerrick Hernandez, Auditor  
[jhernandez@guamopa.com](mailto:jhernandez@guamopa.com)



## OFFICE OF PUBLIC ACCOUNTABILITY

Suite 401 Pacific News Building, 238 Archbishop Flores St., Hagåtña, Guam 96910

Phone: (671) 475-0390 / FAX: (671) 472-7951

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September 21, 2023

Paula Blas  
Director  
Government of Guam Retirement Fund  
424 Route 8  
Maite, Guam 96910

**VIA EMAIL: [pmbblas@ite.net](mailto:pmbblas@ite.net)**

Re: Notice of Receipt of Appeal – OPA-PA-23-005

Dear Ms. Blas,

Please be advised that ASC Trust, LLC (hereinafter referred to as “ASC”) filed an appeal with the Office of Public Accountability (OPA) on September 20, 2023, regarding the Government of Guam Retirement Fund (GGRF)’s denial of its protest decision related to the procurement for Plan Administration Services related to the Defined Retirement System (401(a) Plan) Deferred Compensation Plan and Welfare Benefit Plan (GGRF RFP-002-22). OPA has assigned this appeal case number OPA-PA-23-005.

Immediate action is required of GGRF pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA’s office and on its website at [www.opaguam.org](http://www.opaguam.org). The first eleven pages of the notice of appeal filed with OPA is enclosed for your reference.

Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeal. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), the submission of one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated is required no later than **Thursday, September 28, 2023**, five work days following this Notice of Receipt of Appeal. We also request one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Thursday, October 5, 2023**, ten work days following receipt of this notice.

When filing all required documents with our office, please provide one original and one copy to OPA (**electronic filings will be acceptable and highly encouraged**), and serve a copy to ASC.

Thank you for your prompt attention to this matter. Please contact Jerrick Hernandez at 475-0390 ext. 204 or [jhernandez@guamopa.com](mailto:jhernandez@guamopa.com) should you have any questions regarding this notice.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Benjamin J.F. Cruz', with a stylized flourish at the end.

Benjamin J.F. Cruz  
Public Auditor

Enclosure: First Eleven Pages of the Notice of Appeal – OPA-PA-23-005

Cc: William B. Brennan, Esq., Attorney for ASC

**WILLIAM B. BRENNAN, ESQ.**  
**ARRIOLA LAW FIRM**  
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[attorneys@arriolafirm.com](mailto:attorneys@arriolafirm.com)

Attorneys for Appellant  
 ASC, LLC

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

**PART I**

**In the Appeal of**

Docket No. OPA-PA-23-\_\_\_\_\_

**ASC TRUST, LLC,**

**NOTICE OF APPEAL**

Appellant.

ARRIOLA LAW FIRM HAGATNA, GUAM 96910

**COMES NOW**, ASC Trust, LLC (“ASC”), through the undersigned counsel, to give notice of its appeal from the Government of Guam Retirement Fund’s (“GGRF”) denial of a procurement protest.

**PART II – Appellant Information**

Appellant’s Name	ASC Trust, LLC
Appellant’s Mailing Address	120 Father Duenas Avenue Suite 110 Hagatna, Guam 96910
Appellant’s Business Address	120 Father Duenas Avenue Suite 110 Hagatna, Guam 96910
Email Address:	<a href="mailto:candy.okuhama@asctrust.com">candy.okuhama@asctrust.com</a>

Please direct all correspondence regarding this matter to ASC Trust, LLC’s counsel, the Arriola Law Firm at 259 Martyr St., Ste. 201, Hagatna, Guam 96910, [attorneys@arriolafirm.com](mailto:attorneys@arriolafirm.com).

**PART III – Appeal Information**

- A. Purchasing Agency: Government of Guam Retirement Fund (“GGRF”)
- B. Procurement Number: GGRF RFP-002-22 seeking a provider of Plan Administration Services related to the Defined Contribution Retirement System (401(a) Plan) Deferred Compensation Plan and Welfare Benefit Plan (“RFP”).
- C. Decision being appealed was provided to Appellant on September 5, 2023. The Decision was made by the Executive Director of the GGRF Ms. Paula Blas.  
*Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.*
- D. Appeal is made from the decision to deny ASC’s Protest of Method, Solicitation or Award of the RFP.
- E. Names of Competing Offeror known to Appellant: Empower Retirement, LLC.

**PART IV – Form and Filing**

**A. GROUNDS FOR APPEAL**

**BACKGROUND**

On August 1, 2022, GGRF issued the RFP, seeking a provider of Plan Administration Services related to the Defined Contribution Retirement System (401(a) Plan) Deferred Compensation Plan and Welfare Benefit Plan. ASC timely submitted a proposal on September 15, 2022. On January 31, 2023, ASC participated in a conference with GGRF personnel regarding its proposal. On August 16, 2023, ASC received a letter from GGRF which stated that GGRF had awarded a contract as a result of the RFP to Empower. The letter is attached hereto as Exhibit J.

GGRF did not give ASC notice of the ranking of offerors related to the RFP, or that negotiations with an offeror had commenced. Between January 31, 2023 and August 16, 2023, ASC received no communication regarding the RFP from GGRF.

ASC also learned, subsequent to August 16, 2023, that the GGRF Board took two actions related to Empower and GGRF RFP No. GGRF-002-22 that are relevant to this protest. First, on February 10, 2023 during a Board Meeting of the GGRF Board of Trustees, the Board discussed RFP GGRF-002-22 and extended an existing agreement with Empower while negotiations with Empower related to the RFP were taking place. The Meeting notice for the February 10, 2023 meeting is attached hereto as Exhibit C. The minutes of said meeting are attached hereto as Exhibit D.

Second, on July 28, 2023 the GGRF Board of Trustees convened a meeting and according to the August 16, 2023 letter to ASC, “awarded the contract solicited in RFP No. GGRF-002-22 to Empower Retirement, LLC”. However, the Board meeting Notice attached as Exhibit E did not indicate that an award would be considered by the Board at the July 28, 2023 Board meeting.

ASC filed a procurement protest related to the August 16 notice of award, violations of the Open Government Law concerning actions taken by the GGRF Board on the RFP, for lack of notice of its ranking, and because it appears the procurement record was not properly maintained leading up to the August 16 letter. The protest will hereinafter be referred to as the “first procurement protest”, a copy of which is attached hereto as Exhibit G. The GGRF denied the first procurement protest in its entirety, despite conceding that the apparent August 16, 2023 Notice of Award was issued in error. GGRF’s decision on the first procurement protest is attached hereto as Exhibit F.

Subsequently, based on a GGRF response to a FOIA request from ASC, GGRF produced portions of the procurement record for the RFP. GGRF’s first FOIA request is attached hereto as Exhibit A. GGRF requested an extension of time to respond the first FOIA request. See Exhibit B. After reviewing the first FOIA request response, ASC filed a second procurement protest related to the RFP on September 14, 2023. That procurement protest is attached hereto and marked as Exhibit H. ASC also issued a second FOIA request to the GGRF seeking specific documents that should be a

part of the procurement record for the RFP, but were not provided or specifically identified as exempt from disclosure in GGRF's response to ASC's first FOIA. ASC's second FOIA request is attached hereto as Exhibit I. ASC's second FOIA Request and the second Procurement Protest are pending before the GGRF as of the date of this writing.

## PROTEST

### **1. GGRF violated the Open Government Law and any Board action on the RFP is void.**

The Guam Open Government Law requires the GGRF to give public notice of regular meetings of its Board of Trustees, five business days and forty-eight hours before such meeting. See 5 G.C.A. § 8107(a). Such “[n]otices must contain the agenda of matters to be discussed at the respective meeting. Agenda items must be in sufficient detail to put the public on notice as to what is to be discussed.” 5 G.C.A. § 8107(d) (emphasis added). Any action taken at any meeting where the notice and agenda detail requirement are not satisfied is void. See 5 G.C.A. § 8114.1.

*a. GGRF did not give notice that the RFP was to be discussed at the February 10 meeting.*

The Board did not give notice that an extension of Empower's contract would be discussed at the February 10, 2023 meeting, to continue and extend the contract for TPA services previously provided by Empower until the negotiations with Empower under RFP GGRF-002-22 were completed. Therefore, the Board's action on February 10, 2023 is void and of no effect. There is no extension to Empower's contract, while negotiations are ongoing related to the RFP.

In its response to the agency-level protest, GGRF determined that the February 10, 2023 action was not related to the RFP, but in the same breadth admitted “[i]n this case, the Board's decision to extend the current contract with the current [Third Party Administrator] was necessary because the evaluations, negotiations, and contracting under RFP No. GGRF-002-22 was ongoing and in progress.” Ex. F at p. 2 (GGRF Decision on Protest 1).

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GGRF is incorrect. First, there is no provision in Guam law that allowed GGRF to extend the contract with the current TPA beyond the term in the existing contract. ASC was prejudiced by GGRF's circumvention of the procurement law and Open Government Law in accomplishing this extension. Because there was no notice given that the Board was considering extending the contract with the TPA, ASC had no ability to compete for the contract, even on a short-term basis as required for any expenditure of public funds on *inter alia* services. See 5 G.C.A. § 5004(b) (the Guam Procurement Code "shall apply to every expenditure of public funds, irrespective of their source . . . ."). ASC also had no ability to protest the decision to extend the existing TPA agreement with Empower *before* that action was taken. ASC was competing for the new TPA contract solicited by the RFP, so ASC was obviously interested in providing such services to GGRF.

By not giving public notice of its intent to extend the current contract, and by not procuring the services provided by such extension through a lawful method of source selection, GGRF directly violated the OGL and by extension the procurement law and this violation directly affects the RFP and ASC as a competing offeror. If the services were necessary and an extension was required, the procurement law allows GGRF to take actions to fill the gap left by an expiring contract. See e.g., 5 G.C.A. § 5213 (providing for small purchase procurements); 5 G.C.A. § 5215 (allowing for emergency procurement in appropriate circumstances).

ASC also did not have notice that there was no incentive to finish the RFP process in a timely manner since the existing provider was in a *de facto* and unlawful holdover status. ASC could have raised a protest earlier had GGRF complied with the OGL and (1) gave notice that it had entered negotiations with Empower and (2) intended to unlawfully extend the contract with Empower, while it was also negotiating a new contract *with Empower* under the RFP.



By violating the OGL, GGRF shielded its RFP-related unlawful extension action, and important developments related to the RFP from the public and from ASC. By GGRF's own admission this extension was "necessary" to allow the RFP to be completed. The OGL renders the GGRF Board action to extend the contract void as the public notices for the February Meeting did not provide reasonable notice to the public and to ASC that an extension of the existing agreement with Empower Retirement to allow GGRF to negotiate with Empower for its new contract was on the Agenda, would be discussed and ultimately approved by the GGRF Board. The OGL violations taint the RFP process in this matter for the reasons stated.

*b. GGRF did not give notice the RFP ranking was to be discussed at the July 28 Board meeting.*

The meeting notices for the July 28, 2023 meeting only stated that the RFP was a new business item of the Board. The violation of the OGL related to the July 28 meeting is best exemplified by the GGRF's response to ASC's first procurement protest related to the July 28 GGRF Board Meeting. GGRF posits that by listing the RFP number and title in its notice, sufficient notice was given under the OGL. This is incorrect. GGRF had to refer to actual minutes of the meeting to clarify what the actual discussion item was at the July 28 Board Meeting. See Ex. F at 2 ("Further, see Minutes to the July 28, 2023 Board Meeting wherein Director Blas stated that no formal award has been made at this time. The only information presented to the Board was the Selection Panel's recommendation. . . ."). In short, the Meeting Notice should have clearly stated that the Selection Panel's recommendation would be discussed by the Board. See 5 G.C.A. § 8114.1 *cited supra*. This would have put the public and ASC on notice of the stage the RFP was at, where ASC's proposal was at, and what action GGRF was taking related to the procurement. Because the notice did not have "sufficient detail" to put the public on notice as to what was to be discussed at the Board Meeting, any action taken by the Board is and was void, whether it was to award the contract as stated in the GGRF August 16 letter to ASC

or to accept the settlement panel's recommendation, or for some other insufficiently described purpose as later corrected by ASC in response to its protest. See 5 G.C.A. § 8107(d).

**2. GGRF failed to give notice of the ranking of offerors to ASC.**

GGRF also failed to give ASC notice of the ranking of offerors who responded to the RFP. This deprived ASC of the ability to apprise what stage of the procurement the RFP was at, and when coupled with the OGL violations noted above, demonstrates that GGRF took actions not consistent with the policy of the procurement law and customs of agencies related to the RFP process. See 5 G.C.A. § 5001 (mandating that the procurement law should be construed and applied *inter alia* to provide for increased public confidence in the procedures followed in public procurement, to ensure the fair and equitable treatment of all persons who deal with the procurement system, to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process). Notably, the OAG procurement checklist required of all procurements over \$500,000.00 specifically asks procuring agencies whether all offerors have been given notice of their ranking in the RFP context. See OAG Reference Checklist for Requests for Proposals at item 72.<sup>1</sup>

ASC was never given information about the acceptance and evaluation of its proposal. This led ASC to believe that the RFP proposals were still in the evaluation process, and that ASC was still in competition for first position in negotiations. This was troubling considering ASC received a Notice of Award on August 16, 2023, which was later recognized by GGRF as issued in error. GGRF took the position it was not required to provide notice to ASC of the ranking of its proposal. Exhibit F at 3. This is irreconcilable with GGRF's amended position that the August 16 letter was intended as a notice of conditional award. However, to preserve ASC's claims for appeal while the procurement process used in this matter is clarified and while the error in issuing the August 16 Notice of Award is clarified

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<sup>1</sup> available at: <https://oagguam.org/wp-content/uploads/PROCUREMENT/PROC-FORM-018-RFP-Reference-Checklist-01-09-19.pdf>

by ASC's second protest and second FOIA which are now pending before the GGRF, ASC now brings this protest appeal that the August 16 Notice of Award was improperly issued given that ASC was never apprised of the status of its proposal, and never given notice of its ranking. *See supra* n. 1.

**3. GGRF did not maintain a proper procurement record, and improperly issued a notice of award informing ASC that a contract was awarded to Empower.**

The GGRF Director's response to ASC's first FOIA seeking an extension of time to respond makes clear that the procurement record was still being compiled after August 16, 2023. Ex. B. The Procurement law is clear "[n]o procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record . . . and that it is complete and available for public inspection." 5 G.C.A. § 5250. Section 5250 creates two preconditions to a procurement award: (1) that the record is certified complete under penalty of perjury and (2) that the same is available for public inspection. Since GGRF was still compiling the record, the notice of award issued on August 16, 2023 was incorrect and improper. No award of any contract was properly made under the Guam procurement law. GGRF admitted to this basis for ASC's protest and determined that because the August 16, 2023 notice of award was improperly issued, portions of the procurement record were not yet public. Ex. F at 3. However, GGRF still denied ASC's first procurement protest as it relates to the procurement record and as the record related allegation relates to the August 16, 2023 Notice of Award.

GGRF subsequently responded to ASC's FOIA and provided certain documents and did not produce other documents required to be a part of the procurement record. ASC sent a second FOIA specifically requesting the documents that are missing from the procurement record and that were not specifically identified as exempt by GGRF in its response to the first FOIA. ASC maintains that the procurement record in this matter appears to have been improperly kept because without invoking an exception to disclosure for the missing documents, the logical conclusion is the missing documents,

required to be drafted related to a procurement solicitation by RFP do not exist. The incomplete record that was provided to ASC will not allow for meaningful review of GGRF's actions related to the RFP, and more specifically does not clarify how GGRF erroneously issued to ASC a notice of award to a different offeror on August 16, 2023 without certifying the procurement record was complete. GGRF's walking back of the August 16, 2023 letter does not address the allegation that the procurement record produced to date in response to ASC's FOIA is incomplete, and the second FOIA makes clear that certain documents which should have been part of the record were not provided and were not specifically designated as exempt by GGRF. Because of the incomplete record, ASC cannot determine what went wrong in the procurement resulting in the August 16, 2023 erroneous notice of award. The OPA and a Court similarly would not be able to meaningfully review the RFP process for compliance with the law given the missing documents not produced by GGRF. For these reasons, the procurement record issues mean the RFP should be re solicited, and a record should be kept in accordance with Guam law.

**B. STATEMENT SPECIFYING THE RULING REQUESTED**

Based on the foregoing, ASC requests that the OPA find that:

1. The GGRF violated the OGL related to GGRF Board Actions related to the RFP on February 10 and July 28, 2023 and thus those actions are void,
2. That GGRF failed to give notice of the ranking of offerors to ASC prior to issuing the August 16, 2023 notice of award to Empower, and
3. That the RFP procurement record was not kept in accordance with law. Thus, the August 16, 2023 notice of award was unlawfully issued and the incomplete record deprives the OPA of the ability to meaningfully review the procurement and GGRF's actions.

Due to the violations of the OGL, the failure to give notice of the ranking of offerors and the error in issuing a notice of award to a competing offeror by the GGRF, the RFP process is irreversibly tainted. For the violations noted herein, ASC requests that the OPA cancel the RFP and order the GGRF to restart the process. Board action related to the RFP should occur in public, in accordance with the Open Government law, to allow ASC and other interested person to understand GGRF's processes and decision making related to the RFP. The ranking of offerors should be announced publicly prior to negotiations commencing, as is customary among Government of Guam agencies and as required by the OAG procurement checklist. Additionally, the procurement record should be maintained in accordance with law to allow for meaningful review of any procurement-related action(s) taken by GGRF.

### **C. SUPPORTING EXHIBITS, EVIDENCE OR DOCUMENTS**

The following Exhibits are referenced in this notice of appeal and are attached hereto:

1. Exhibit A. ASC's first FOIA request to GGRF.
2. Exhibit B. GGRF's request for extension of time to respond to ASC's first FOIA request.
3. Exhibit C. The GGRF Board of Trustee's Meeting Notice for the February 10, 2023 Meeting.
4. Exhibit D. The minutes of the February 10, 2023 Meeting.
5. Exhibit E. The GGRF Board of Trustee's Meeting Notice for the July 28, 2023 Meeting.
6. Exhibit F. GGRF's Decision on ASC's first procurement protest.
7. Exhibit G. ASC's first procurement protest related to the RFP.
8. Exhibit H. ASC's second procurement protest related to the RFP.
9. Exhibit I. ASC's second FOIA request related to the RFP.
10. Exhibit J. The Notice of Award to Empower issued by GGRF to ASC dated August 16, 2023.

ASC anticipates GGRF's response to its second FOIA request and its second procurement request will occur in the coming days or weeks. ASC will supplement this notice of appeal as may be appropriate and may seek consolidation of subsequent appeals depending on the GGRF's actions on its second and potential other agency-level protests, if any.


**PART V – Declaration re Court Action**

Pursuant to 5 G.C.A. Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability 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 Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 20<sup>th</sup> day of September, 2023.

Respectfully submitted,  
**ARRIOLA LAW FIRM**

By:   
WILLIAM B. BRENNAN

ARRIOLA LAW FIRM HAGATÑA, GUAM 96910



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

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## OPA-PA-23-005 Notice of Receipt of Appeal

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**Jerrick Hernandez** <jhernandez@guamopa.com>

Thu, Sep 21, 2023 at 10:05 AM

To: Paula Blas &lt;pmbblas@ite.net&gt;

Cc: William Brennan &lt;wbrennan@arriolafirm.com&gt;, Arriola Law Firm General Information &lt;attorneys@arriolafirm.com&gt;

Hafa Adai,

Please see the attached Notice of Receipt of Appeal for OPA-PA-23-005. This email will serve as an official notice in lieu of a transmittal via Fax.

Please confirm receipt of this email and the attached document. Thank you.

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Best Regards,



Jerrick J.J.G. Hernandez, MA, CGFM, CFE, CICA, CGAP  
*Accountability Auditor*

**Office of Public Accountability**

+1 671 475 0390 (ext. 204)

[jhernandez@guamopa.com](mailto:jhernandez@guamopa.com)<https://www.opaguam.org/>

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