

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>	12 (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>	October 16, 2023
		<b>Phone:</b>	(671) 475-0390 x. 204
		<b>Fax:</b>	(671) 472-7951

**Re:** OPA-PA-23-006 Notice of Receipt of Appeal

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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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October 16, 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-23-006

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 October 13, 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-23-006.

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 **Monday, October 23, 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 **Monday, October 30, 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". The signature is stylized and cursive.

Benjamin J.F. Cruz  
Public Auditor

Enclosure: First Nine Pages of the Notice of Appeal – OPA-PA-23-006

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

**WILLIAM B. BRENNAN, ESQ.**  
**ARRIOLA LAW FIRM**  
 259 MARTYR STREET, SUITE 201  
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[attorneys@arriolafirm.com](mailto:attorneys@arriolafirm.com)

Attorneys for Appellant  
*ASC Trust, 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 HAGATÑA, 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”) September 29, 2023 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 9691, [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 29, 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.

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”, which is now on appeal before the OPA in OPA-PA-23-005.

On September 14, 2023, ASC lodged a second protest related to the procurement with the GGRF. GGRF denied ASC’s second protest in its entirety in a letter dated September 29, 2023. The bases for protest, which are now elevated to the Public Auditor by this Notice of Appeal are discussed below.

### **PROTEST**

#### **1. GGRF violated the terms of the RFP by issuing a Notice of Award and then a Notice of Conditional Award.**

In its initial August 16, 2023 correspondence with ASC, GGRF stated that it issued a notice of award to Empower. Subsequently, GGRF rescinded that statement and stated that it issued a notice of conditional award given that the GGRF Board of Trustees had determined that Empower was the highest ranked offeror, and that negotiations would be commenced with Empower. GGRF’s statements do not match the limited records provided to ASC. Also, ASC is unable to determine whether Empower received a notice of award or notice of conditional award due to the incomplete disclosure by GGRF in response to ASC requests under the Sunshine Reform Act of 1999.

The Communications Log shows that on April 28, 2023 and May 5, 2023, GGRF was already reviewing Empower’s price proposal and negotiating with Empower. This despite GGRF’s statement in its September 7, 2023 correction letter that the Board of Trustees had not met regarding the RFP until July 28, 2023. GGRF’s statement that its August 16, 2023 letter was a notice of conditional award, and that the Board of Trustees on July 28, 2023 “determined that Empower was the best-qualified offeror” based on the RFP evaluation factors cannot be reconciled with the fact that the GGRF began negotiations at least two months earlier in April 2023 – before the Board made that determination.

This is irregular and not in line with Guam Procurement Law and regulations, which require: the head of the purchasing agency or a designee of such officer to determine in writing which offeror is the best qualified based on the evaluation factors set forth in the Request for Proposals. See 5 G.C.A. Section 5216(e); see also, 2 GAR Section 3114(l). Subsequently, if negotiation of compensation is determined to be fair and reasonable, then award of a contract using an RFP can be made. Id.

In response to ASC's protest, GGRF stated that ASC improperly cited to Section 5216(c) in its protest. However, the basis of the protest is clear. Because GGRF had already engaged in price negotiations it is not clear what the Board was approving in July 2023. GGRF determined that it erroneously issued a notice of award on August 16, 2023 to ASC since the Board of Trustees only determined that Empower was the best-qualified offeror in its July 2023 Board Meeting. GGRF clarified that only a notice of conditional award was issued, but has yet to provide the actual notice of conditional award to ASC.

ASC has only been provided limited portions of the procurement record, in response to requests under the Sunshine Reform Act of 1999. Based on these incomplete disclosures, it is unclear if the now-corrected "notice of conditional award" not provided for in Guam Procurement Law or regulations, succeeded the requirements of an actual award – such as the completion of negotiations of price and a contract. Additionally, it is unclear to what extent the conditional award complied with the requirement of a notice of conditional award in the RFP at page 35. The lack of clarity in this procedure, and GGRF's error in issuing a notice of award to ASC have, in essence, tainted the solicitation and possible award of the contract resulting from the RFP. This taint is made worse by the incomplete and piecemeal disclosure of the procurement record in this matter. Without the full record, ASC is unable to understand how the notice of award it received was erroneously issued. More importantly, without the full record, the Public Auditor will not be able to conduct a meaningful review

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of this procurement. Due to the lack of clarity and the seemingly ad hoc procedure being employed by GGRF, ASC hereby protests any further conduct related to this solicitation. The process should be restarted.

**2. GGRF violated the terms of its RFP by substituting an evaluator on its proposal evaluation committee, with a GGRF representative who was not present during the discussions with ASC, after the date of ASC's presentation to the selection panel.**

The RFP provides that the proposals would be evaluated "by a selection panel made up of Retirement Fund Management and Board of Trustees" and that the panel could receive technical assistance from outside sources. RFP at 34, Section VI.B. However, the meetings log shows that after a presentation was conducted by ASC related to its proposal, GGRF purportedly substituted a member of the selection panel due to staff retirement. ASC challenged the substitution of this staff member, done after ASC's presentation to the original evaluators.

GGRF responded to this basis of protest by stating that Guam law, the RFP, nor the procurement regulations prohibit substitution of a selection panel evaluator. However, nothing in those same authorities permits the substitution of an evaluator either. The substitute evaluator here was not able to attend ASC's presentation live, and was therefore deprived of the opportunity to question ASC regarding its presentation.

Nothing in the RFP discusses how a change in panel member, post proposal presentation is to occur. The documents provided to ASC as of the date of this writing do not indicate whether and to what extent the replacement panel member was made aware of the proposal presentation by ASC, whether such individual had questions related to ASC's proposal or the presentation, and how and to what extent the proposal presentation was weighed by such replacement. All that ASC has is GGRF's statement denying its protest that the evaluator was required to review the presentation. Due to the lack of clear procedure, the lack of any information on how the replacement was conducted and



whether the proposal conference and replacement panel members' questions regarding ASC's proposal or the conference were addressed, ASC protests any further action on this procurement. At a minimum the RFP should be resolicited, with the replacement panel member included in the ASC proposal presentation and evaluation of ASC's proposal.

**3. GGRF violated the OGL in convening meetings which two or more members of its Board of Trustees participated in a procurement they would purportedly later approve, and because those meetings were not noticed and livestreamed in accordance with the OGL.**

GGRF responded to this basis of protest: (1) denying that GGRF violated the OGL, and (2) by stating it was unclear what meetings ASC was referring to and that ASC's protest is untimely. As shown below, GGRF is wrong on each basis of its response.

- a. Two or More Members of the Board cannot discuss public business to be considered by the Board outside of a duly noticed public meeting.*

The Guam Open Government law requires that any meeting of members of a public agency where action is taken must be duly noticed and livestreamed. Meeting is defined in the OGL as "the convening of a governing body of a public agency for which a quorum is required in order to make a decision *or to deliberate toward a decision on any matter.*" 5 G.C.A. § 8104(b) (*emphasis added*).

While chance meetings of two or more directors are not considered a public meeting, "no chance meeting, informal assemblage or electronic communication shall be *used to decide or deliberate public business in circumvention of the spirit of the*" Open Government Law. 5 G.C.A. § 8105.

More than one Board Member at a time attended meetings related to the RFP according to the meetings log provided to ASC. These members were involved in the discussion of public business that they would purportedly later act on at noticed Board Meetings related to the RFP. Thus, there were clearly discussions related to, and by natural consequence deliberation toward, decisions of the Board that were not conducted in open, duly noticed and live streamed meetings.

Two Board Members should not have been involved with a procurement that was subject to ultimate Board approval. At a minimum, the Board Members should not have been involved in the greater Board decision making, since (1) they had information gleaned from discussions amongst *inter alia* Board Members outside of duly noticed Board Meetings and (2) by GGRF's own admission were present at non-public procurement meetings. Ex. A at 3 ("ASC was well aware that meetings were not open to the public because the meetings were part of the procurement process, allowing discussions").

Notably, the GGRF cites to Guam law allowing the head of the purchasing agency, an individual not a member of a Public Agency as defined by the OGL, or his designee, to have confidential discussions with offerors during the RFP process. The Procurement Law does not provide for Board Members subject to the OGL to participate in non-public meetings regarding public business. The Procurement law does not exempt public agencies from the OGL in 5 G.C.A. Section 5216(d) or otherwise. By using the procurement law to purportedly circumvent the requirements of the OGL, the GGRF violated the OGL and thus any Board action related to the RFP is void. 5 G.C.A. § 8114. The RFP must be resolicited.

- b. ASC was not aware of whether and to what extent the RFP process was subject to Board Approval, including by members who participated in the procurement until GGRF provided the meetings log.*

GGRF has full awareness of the procurement-related meetings that two or more of its Trustees attended. ASC only has access to portions of the procurement record and only after its FOIA requests were responded to. The Procurement law says nothing about Board Approval of GGRF procurement-decision making. It appears and ASC intends to clarify via this appeal, that those Board members who helped plan this procurement, and evaluated proposals from offerors, also participated in eventual Board discussions directly related to the RFP on February 10 and July 28, 2023 and approved the

procurement-related planning and evaluation actions taken by GGRF. Members of the Board appear to be involved in the very process they are tasked to review and approve.

Once ASC learned of this dual role of evaluator-Trustee and Board-Trustee-procurement-approver, ASC became aware of the OGL violation and brought its second protest. Because ASC raised its second protest less than 14 days after receiving the meetings log in response to its FOIA request, ASC's 2<sup>nd</sup> protest on this basis was timely.

These basic OGL violations render the entire RFP process in doubt. Thus, to cure the OGL violations and voided actions, GGRF must restart the procurement and resolicit the RFP.

## **B. STATEMENT SPECIFYING THE RULING REQUESTED**

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

1. That GGRF violated the Guam Procurement law and the terms of its RFP when it issued a Notice of Award before a Notice of Conditional Award,
2. That the GGRF violated the Guam Procurement law and the terms of its RFP when it substituted an evaluator on its proposal evaluation panel after presentations on said proposals were given to the panel by offerors, and
3. The GGRF violated the OGL when the GGRF Board took actions related to the RFP despite Trustees being involved in the procurement, and attending nonpublic meetings related to the procurement. Thus, those Board actions concerning the RFP are void.

The RFP process is irreversibly tainted. 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 parties to understand GGRF's processes and decision making related to the RFP. Board members should not serve as evaluators and planners at the procurement level and also provide approval at the Board level, in violation of the

OGL. Additionally, a notice of award is a consequential document in Guam Procurement law. GGRF's records do not indicate how a notice of award was erroneously issued here. Finally, the substitution of an evaluator is not provided for in Guam law or the RFP and therefore it was error to substitute an evaluator in this matter after presentations by proposed offerors were completed.

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

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

1. Exhibit A. GGRF's Decision on ASC's Second Procurement Protest.
2. Exhibit B. ASC's second procurement protest related to the RFP.

ASC anticipates filing a motion to consolidate the appeal initiated by this Notice of Appeal with ASC's appeal from the GGRF denial of its first procurement protest in OPA-PA-23-005. The documents relevant to that appeal regarding the same RFP are relevant to this appeal, and there are common issues of law and fact raised in the appeals.


### **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 13th day of October, 2023.

Respectfully submitted,  
**ARRIOLA LAW FIRM**

By:   
**WILLIAM B. BRENNAN**



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

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## OPA-PA-23-006 Notice of Receipt of Appeal

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

Mon, Oct 16, 2023 at 10:17 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-23-006. 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)

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