

CARLSMITH BALL LLP

ELYZE J. McDONALD  
*emcdonald@carlsmith.com*  
MARIA TERESA B. CENZON  
*mcenzon@carlsmith.com*  
134 West Soledad Ave  
Bank of Hawaii Bldg., Suite 401  
Hagåtña, Guam 96910  
Telephone No. 671.472.6813  
Facsimile No. 671.477.4375

Attorneys for Purchasing Agency  
Government of Guam Retirement Fund

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OFFICE OF PUBLIC ACCOUNTABILITY - GUAM

IN THE APPEAL OF  
ASC TRUST CORPORATION,  
  
Appellant.

APPEAL NO. OPA-PA-09-010

**AGENCY REBUTTAL TO  
APPELLANT'S COMMENTS ON  
AGENCY REPORT**

**I. INTRODUCTION**

The Government of Guam Retirement Fund (the "Fund" or "GGRF" as the Purchasing Agency) submits this Agency Rebuttal pursuant to §12104(c)(4) of the OPA's Rules of Procedure in response to the Comments on Agency Report filed by Appellant ASC Trust Corporation ("ASC") on November 20, 2009.

As the Fund pointed out in its Agency Statement, ASC "knew or should have known" of the facts giving rise to its right to protest and appeal the agency's action in the first instance on May 7, 2007, and, alternatively, on May 11, 2007 or July 6, 2007.<sup>1</sup> ASC admits that it "had long

<sup>1</sup> Agency Statement at pp. 11-12.

known” that it was not rated the best qualified offeror by the Fund’s selection panel.<sup>2</sup> ASC claims, however, that it became aware of “the facts...related to the evaluation and scoring of its proposal ... on October 6, 2009.”<sup>3</sup> ASC’s knowledge of its rank relative to Great-West Retirement Services (“GWRS”), the higher ranking offeror who filed a protest with the OPA in 2007, combined with the public disclosure of GWRS’ pricing, created the particular circumstances by which ASC then should have challenged the Fund’s overall rankings and evaluations leading to GWRS’ ranking as the best qualified offeror.

To excuse its untimeliness, ASC argues that the basis of its protest is not the fact that ASC was not initially deemed the best qualified offeror, but that one of the evaluators had acted arbitrarily and capriciously in rating ASC lower than GWRS despite GWRS’s higher price, and that “it suggests intentional and deliberate manipulation of the evaluation criteria to favor GWRS (or disfavor ASC) to the detriment of the Fund and its members.”<sup>4</sup> ASC emphasizes that the “focus” of its protest is “solely on the objective criterium of price, under the only possible rational assumption that a lower price proposal would be given a higher rating score than a higher price proposal.”<sup>5</sup> Under the facts and circumstances, ASC’s appeal is unsupported in fact and law. As such, the Fund reiterates its position that ASC’s appeal should be denied.

## **II. REBUTTAL OF APPELLANT’S COMMENTS**

### **A. ASC Knew of Grounds for Protest During GWRS Protest in 2007.**

Contrary to ASC’s assertion that it only became aware of the facts upon which its protest is based on October 6, 2009, ASC actually became aware of such facts during GWRS’ protest and appeal in 2007. A key element in GWRS’s protest involved the pricing proposal submitted

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<sup>2</sup> Id.

<sup>3</sup> Appellant’s Comments on Agency Report at p. 2.

<sup>4</sup> Appellant’s Comments at p. 3. See also, *Notice of Protest of Award of Contract*, Letter from William Blair, Esq., to Paula M. Blas dated October 15, 2009 at p. 3, ¶ 4 (“Notice of Protest”).

<sup>5</sup> Notice of Protest at p. 3, fn. 5 (Emphasis added).

by GWRS. The Fund's position (as stated in its Agency Report) was that GWRS's proposal was unresponsive:

[N]o option under Great-West's proposal addressed all four items concurrently as requested. Great-West submitted two pricing options. Pricing Option One did not meet any of the four items requested as it included a fee to participant accounts, did not remit 12(b)(1) fees to GGRF, and stated a fixed fee. [See Tab #6 of Procurement Record]. Although Pricing Option Two did propose a zero fee to participant accounts, it conditioned this not only on not remitting 12(b)(1) fees, but also required GGRF or its plan participants to make up any short fall in one of several listed ways, including charging participant accounts. *Id.*

(Citations to the record added.) Specifically, during the negotiation phase of the procurement, the Fund sought confirmation of the following pricing data:

1. the independent custodian selected to provide trust services, preferably a local trust company;
2. that no fees would be assessed to participant account balances;
3. that Great-West's fee would be .25% of the total assets; and
4. that all re-allowances and rebates of 12b-1 fees received from investment option managers would be remitted to GGRF.<sup>6</sup>

In response to the request, GWRS sent a letter that the Fund then deemed non-responsive, identifying the shortcomings as follows:

The letter [from GWRS] did not sufficiently address any of the four (4) items requested by GGRF. The letter did not confirm an independent custodian licensed in Guam to provide the services; *it did not specifically address the fees for participant account balances under "Option 1" of its proposals: it simply re-stated its prior offer of fees at .27%-.33%, basing such fees on assumptions that were not part of its original proposal*; and it did not indicate remittance of re-allowances and 12b-1 fee rebates to GGRF.<sup>7</sup>

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<sup>6</sup> Agency Report filed on July 6, 2007 in the Office of the Public Auditor, Docket No. OPA-PA-07-006, p. 2 (Emphasis added)..

<sup>7</sup> *Id.* at pp. 2-3. (Emphasis added).

ASC thus was made aware of GWRS' pricing offer on July 6, 2007 when the Agency Report was filed and then served upon ASC's counsel at the time, the Law Offices of Arriola, Cowan, Arriola. (See Agency Report filed on July 6, 2007, in the Office of the Public Auditor, Docket No. OPA-PA-07-006, attached as Exhibit 2 to the Fund's Agency Statement at Tab A of the Agency Report filed in this instant matter on November 17, 2009).

ASC contends that, by taking the position that it should have filed a protest in 2007, the Fund is encouraging "knee-jerk" and "frivolous" protests and fishing expeditions to determine if any basis for the protest exist. However, in this particular instance, by July 6, 2007 at the latest, when the Fund filed its Agency Report and served the same on ASC's counsel,<sup>8</sup> ASC knew or should have known of the pricing proposal submitted by GWRS and had the means to compare GWRS' pricing with its own pricing -- submitted to the Fund in ASC's proposal. This information was sufficient to alert ASC to consider challenging the Fund's evaluations and rankings leading to the selection of the best qualified offeror, given that pricing counted for 40% of the factors being evaluated.<sup>9</sup> The contention made in ASC's Notice of Protest of Award of Contract (the "Notice of Protest")<sup>10</sup> is the same contention that ASC could have made in 2007, but did not. In fact, ASC's Notice of Protest refers to the Fund's Agency Report in OPA Docket No. OPA-PA-07-006, which ASC had in its possession since July 6, 2007.

ASC could have timely protested in 2007, at which time it also could have requested information regarding the evaluations leading to the rankings. As an offeror under the RFP, rather than a member of the public seeking information pursuant to a Freedom of Information

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<sup>8</sup> Exhibit 2 to Agency Statement submitted to OPA on November 17, 2009 (Agency Report in OPA Docket No. OPA-PA-07-006, *In the Appeal of Great-West Retirement Services* at p. 5) (7/6/07)).

<sup>9</sup> RFP. Section VI.C.10., p. 29, Procurement Record at Tab 1.

<sup>10</sup> Notice of Protest of Award of Contract dated October 15, 2009, submitted to GGRF on October 15, 2009, Exhibit 1 to ASC's Notice of Appeal, p. 3, ¶3 and fn. 3. ASC has had the Fund's Agency Report in OPA Docket No. OPA-PA-07-006, since July 6, 2007.

Act (“FOIA”) request, ASC would have been entitled to certain information (albeit redacted as necessary) in the evaluation sheets that would have allowed it to determine whether to proceed in a protest. There is nothing to suggest that the Fund would have denied ASC the relevant, non-proprietary, non-confidential information in the evaluation sheets. On the contrary, as discussed in the Fund’s Agency Statement at page 9, Section 9101(f) of the Procurement Regulations (2 G.A.R. Div. 4 §9101(f)) mandates that the Fund “upon written request make available to any interested party information submitted that bears on the substance of the protest except where information is proprietary, confidential or otherwise permitted or required to be withheld by law or regulation.”

The particular evaluation sheets at issue in this case did not contain any pricing or other confidential information that would appear to have precluded its release to ASC if it only thought to ask for them in 2007, nor is the OPA’s Decision and Order Re Purchasing Agency’s Motion for Protective Order in OPA Appeal No. OPA-PA-09-007 *In the Appeal of Guam Education Financing Foundation, Inc.*, cited to by ASC, relevant in this regard.

The OPA’s Decision and Order in *Guam Education Financing Foundation* addresses exceptions to disclosure: *proposals* (“proposals shall not be opened publicly nor disclosed to *unauthorized persons*” (emphasis added)) and *information contained in proposals* (“the Purchasing Agency is prohibited from disclosing any information contained in any of the proposals until after an award of the contract is made...”). In the instant case, ASC became aware of GWRS’ pricing proposal as a result of GWRS’ appeal. ASC did not need to see GWRS’s proposal because GWRS’ pricing component was already disclosed as part of GWRS’ protest. The public disclosure of GWRS’ pricing proposal, combined with ASC’s knowledge of its own pricing offer, should have been sufficient to cause ASC to consider whether its second place ranking as best qualified offeror was properly determined (which it was). ASC failed to

challenge the rankings at that point and did not attempt to seek information (the evaluation sheets) in a timely fashion. The Decision and Order in *Guam Education Financing Foundation* does not discuss the disclosure of evaluation sheets – documents *not* contained in a proposal – to an interested person such as ASC pursuant to Section 9109(f) of the Procurement Regulations. It is, therefore, misapplied. Quite simply stated, ASC has propounded no support for its contention that it would have been denied access to the relevant portions of the evaluation sheets in 2007. Any contention that ASC would not have been given the relevant portions of the evaluation sheets is pure speculation because *it did not even ask for them in 2007*.

Based on the information disclosed and which ASC could have received if only it had requested it, ASC could have timely asserted its claims that it was unfairly evaluated in 2007. Instead, it chose to bring its protest years after it already knew of the Fund's initial rankings and after a contract had already been executed.

B. ASC Cannot Satisfy its Burden of Proof that Evaluation Was Skewed Against It.

As for ASC's allegations of impropriety by an evaluator based on ASC receiving a lower ranking than GWRS "suggest[ing] intentional and deliberate manipulation of the evaluation criteria to favor GWRS (or disfavor ASC)", ASC has proffered nothing more than mere speculation and conjecture. In this regard, the Comptroller General has ruled that where a protester alleges an intention to preclude the protester from receiving the award, the protester must submit "virtually irrefutable proof that contracting officials had a specific and malicious intent to harm the protester, since contracting officials are presumed to act in good faith." *Matter of Microtonics, Inc.*, 1988 WL 2277188 at p. \*3 (Comp. Gen. 1988). ASC has proffered nothing more than pure speculation with regard to allegations of impropriety on the part of the evaluator. The alleged impropriety concerns an evaluation in which ASC's pricing proposal, in comparison to GWRS's pricing proposal, received different treatment by the three members of the Selection

Panel. One evaluator scored ASC and GWRS the same 5 points each. Another evaluator scored ASC higher, 9 points to GWRS' 5 points. The final evaluator scored ASC lower, 5 points to GWRS' 9 points. The final evaluator's score sheets included written comments about ASC's pricing ("concerns w/ methodology") and about GWRS' pricing ("got one price ↑ but good disclosure opt. 2 – NO"). (Tab #7 of the Procurement Record ("P.R.") filed with the OPA on November 9, 2009). Given the diversity of scores among all three offerors by members of the selection panel, the similarity of absolute scores (GWRS receiving 5's from two members; ASC receiving 5s from two members), and the written comments explaining the rationale for the scores, ASC has failed to show intentional and deliberate manipulation of the evaluation criteria to favor GWRS and disfavor ASC. Importantly, ASC fails to offer virtually irrefutable proof that selection panel members had a specific and malicious intent to harm ASC. The presumption that contracting officials act and have acted in good faith has not been sufficiently rebutted by ASC, below in its protest, and here on appeal to the OPA.

### **III. CONCLUSION**

ASC waxes poetic about the integrity of the procurement process and propounds support for the government getting "the most value for their dollars." However, over the roar of this soapbox diatribe, ASC's shortcoming is clear – it simply did not participate in the procurement process properly and, ironically, is now causing the Fund to expend government dollars to defend against claims that should have been made timely but which are now time barred. ASC had full control of events leading to its untimeliness, and the Fund was not responsible for hindering disclosure of information to ASC.

Under the circumstances, ASC knew or should have known of the facts which form the basis of its protest. Instead, ASC chose instead to allow the Fund to proceed in the procurement, hoping that it would not have to expend any of its funds in the pursuit of an award of the RFP.

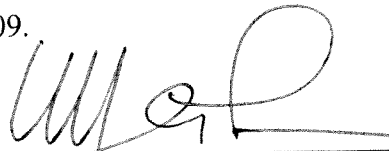
Only now, years after it already knew of the evaluation factors and after an award of the contract had been made, does it seek to enforce its rights – at the unnecessary expense of the Purchasing Agency. It should not be allowed to do so in such an untimely fashion. To allow ASC to prevail in this appeal would not only be contrary to the facts and the law relevant hereto, but would open the floodgates to more untimely protests. Despite ASC’s theory that a “premature” bid protest would lead to a “fishing expedition,” the simple fact is that the Guam Procurement Laws allows for protests to be filed “at any state of procurement”<sup>11</sup> – arguably to prevent the expenditure of public funds in addressing procurement protests which are brought *after* award, leading to unnecessary expenses in the form of direct costs to defend a protest and appeal, and wasted expenditures incurred in reaching contract with offerors who might be unworthy of selection for negotiations.

Even if the OPA allows the untimely protest and considers ASC’s claims that the evaluation was skewed in favor of GWRS or against ASC, this claim is unsupported by any fact or credible evidence. Mere speculation, particularly three years after the fact, is insufficient to now invalidate a properly procured contract.

For all of the foregoing reasons and the reasons described in the Agency Statement, the Fund submits that ASC’s Appeal should be denied.

DATED: Hagåtña, Guam, November 30, 2009.

CARLSMITH BALL LLP



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MARIA TERESA B. CENZON  
ELYZE J. MCDONALD  
Attorneys for Purchasing Agency  
Government of Guam Retirement Fund

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<sup>11</sup> 2 G.A.R. Div. 4. §9101(c)(2)(“Protestors may file a protest *on any phase of solicitation or award* including, but not limited to, specifications preparation, bid solicitation, award, or disclosure of information marked confidential in the bid or offer.”) (Emphasis added).