



Jerrick Hernandez <jhernandez@guamopa.com>

Notice of Appeal

William B Brennan <wbrennan@arriolafirm.com>

Fri, Oct 13, 2023 at 4:47 PM

To: Jerrick Hernandez <jhernandez@guamopa.com>

Cc: Thyrza Bagana <tbagana@guamopa.com>, Vince Duenas <vduenas@guamopa.com>

Hafa Adai OPA,

Please see the attached notice of appeal for filing.

Please confirm receipt.

Thanks and have a nice weekend.

Best,

William Bucky Brennan, Esq.

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**Notice of Appeal - GGRF RFP-002-22 Protest 2 10.13.23 FINAL Combined w Exhibits.pdf**

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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:	candy.okuhama@asctrust.com

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.

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 2nd 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

VERIFICATION

I, Candy Okuhama, being duly sworn, hereby declare, that the undersigned is an Officer of ASC Trust, LLC. I have read the foregoing Notice of Appeal and I am aware of the factual allegations made therein. In my capacity as Officer of ASC Trust, LLC I verify said factual allegations are true based on my own knowledge and belief, except as to those matters averred on information and belief. As to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of Guam that the foregoing is true and correct.

Dated this 13th day of October, 2023 at Hagatna, Guam.



Officer, ASC Trust, LLC

Exhibit A



GOVERNMENT OF GUAM
RETIREMENT FUND
STABILITY • SECURITY • REWARDS

Lourdes A. Leon Guerrero
Governor

Joshua F. Tenorio
Lieutenant Governor

Paula M. Blas
Director

September 29, 2023

RECEIVED BY
ASC TRUST CORP.

SEP 29 2023

Hand Delivery

Ms. Candy Okuhama
President & CEO
ASC Trust, LLC
120 Father Dueñas Avenue
Suite 110
Hagåtña, Guam 96910

Re: RFP No. GGRF-002-22 (Second) Procurement Protest

Dear Ms. Okuhama,

This letter responds to Section III of your September 14, 2023 letter concerning ASC Trust, LLC's second protest of the procurement of services under RFP No. GGRF-002-22. GGRF's responses to your September 14, 2023 procurement protest are set forth below.

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

The GGRF denies ASC's protest on this point.

In Section III.1 of the September 14, 2023 protest letter, ASC claims that it is unable to determine whether Empower received a Notice of Award or Notice of Conditional Award. Because neither term is defined or required in RFP No. GGRF-002-22 or the Guam Procurement Law (5 G.C.A. Chap. 5), there is no violation of the RFP or the Procurement Law supporting ASC's protest on this point. Relevant sections of the Guam Procurement Law and Guam Procurement Rule and Regulations also do not support ASC's protest.

Section 5216 of the Guam Procurement Law describes the competitive selection procedures for services specified in § 5121 (authority to contract for certain service and approval of contracts). Section 5216(c)(public announcement and form of request for proposals) states: "Adequate notice of the need for such services shall be given by the purchasing agency through a Request for Proposals. The Request for Proposals shall describe the services required, list the type of information and data required of

Trustees:

Wilfred P. Leon Guerrero, Ed.D.
Chairman

Antolina S. Leon Guerrero
Vice Chair

Katherine T.E. Taitano
Secretary
Chair, Members and Benefits Committee

Artemio R.A. Hernandez, Ph.D.
Treasurer
Chair, Investment Committee

Thomas H. San Agustin
Trustee

David N. Sanford
Trustee

George A. Santos
Trustee

424 Route 8,
Maitte, Guam 96910
Tel: 671.475.8900
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www.ggrf.com

each offeror, and state the relative importance of particular qualifications.” 5 G.C.A. § 5216 (c). Nothing in this section supports ASC’s assertion of a violation because a Notice of Award was corrected by a Notice of Conditional Award. Section 5216(c) pertains to the requirement to publish a Notice of the RFP. ASC did not dispute the required Notice after it was issued, and ASC submitted a response to RFP No GGRF-002-22 arising from the GGRF’s notice.

Section 3114 of the Guam Procurement Rule and Regulations (2 G.A.R. Division 4) addresses negotiating and awarding of contracts, and does not require notice prior to the successful negotiation of compensation, contract requirements, and contract documents with the best qualified offeror (or subsequent qualified offerors, should negotiations fail with the best qualified offeror). See 2 G.A.R. § 3114(1). Guam Procurement Rule and Regulations do not require the GGRF to issue a notice of award of contract before it has completed negotiations for the required services at compensation determined in writing to be fair and reasonable.

ASC fails to provide a legal basis to sustain its protest for GGRF’s errors in issuing its letters. The GGRF’s position is explicitly stated in the July 28, 2023, Board Minutes that the GGRF has not awarded a contract for RFP No. GGRF-002-22. Nothing in the authorities cited in the Second Protest, 5 G.C.A. § 5216(c) or 2 G.A.R. §3114(1), is relevant to the alleged error in issuing the Notice of Award before the Notice of Conditional Award.

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 GGRF denies ASC’s protest on this point.

The GGRF did not violate any RFP, Guam law, or Guam regulation provision by substituting an evaluator. All evaluators conducted their evaluations with the same information.

The GGRF did not violate the terms of the RFP when it substituted an evaluator to review the proposals because no such requirement exists. The RFP did not identify the evaluators other than to state that “proposals submitted may be evaluated by a selection panel consisting of the following: Retirement Fund Management and Board of Trustees.” See Section VI. Evaluation and Selection Procedures (RFP GGRF-002-22).

ASC fails to provide a legal basis to sustain its protest regarding the evaluator change. Nowhere in the RFP discusses the substitution of an evaluator and the requirement to resolicit the RFP so that an evaluator can physically attend the presentations. Furthermore, neither Guam law nor its rules and regulations require GGRF to resolicit if the evaluators were absent during a presentation. In this case, the GGRF recorded all the presentations, and the absent evaluator was required to review the recorded version of all the presentations (including ASC’s) and allowed to ask additional questions.

Guam Procurement Law and Guam Procurement Rule and Regulations have no prohibitions concerning the substitution of an evaluator on the proposal evaluation committee.

3. GGRF violated the Guam Open Government Law (OGL) in convening meetings which included two or more members of its Board of Directors that were not noticed and livestreamed in accordance with the Guam OGL.

The GGRF denies ASC's protest on this point.

First, ASC's protest describes meetings that included two or more members of the Board of Directors that were not noticed and livestreamed under Guam's Open Government Law. However, without the identification of specific meetings that allegedly violated the OGL, the GGRF is unable to consider the merits of ASC's protest on this point.

Second, even assuming ASC's protest identifies the most recent meeting it attended, ASC's protest is untimely because the most recent meeting identified on the meeting log occurred on January 31, 2023. Guam law provides that "[a] protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the fact giving rise thereto." 5 G.C.A. § 5425 (a). Here, ASC knew as early as January 31, 2023 that two or more GGRF Trustees participated in meetings related to the RFP. ASC was well aware that the meetings were not open to the public because the meetings were part of the procurement process, allowing discussions. See 5 G.C.A. § 5216 (d) and 2 G.A.R. § 3114(i). Section 3114 (i)(2) specifically provides that "discussions shall not disclose any information derived from proposals submitted by other offerors, and the agency conducting the procurement shall not disclose any information contained in any proposals until after the award of the proposed contract has been made." 2 G.A.R. § 3114 (i)(2).

At no time during the January 31, 2023 presentation or fourteen (14) days from January 31, 2023, did ASC submit a written protest objecting to the two Trustees participating in the presentations. Thus, ASC's protest is untimely regarding its Open Government Law protest.

Third, the GGRF Board of Trustees did not convene a meeting as defined by Guam law, in connection with the method of source selection, solicitation, or award of the contract. Guam law defines a meeting as "the *convening of a governing body of a public agency for which a quorum is required* in order to make a decision or deliberate toward a decision on any matter." 5 G.C.A. 8104 (b). Guam law provides that "four (4) or more board members physically in attendance shall constitute a quorum for all meetings of the Board of Trustees." 4 G.C.A. § 8138.3.

At no time during the source selection or solicitation for RFP No. GGRF-002-22, did the GGRF Board of Trustees convene a meeting that required a quorum to make a decision or deliberate toward a decision on any matter related to RFP No. GGRF-002-22 because no Board decision or deliberation is needed until the selection panel successfully negotiates a contract with the best-qualified offeror. Here, as the July 28, 2023, GGRF Board minutes confirm, no contract has been negotiated. So, there would be no reason to convene the Board of Trustees for a meeting for which a quorum is required because no decision can be made at this time due to the automatic stay put in place due to ASC's First and Second protest to RFP No. GGRF-002-22.

Automatic Stay

The GGRF agrees since ASC's First Protest, an automatic stay remains in place, and the GGRF has ceased negotiations with the best-qualified offeror until the finality of both ASC's First and Second Protest to RFP GGRF-002-22.

For the reasons stated above, the GGRF denies ASC's Second Protest in its entirety. According to 5 G.C.A. § 5425(c), ASC may pursue administrative and judicial review of this decision under Chapter 5, Article 9 of Title 5 of the Guam Code Annotated, and Division 4, Chapter 9 of Title 2 of the Guam Administrative Rules and Regulations.

Sincerely,


PAULA M. BLAS

Exhibit B



SECOND PROCUREMENT PROTEST

September 14, 2023

Via email & Hand Delivery:

Ms. Paula Blas
Director
Government of Guam Retirement Fund
424 Route 8
Maite, Guam 96910
pmbblas@ite.net

Re: Second Procurement Protest – GGRF-002-22

Dear Ms. Blas,

Pursuant to 5 G.C.A. Section 5425(a) ASC Trust, LLC (“ASC”) hereby files this **Second PROCUREMENT PROTEST** related to Government of Guam Retirement Fund (“GGRF”) RFP-002-22 (the “RFP”).

I. 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 Retirement, LLC. GGRF did not give ASC notice of the ranking of offerors related to the RFP, or that negotiations with a responsive and qualified offeror had commenced. Between January 2023 and August 16, 2023, ASC received no communication regarding the RFP.

On August 23, 2023, ASC issued a FOIA to GGRF requesting certain documents that by law were required to be in a procurement record, that was subject to public inspection as a result of the notice of award issued to Empower Retirement, LLC.

ASC also issued a request under the Sunshine Reform Act of 1999 to GGRF on August 23, 2023 for documents related to GGRF RFP 002-22. Subsequently, ASC issued a protest to the GGRF on

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Page 2 of 4
Ms. Paula M. Blas
9/14/2023

August 25, 2023 related to the RFP. GGRF denied ASC's first protest in a letter dated September 6, 2023. GGRF also issued a letter on September 7, 2023 which GGRF stated superseded its August 16, 2023 letter. GGRF took the position that its "Notice of Award" was issued in error and instead stated that GGRF had issued a "Notice of Conditional Award" to Empower Retirement, LLC.

GGRF's September 5, 2023 FOIA response to ASC provided a Meetings Log, a Communication Log, a written Determination of Need for GGRF RFP-002-22 and for a multiple year contract, and drafts of the RFP.

II. Timeliness of Protest:

ASC raised this protest after receiving a FOIA response from GGRF on September 5, 2023 and thus lodges this protest within 14 days of when ASC knew or should have known of the facts giving rise thereto. Additionally, ASC reserves the right to amend and or supplement this protest should it discover any additional factual basis to do so.

III. 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 record provided to ASC. Also, ASC is unable to determine whether Empower received a Notice of Award or Notice of Conditional Award.

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 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 Retirement, LLC 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



Page 3 of 4
Ms. Paula M. Blas
9/14/2023

the best qualified based on the evaluation factors set forth in the Request for Proposals. See 5 G.C.A. Section 5216(c); 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. Here, GGRF determined that it had not issued a notice of award since the Board of Trustees only determined that Empower was the best-qualified offeror in its July 28, 2023 Board Meeting and thus only a notice of conditional award was issued. It is unclear if this “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. 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. 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 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. 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. 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 Guam Open Government Law (OGL) in convening meetings which included two or more members of its Board of Directors that were not noticed and livestreamed in accordance with the Guam OGL.

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. See 5 G.C.A. § 8101 *et seq.* Meeting is defined



Page 4 of 4
Ms. Paula M. Blas
9/14/2023

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 attended several 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 later act on at noticed Board Meetings related to the RFP. Therefore, there were clearly discussions related to, and thus deliberation toward, later decisions of the Board that were not conducted in open, duly noticed and live streamed meetings. Under the OGL, this renders the actions taken at these meetings void, and any subsequent action by the greater Board meetings by a quorum of the GGRF Board, void. 5 G.C.A. §§ 8114, 8114.1. These basic Open Government Law 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.

IV. Automatic Stay

This protest affects an automatic stay of the procurement related to the RFP until this pre-award protest is resolved finally. See 5 G.C.A. § 5425(g). To the extent a stay is not in place or is not put in place because of this protest, ASC hereby gives notice that it protests GGRF’s decision related to the failure to issue a stay. Guam law mandates that solicitation or an award of a contract be stayed until all timely pre-award protests are resolved finally. ASC’s protest is timely and pre-award. Therefore, the RFP must be stayed until this protest is resolved finally.

For the reasons set forth hereinabove, ASC brings this procurement protest and demands that the RFP be resolicited to remove the taint of the various errors and violations of Guam law noted in this and ASC’s first procurement protest.

Sincerely,
ASC Trust, LLC

A handwritten signature in black ink, appearing to read "Candy Okuhama", written in a cursive style.

Candy Okuhama
President & CEO

cc: Jackie M. Blas, GGRF Board Secretary, via email: jmbblas@ggrf.com
Emma R. Reyes, GGRF Administrative Office, via email: erreyes@ggrf.com