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**In the Appeal of ASC Trust, LLC - Consolidated Appeal OPA-PA-23-005 and OPA-PA-23-6**

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Mon, Dec 4, 2023 at 4:45 PM

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Hafa Adai,

Please see the attached Opposition to GGRF's Motion to Dismiss for filing in the subject consolidated appeal.

Please let me know if you have trouble accessing the attachment.

Kind Regards,

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

ARRIOLA LAW FIRM HAGÁTÑA, GUAM 96910

<b>In the Appeal of</b>	)	Consolidated Appeal
	)	Docket No. OPA-PA-23-005
	)	Docket No. OPA-PA-23-006
<b>ASC TRUST, LLC,</b>	)	<b>OPPOSITION TO GGRF MOTION TO DISMISS</b>
Appellant.	)	
_____	)	
	)	

**COMES NOW**, ASC Trust, LLC (“ASC”) through the undersigned counsel, who submits this Opposition to the Government of Guam Retirement Fund’s (“GGRF”) Motion to Dismiss filed on November 27, 2023. This Opposition incorporates the arguments raised previously by ASC in its Notices of Appeal and Comments to Agency Report filed in OPA-PA-23-005 and OPA-23-006.

GGRF asks the Public Auditor / Office of Public Accountability (“OPA”) to dismiss this procurement appeal because of an alleged lack of jurisdiction and because it alleges ASC’s claims for relief are either premature or time barred. As discussed herein, GGRF’s arguments are baseless and its Motion to Dismiss should be denied.

**I. GGRF Does Not Articulate a Basis to Dismiss.**

Under the procurement law, an offeror aggrieved in connection with a method of source selection, solicitation or award of a contract may file a protest at the agency level within 14 days from when the “aggrieved person knows or should know of the facts giving rise thereto” and may appeal

to the Public Auditor “within fifteen days after receipt” of a denial of the same protest. See 5 G.C.A. §§ 5425(a), (e). The 14-day protest period begins from when the protesting party is “entitled to a remedy”, that is when they become aware of the violation of the procurement law or RFP they complain of. D.F.S. Guam L.P. vs. A.B. Won Pat. Int’l Airport Auth., 2020 Guam 20 ¶ 84.

The Public Auditor has the “power to review and determine de novo any matter properly submitted to her or him.” 5 G.C.A. § 5703(a). This jurisdiction *shall* be utilized to promote the integrity of the procurement process and the purposes of 5 G.C.A. Chapter 5. The codified purposes of the procurement law include *inter alia* “to provide for increased public confidence in the procedures followed in public procurement” and “to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process.” 5 G.C.A. §§ 5001(b)(3), (b)(8). Whether a procurement protest or appeal is pre award or not is consequential as “[i]f prior to an award, it is determined that a solicitation *or proposed award of a contract is in violation of law*, then the solicitation or proposed award shall be: (a) cancelled, or (b) revised to comply with the law.” 5 G.C.A. § 5141 (*emphasis added*). In the post-award context, if a solicitation or contract is determined to be in violation of law then ratification and affirmation of the award and resulting contract is preconditioned on the good or bad faith of the awardee. See 5 G.C.A. § 5452.

Because ASC’s protests were properly appealed to the Public Auditor within 15 days of denial of the applicable GGRF agency level protest denials, the matters are properly *on appeal* before the Public Auditor. The Public Auditor thus has jurisdiction to consider ASC’s appeals. ASC’s appeals should not be dismissed even if the Public Auditor agrees with GGRF’s meritless arguments after a hearing of this matter. Rather, in that event the Public Auditor should affirm the GGRF denial of ASC’s protests. On this basis, the Motion to Dismiss should be denied.

**II. GGRF’s Erroneous Notice of Award Prompted ASC’s Protest, and Discovery of Other Violations of Law.**

GGRF concedes that it erroneously issued a notice of award to ASC regarding the procurement. Mot. Dismiss at p. 3. However, GGRF posits that because it gave ASC notice of its error, it is absolved of any consequence of issuing the erroneous notice of award. GGRF corrected its purported error and alleges that there was no award made, and only a notice of conditional award was issued to Empower Retirement, LLC (“Empower”).

Under the RFP a conditional award follows the *completion* of negotiations and finalization of a contract. See OPA-PA-23-005, Notice of Appeal at p. 110 (“The contract will be conditionally awarded to the *successful offeror*. . .” subject to the requirements that within eight weeks, the offeror duly register as an Investment Advisor under 22 G.C.A. Chapter 46, provide a copy of the registration, and be duly authorized to do business on Guam.” (*emphasis added*)). Notably, the RFP clearly states a conditional award is made to a “selected offeror” not the “best qualified offeror.” Id.

The communications log confirms that GGRF was engaged in fee negotiations as early as April and May of 2023. OPA-PA-23-005, Notice of Appeal at pp. 59-62. However, in this consolidated appeal and now in GGRF’s Motion to Dismiss, GGRF asserts that it is still in “negotiations with the best-qualified offeror” which would be stayed pending completion of this consolidated appeal. GGRF Mot. Dismiss at p. 3. Again, the procedure is not in accord with the RFP. GGRF cannot explain why GGRF was already requesting a best and final offer prior to the Board meeting in July 2023, while they now state that negotiations commenced after approval of the best qualified offeror at the same Board meeting. If the Board approved the best qualified offeror on July 28, 2023, such approval came after price negotiations were already ongoing, and after GGRF had already requested from Empower its Best and Final Offer, in violation of 5 G.C.A. Section 5216(e) which requires the determination of the best qualified offeror and ranking of offerors to *precede* price negotiations. If the GGRF Board

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only approved the selection panel's recommendation of the best qualified offeror on Wednesday, July 28, 2023, how was a conditional award appropriate by Tuesday, August 1, 2023, with no additional communication between GGRF and Empower except the notice of conditional award? OPA-PA-23-005, Notice of Appeal at p. 62 (Sept. 20, 2023). The price was thus already negotiated, prior to Board approval of the selection panel's ranking recommendation in violation of Guam law. Price and contract negotiations had to follow the determination of the best qualified offeror, as the law requires. See 2 GARR § 3114(k) ("The offeror determined to be best qualified shall be required to submit cost or pricing data to the head of the agency conducting the procurement at a time specified *prior to the commencement of negotiations*" (*emphasis added*)).

The September 7, 2023, letter stating that a notice of conditional award was issued to Empower therefore does not appear to comply with the terms of the RFP or Guam law. ASC has still not seen the "notice of conditional award" issued to Empower and the same does not appear to have been submitted with the procurement record in this matter. If GGRF has issued a notice of conditional award pursuant to Page 35 of the RFP, then negotiations should have already been completed and Empower is the "selected offeror" which does not align with GGRF's Agency Statement or its Motion to Dismiss. See OPA-PA-23-006, Agency Statement at p. 4 (Oct. 30, 2023) (disputing *inter alia* that contract negotiations were underway as of May 2023), see also GGRF Mot. Dismiss at p. 3 (Nov. 27, 2023). If some other conditional award is contemplated, then GGRF is not in compliance with the terms of its own RFP. If price and contract negotiations are still ongoing with Empower, as GGRF's Agency Statement and Motion to Dismiss appear to suggest, then the notice of conditional award was improper as Empower is still not the "selected offeror." GGRF cannot explain why their own Communications Log shows "fee negotiations" with Empower were occurring in April and May

2023, despite its position that it did not know Empower was the best qualified offeror until its July 28 Board Meeting. GGRF's actions violate the Guam procurement law and the terms of its own RFP.

GGRF's error in issuing a notice of award is what creates the confusion of whether the procurement is pre or post award, not ASC's actions that prompted the correction of the erroneous notice of award. As it stands, it appears from the record presented to date that GGRF has already predetermined Empower should be awarded the contract, outside of the sequence of events provided for in its RFP and the procurement law. Therefore, any potential award to Empower by GGRF is or will be in violation of Guam Law. Far from being premature, ASC's basis of protest prompted GGRF's correction of the erroneous August 16, 2023, notice of award is valid and timely. That GGRF corrected its mistake does not absolve GGRF of the consequences of its error. Rather, it confirms ASC's basis of protest and GGRF's improper and blatant predetermination that Empower will be awarded before the procurement process is complete. The Motion to Dismiss due to the confusion created by GGRF's admitted error must be denied.

### **III. The Incomplete Record Deprives the OPA of the Ability to Review this Matter.**

Even if the Public Auditor were intrigued by GGRF's inexplicable erroneous August 16, 2023, notice of award, nothing in the incomplete procurement record submitted by GGRF explains the error. The incomplete record therefore deprives and interferes with the Public Auditor conducting its review of this procurement as required by law.

Guam law mandates the complete procurement records of an agency must be maintained. See 5 G.C.A. § 5249. In the face of an appeal to the Public Auditor, that **entire** record must be submitted for the OPA to review. See 2 GARR § 12104(c)(3) (on receipt of a notice of appeal to the Public Auditor, the head of a purchasing agency "shall submit to the Public Auditor a *complete copy* of the procurement record relevant to the appeal within five (5) working days of receiving notice of an

Appeal” (*emphasis added*)). Complete and relevant procurement records are critical to understanding agency decision-making and processes, and this is why the incomplete record here, where GGRF admits an error in its procurement process, is a valid basis of protest. See Teleguam v. Guam, 2018 Guam 5 ¶ 40 (requiring an appealing party to show that missing procurement documents are material to a procurement, and holding material means those situations where review is thwarted by missing material related to the relief requested).

Importantly, where an agency wishes to shield portions of the record from public review during a procurement appeal, Guam law provides a process for the agency to invoke. See 2 GARR § 12106(c)(6) (“If the . . . Agency considers that the Appeal, the Procurement File, the Agency Report, or any other report or material submitted contains material which shall be withheld pursuant to law or regulation, a statement advising of this fact must be affixed to the front page of the document and the allegedly exempted information must be so identified wherever it appears”). Notably, GGRF is not excused from submitting a full and complete copy of the record under this procedure. Instead GGRF is required to mark portions they wish to be shielded from public view as confidential in accordance with 2 GARR § 12106(c)(6) and *submit the material* for the Public Auditor to review. GGRF’s Motion on this basis is therefore contrary to law. See GGRF Mot. Dismiss at pp. 3-4 (“That the complete record cannot be made public at this time only reiterates that ASC’s appeal is premature and must be dismissed).

The lack of a complete record here is a valid and material basis of protest since GGRF’s incomplete record fails to explain the erroneous notice of award issued to ASC on August 16, 2023, or the reasons why the procurement process was conducted in violation of law and the terms of the RFP, as laid out herein. Because ASC has raised a valid basis of protest related to the incomplete procurement record, GGRF’s Motion to Dismiss should be denied.

**IV. GGRF's Substitution of an Evaluator was and is Arbitrary.**

GGRF contends that “adding a member to an even number of members would create an odd number of members to resolve potential ranking ties” in defense of substituting an evaluation panel member using a process that is neither provided for in Guam law or the RFP. GGRF Mot. Dismiss at p. 7. As stated previously, GGRF does not offer citation to authority or to its RFP that shows GGRF is allowed to substitute an evaluator, or that GGRF was allowed to have the substitute evaluator review offeror’s proposals and audio-visual tapes of discussions and proposal presentations after the fact. GGRF also contends in this consolidated appeal that the substitute evaluator was given further opportunity to hold further discussions with offerors *if deemed necessary*. Neither GGRF nor any part of its procurement record articulates, *if deemed necessary by whom*. Perhaps most importantly, nothing in the record substantiates that GGRF was faced with a tied evaluation panel prior to the substitution occurring.

Had ASC received notice of the substitution, perhaps ASC would have deemed it necessary to make its presentation to the substitute, or to protest the substitution outright. However, GGRF did not inform ASC of the substitution. Additionally, nothing in the procurement record provided to date establishes that the substitute evaluator was (1) allowed to review the presentations or (2) allowed to have further discussions with ASC. At a minimum, this will require the evaluator to testify at a hearing as to the actions taken related to the substitution and review of the solicitation and proposals. This in and of itself militates in favor of an evidentiary hearing and against dismissal.

GGRF is mandated to act deliberately related to procurement and not take action that is erroneous, arbitrary, capricious or contrary to law. See e.g., D.F.S. Guam L.P. v. A.B. Won Pat Int'l Airport Auth., 2020 Guam 20 ¶ 45 n. 12. There is nothing in the record to suggest that GGRF considered its action in substituting an evaluator post presentation, including whether there was an

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impact on the procurement solicitation and whether notice should have been given to proposers that an evaluator was substituted after presentations were completed. GGRF could have proceeded without the retired evaluator, which would not have put one evaluator at a disadvantage of not having been present for ASC's presentation. Instead, GGRF arbitrarily substituted an individual who was unknown to proposers, not a member of GGRF management, and who did not attend ASC's presentation. GGRF's action in this regard violated the Guam Procurement law and the plain terms of its RFP. On its face, nothing in Guam law or the RFP allowed for substitution of an evaluator.

Thus, the Motion to Dismiss must be denied.

**V. The Open Government Law ("OGL") Violations were Timely Raised, and Void the GGRF Board Procurement Actions.**

**a. ASC protested within 14 days of when it knew selection panel Trustees participated in Board Action on the RFP in violation of the OGL.**

GGRF argues that ASC should have known that evaluation panel members would include GGRF Trustees since the RFP identified the Trustees and stated proposals may be evaluated by a panel consisting of Retirement Fund Management and Board of Trustees. GGRF Mot. Dismiss at pp. 4-6. GGRF argues ASC untimely raised this basis of protest since it therefore knew of GGRF Trustee participation in the selection panel more than 14 days before it filed its protest on this basis. GGRF misapprehends ASC's protest, the OGL and the procurement law.

Guam law unambiguously prohibits deliberation of public business during an informal or chance meeting of **two or more** GGRF Board members where public *business that will come before such Board* is discussed. 5 G.C.A. § 8105 ("No chance meeting, informal assemblage or electronic communication shall be used to decide or *deliberate* public business in circumvention of the spirit or requirements of this Chapter. . ." *(emphasis added)*). Actual GGRF action can only occur at a duly

noticed meeting in compliance with the OGL. See 5 G.C.A. § 8104 (defining “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 to deliberate toward a decision on any matter.”); see also, 5 G.C.A. §§ 8114-8114.1 (voiding action taken at any meeting in violation of the OGL).

ASC’s position is that the meeting of the Board where action is taken is consequential to the procurement, since the action taken related to the procurement is void for the OGL violation. That two or more members of the Board discussed Board business prior to taking action under the OGL entitles ASC to a remedy. To be clear, based on the GGRF’s September 5, 2023, disclosure of the procurement meetings and communications Logs, ASC suspected that GGRF Trustees were likely participating in greater Board Meetings related to the procurement and subject to the OGL, while simultaneously being involved in the procurement evaluation panel. ASC’s second procurement protest, which included this basis for protest was served on GGRF on September 14, 2023 – nine (9) days after the communications and meetings log were served on ASC in response to ASC’s first FOIA request.

The minutes for its July 28, 2023, meeting were not publicly available or provided to ASC until September 25, 2023, when GGRF responded to ASC’s second FOIA request. Indeed, that document shows for the first time the *violation* of the OGL complained of and that entitles ASC to the relief it seeks – voiding of the procurement action taken by the Board on July 28, 2023. The minutes confirm Board Vice Chairperson Antolina Leon Guerrero, who sat on the selection panel for the procurement *also* made the motion to approve the selection panel’s recommendation at the greater GGRF Board level. Thus, ASC’s suspicions of a *violation* of the OGL were confirmed by the production of the minutes of the July 28, 2023, meeting to ASC on September 25, 2023. ASC’s preemptive protest was therefore timely because ASC brought the protest within 14 days of both its suspicion and before the

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later *confirmation* of the procurement related violation of the law ASC complains of. See e.g., Guam Imaging Consultants v. GMHA, 2004 Guam 15 ¶ 28 (“there may be multiplate events in any given solicitation that could legitimately trigger protests”). ASC’s claim related to the Trustees at the evaluation panel level also *participating* in action at the Board level did not accrue until ASC *knew* of the participation at the Board level. ASC’s protest on this basis is therefore timely and the motion to dismiss on this basis should be denied.

*b. GGRF violated the OGL related to notice of its February 10 and July 28, 2023, Board Meetings. Therefore, its procurement-related Board actions are void.*

GGRF argues that the February 10 and July 28 Notice claims raised by ASC “do not involve the solicitation’s statute, regulations, terms and conditions.” GGRF Mot. Dismiss at 8-9. This is incorrect. The OGL is aligned with the purpose of the procurement law – to provide public confidence in public procurements and access to GGRF procurement procedures. GGRF also inserted its Board into its procurement process by having them extend, without lawful and required public notice, a contract “because the evaluations, negotiations and contracting under RFP No. GGRF 002-22 was ongoing and in progress.” OPA-PA-23-005, Notice of Appeal, Ex. F at p. 2 (Sept. 20, 2023). GGRF also subjected a procurement milestone, the alleged approval of the selection panel’s recommendation, to Board approval. Therefore, if the GGRF Board action directly related to the procurement is void, the OPA is well within its jurisdiction in considering the effect of the voided action on the procurement itself. Finding otherwise would insulate GGRF procurement-related conduct from review simply by the selective and convenient framing of the issue by GGRF.

Regarding the February 10, 2023, procurement action by the Board, there is no provision in Guam law that allowed GGRF to extend an expiring contract beyond the term in the existing contract originally solicited. ASC was prejudiced by GGRF’s circumvention of the procurement law and Open Government Law by this unnoticed and illegal extension because ASC had no ability to compete for

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the contract and no ability to protest the decision to extend the existing contract before that Board procurement 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, even on a short-term basis.

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 removing any incentive for GGRF to end negotiations and move onto the next qualified offeror – presumably ASC.

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. In addition to the OGL violation, this presents a clear conflict of interest that benefited Empower, and disadvantaged ASC.

GGRF unlawfully shielded its RFP-related illegal extension action, and important developments related to the RFP from the public and from ASC in violation of the OGL. The OGL renders the GGRF Board action to extend the contract void as the 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 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 as a necessity to the ongoing RFP procurement process.

Similarly, GGRF did not give OGL-compliant notice that it would take procurement-related action at its July 28, 2023, Board meeting. The GGRF Board Meeting Notice should have clearly stated that the selection panel’s recommendation related to the RFP would be discussed by the Board. See 5. G.C.A. §§ 8107 (requiring public agency meeting notices “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”); 8114.1 (voiding action taken at any meeting where notice and agenda detail requirements are not satisfied). Without OGL-compliant notice, the public and ASC were deprived of notice of GGRF’s anticipated procurement-related Board Action. This renders the action taken at the meeting – void, which would invalidate any succeeding procurement action by GGRF. 5 G.C.A. § 5141 cited *supra*.

Therefore, not only are the OGL claims valid bases of protest, but these claims also present plain violations of the OGL that void GGRF board action related to the procurement at issue and create an impediment to any award and contract related to the RFP. Thus, GGRF’s Motion to Dismiss must be denied.

**CONCLUSION**

Based on the foregoing, as well as for those reasons set forth in the Notices of Appeal and Comments on Agency Reports in OPA-PA-23-006 and OPA-PA-23-005, ASC requests that the OPA deny GGRF’s November 27, 2023, Motion to Dismiss.

Respectfully stipulated this 4<sup>th</sup> day of December 2023.

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