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DATE: 12/25/09 TIME 4:37 p.m.

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Attorneys for Petitioner, ASC Trust Corporation

IN THE SUPERIOR COURT OF GUAM

ASC TRUST CORPORATION,

Petitioner,

v.

GOVERNMENT OF GUAM
RETIREMENT FUND AND PAULA M.
BLAS, IN HER CAPACITY AS
DIRECTOR OF THE GOVERNMENT OF
GUAM RETIREMENT FUND,

Respondents.

) SPECIAL PROCEEDING
) CASE NO. **SP 0193-09**

) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **PETITION FOR WRIT OF**
) **MANDATE**

This Memorandum of Points and Authorities is submitted in support Petitioner **ASC TRUST CORPORATION'S** ("ASC's") verified Petition for Writ of Mandate filed concurrently herewith (the "Petition").

THE LAW

Under the Sunshine Reform Act of 1999, Chapter 10 of Title 5 of the Guam Code Annotated (the "Act"), every person has the right to inspect and take a copy of any public document on Guam, except as otherwise prohibited by law or except as prohibited by 5 GCA 10108. 5 GCA 10103(a). "Public records" includes "any writing containing information related to the conduct of the

1 public's business prepared, owned, used or retained by any
2 [government agency]..." 5 GCA 10102(d).

3 Public access to information is a fundamental right of
4 citizens and denial of that information is not acceptable in the
5 government of Guam. Guam Public Law 25-06, Section 1.

6 The Act reflects a public policy favoring general disclosure
7 in recognition of the public's interest in open government. *Guam*
8 *Publications, Inc. v. Government of Guam Retirement Fund*, 1999
9 *Guam 29* (construing the Sunshine Act of 1987), at *10. In
10 keeping with this general policy favoring disclosure, all
11 government records are presumed to be public and the burden of
12 establishing that a document or record is private is on the
13 agency or person claiming that the document should not be
14 disclosed. 5 GCA 10111(c).

15 Unless a document or record is exempt from disclosure by an
16 express provision of law, an agency is obligated promptly to make
17 available a copy upon receipt of a request that reasonably
18 describes the document or record. 5 GCA 10103(c). Exemptions
19 are to be narrowly construed. *Maricopa Audobon Society v. U.S.*
20 *Forest Service*, 108 F.3d 1082, 1085, (9th Cir. 1997) (federal FOIA
21 mandates a policy of broad disclosure; exceptions must be
22 narrowly construed in light of Act's dominant objective of
23 disclosure).

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1 To ensure expedient disclosure of records by an agency, the
2 director of such agency must immediately notify the director or
3 the director's designee of the receipt of a request for a
4 document and immediately assign the request to be fulfilled or
5 responded to by an employee of the agency. 5 GCA 10105(a), (b).

6 The purpose for which the request for a document or record
7 is made is irrelevant. 5 GCA 10110.

8 Any person may institute proceedings in this Court to seek a
9 writ of mandate or declaratory relief to enforce that person's
10 right under the Act to obtain a copy of a public document or
11 record. 5 GCA 10111(b).

12
13 **THE FACTS**

14 Petitioner has twice requested from the Government of Guam
15 Retirement Fund (the "Fund") a copy of the evaluation sheets
16 reflecting the scoring by a panel of evaluators of a proposal
17 submitted to the Fund by Petitioner in response to RFP No. GGRF-
18 028-06. The evaluation sheets are documents produced by or for
19 the Fund and they contain information related to the conduct of
20 the public's business.

21 Respondent Paula M. Blas ("Blas") is the Director of the
22 Fund and, as such, has the statutory duty to provide copies of
23 the requested documents, unless they are exempt from disclosure
24 under some express provision of law.

25 Blas has twice, the first time directly and the second time
26 through counsel, refused to produce the requested documents. In
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1 each instance, Blas has asserted that the requested documents are
2 exempt from disclosure under a regulation promulgated under the
3 procurement law of Guam. The regulation upon which Blas appears
4 to have solely relied is 2 GAR, Div. 4, Section 3114(h) (the last
5 sentence).¹ That regulation states, in pertinent part,
6 "Proposals of offerors who are not awarded the contract shall not
7 be opened to public inspection."
8

9 ASC was not awarded the subject contract. Blas' position is
10 that the requested evaluation sheets "necessarily reflect
11 information contained in [ASC's proposal]." Letter of Elyze
12 McDonald, dated September 29, 2009, Ex. D to the Petition, p. 1.
13 Thus, "like proposals," the evaluation sheets "fall under the
14 umbrella of 'confidential documents or other information
15 expressly protected under the law'..." from disclosure. *Id.*
16

17 **ARGUMENT**

18 Director Blas' position is utterly specious. As is made
19 plainly evident by the evaluation sheets of the proposer which
20 was awarded the subject contract (attachment to Ex. B to
21 Petition), the evaluation sheets reveal absolutely no details of
22 the winning proposal (or, it must be assumed, the losing
23 proposals). The evaluation sheets are not "like proposals."
24 They list only the evaluation criteria that were set forth in the
25

26 ¹ The September 29, 2009 letter from the Fund's legal counsel does not refer
27 to this regulation, but rather cites to the "corollary" of 2 GAR, Div. 4,
3114(i) for the same proposition.

1 RFP documents, the relative weight given to the evaluation
2 criteria (also set forth in the RFP documents) and the numerical
3 scores awarded by the three evaluators. No information
4 whatsoever relating to the specifics of the winning proposal can
5 be divined from the evaluation sheets. This is directly contrary
6 to and wholly refutes Blas' assertion that the evaluation sheets
7 "reflect information" contained in the proposal.
8

9 For example, evaluation criterium no. 1 is "the plan for
10 performing the required services." Nothing on the evaluation
11 sheets describes the proposer's plan in any way. Nothing is
12 revealed. Nothing is "reflected." Nothing at all about the plan
13 can be gleaned or determined from the evaluation sheets. To
14 claim otherwise is wholly capricious.
15

16 Under 5 GCA 10111(c), it is presumed that the evaluation
17 sheets are public documents, and it is the burden of Blas and the
18 Fund to overcome that presumption. This they cannot possibly do.
19 The exemption from disclosure on which Blas relies must be
20 narrowly construed, not arbitrarily stretched, as Blas has
21 attempted to do.
22

23 CONCLUSION

24 For these simple and obvious reasons, the Court should issue
25 its alternative writ requiring the Director to produce the
26 //

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28

1 requested documents or show cause why she should not.² Further,
2 the Court should award Petitioner its court costs and reasonable
3 attorney's fees for having been required to jump through these
4 wholly unnecessary legal hoops.

5 DATED this 31st day of October, 2009.

6
7
8 **BLAIR STERLING JOHNSON**
MARTINEZ & LEON GUERRERO
9 A PROFESSIONAL CORPORATION

10
11 BY: William J. Blair
12 **WILLIAM J. BLAIR**
Attorneys for Petitioner, ASC Trust Corporation

13 G62\03079-01
14 G:\WORDDOC\PLD\WJB\165-MEMO OF P&A IN SUPP OF PETITION
15 FOR WRIT OF MANDATE RE ASC TRUST CORP V GGRF ET AL.DOC
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27 ² The requested documents would presumably be the same evaluation sheets that
28 Blas has already produced, except that the scores of Petitioner would not be
redacted. Petitioner is not requesting to see the scores of the other non-
winning proposer, only its own.

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A LIMITED LIABILITY LAW PARTNERSHIP

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OUR REFERENCE NO.:
039415-3

September 29, 2009

VIA E-MAIL WJBLAIR@KBSJLAW.COM

William Blair
BLAIR STERLING JOHNSON
MARTINEZ & LEON GUERRERO
A Professional Corporation
Suite 1008 DNA Building
238 Archbishop F.C. Flores Street
Hagåtña, Guam 96910-5205

Re: Response to ASC's FOIA Request

Dear Mr. Blair:

As legal counsel to the Government of Guam Retirement Fund, I am responding to your September 21, 2009 letter to Retirement Fund Director Paula Blas, in which you, on behalf of your client, ASC, requested information under the Freedom of Information Act related to RFP No. GGRF-028-06 (the "RFP"). ASC was one of the offerors submitting a proposal in response to the RFP.

Under the Freedom of Information Act, the Retirement Fund considers ASC's request as it would consider a similar request made by any other member of the public. Members of the public may not access confidential records or other information expressly protected by law. 5 G.C.A. § 10108(i). In determining what constitutes a "confidential record or other information expressly protected under the law" the procurement regulations provide that "the agency conducting the procurement shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be opened to public inspection except as otherwise provided in the contract." 2 GAR Div. 4 § 3114(i). The corollary to this regulation is that the proposals of offerors who were not awarded a contract may not be opened to the public, and therefore, remain confidential.

The Retirement Fund's position under the Freedom of Information Act is that the evaluation sheets of offerors' proposals necessarily reflect information contained in the proposals, and therefore, like proposals, would fall under the umbrella of "confidential documents or other information expressly protected under the law" protected from disclosure to

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William Blair
September 29, 2009
Page 2

members of the public under sections 10108(i) and 3114(i). If the information would not be disclosed to the public under the Freedom of Information Act, it would not be disclosed to ASC.

ASC's status as one of the offerors submitting a proposal to the RFP does not confer it any greater rights than a member of the public would have under the Freedom of Information Act. It is important to the Retirement Fund to take this position with all requests under the Freedom of Information Act. If you have any further questions, please do not hesitate to contact me.

Sincerely,

/s/ Elyze J. McDonald

4824-9397-1972.1.039415-00003

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OUR REFERENCE NO.:
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October 6, 2009

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10-06-09

RECEIVED
HD 430 p. RMT
OCT 06 2009

BLAIR
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LEON

STERLING JOHNSON
GUERRERO

Re: Response to ASC's Revised Request for Evaluation Sheets

Dear Mr. Blair:

This responds to your October 6, 2009 email in which you request, on behalf of ASC, to inspect the sheets reflecting the Government of Guam Retirement Fund's evaluations of ASC's proposal for RFP No. GGRF-028-06.

As I noted in my previous correspondence to you, GGRF firmly contends that under the Freedom of Information Act, no member of the public, including ASC, is entitled to see these evaluations. This is explicit in 2 GAR Div. 4 § 3114(i),¹ discussed in my previous letter.

ASC's prior FOIA requests were deficient in that respect, a point which we attempted to convey in our previous correspondence. However, as ASC has now requested the evaluations in its capacity as an offeror, GGRF will provide the requested information.

With the understanding that ASC has asked for these documents in its capacity as an offeror, and with the understanding that ASC will withdraw its Petition for Writ of Mandate, I hereby enclose the evaluation sheets requested. Please forward to my office the dismissal papers for the Petition at your earliest convenience, and contact me if you have further questions.

¹ "[T]he agency conducting the procurement shall not disclose any information contained in any proposals until after award of the proposed contract has been made. The proposal of the offeror awarded the contract shall be opened to public inspection except as otherwise provided in the contract." (Emphasis added.)

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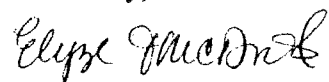
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COPY

William Blair
October 6, 2009
Page 2

Sincerely,

A handwritten signature in cursive script that reads "Elyze McDonald".

Elyze J. McDonald

cc: Paula M. Blas

4839-0103-5524.1.039415-00003

RFP NO. GGRF-028-06: INVESTMENT MANAGEMENT AND PLAN ADMINISTRATION SERVICES
 related to the 401(a) Defined Contribution Plan / 457 Deferred Compensation Plan and Welfare Benefit Plan
SUMMARY

Evaluator	GWRS	ASC
J.T. San Agustin	7.37	7.31
G. Cruz	6.35	8.76
K.T.E. Taitano	8.70	5.57
TOTAL:	22.42	21.64

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval.

JOE T. SAN AGUSTIN

Date: 7-Feb-07

1.	EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWRS			ASC		
			pls.	Total	Total	pls.	Total	
1.	The plan for performing the required services.	0.15	9	1.35	9	1.35		
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15	10	1.50	10	1.50		
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15	8	1.20	8	1.20		
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10	8	0.80	8	0.80		
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10	9	0.90	9	0.90		
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10	10	1.00	10	1.00		
7.	Educational resources and ability to provide ongoing training.	0.10	9	0.90	9	0.90		
8.	Record of past performance of similar work.	0.10	9	0.90	9	0.90		
9.	Other Factors	0.05	8	0.40	8	0.40		
	TECHNICAL - TOTAL POINTS POSSIBLE:	1.00		8.95		8.95		
10.	Technical Factors	0.60	0.00	0.00	8.95	5.37	8.85	5.31
	Price	0.40	0.00	0.00	5	2.00	5	2.00
	OVERALL SCORE:	1.00	0.00	0.00	7.37			7.31

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval.

GERRY A. CRUZ

Date: 7-Feb-07

1.	EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWRS			ASC		
			pts.	Total	pls.	Total	pts.	Total
1.	The plan for performing the required services.	0.15		0.00	8	1.20	8	1.20
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15		0.00	4	0.60	8	1.20
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15		0.00	8	1.20	9	1.35
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10		0.00	7	0.70	9	0.90
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10		0.00	9	0.90	9	0.90
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10		0.00	6	0.60	9	0.90
7.	Educational resources and ability to provide ongoing training.	0.10		0.00	8	0.80	8	0.80
8.	Record of past performance of similar work.	0.10		0.00	8	0.80	9	0.90
9.	Other Factors	0.05		0.00	9	0.45	9	0.45
TECHNICAL - TOTAL POINTS POSSIBLE:		1.00		0.00		7.25		8.60
10.	Technical Price	0.60	0.00	0.00	7.25	4.35	8.60	5.16
OVERALL SCORE:		1.00	0.00	0.00	5	2.00	9	3.60
						6.35		8.76

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval.

KATHERINE T.E. TAITANO

Date: 7-Feb-07

1.	EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWRS			ASC		
			pts.	Total	Total	pts.	Total	Total
1.	The plan for performing the required services.	0.15	8	1.20	5	0.75		
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15	9	1.35	6	0.90		
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15	9	1.35	6	0.90		
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10	10	1.00	6	0.60		
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10	9	0.90	6	0.60		
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10	8	0.80	7	0.70		
7.	Educational resources and ability to provide ongoing training.	0.10	7	0.70	7	0.70		
8.	Record of past performance of similar work.	0.10	8	0.80	5	0.50		
9.	Other Factors	0.05	8	0.40	6	0.30		
	TECHNICAL - TOTAL POINTS POSSIBLE:	1.00		8.50		5.95		
10.	Technical	0.60	0.00	0.00	8.50	5.10	5.95	3.57
	Price	0.40	0.00	0.00	9	3.60	5	2.00
	OVERALL SCORE:	1.00	0.00	0.00	8.70	8.70		5.57

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DATE: 10/08/09 TIME: 9:27 AM

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Attorneys for Petitioner, ASC Trust Corporation

2009 OCT -8 AM 9:10

CLERK OF COURT

FILE

IN THE SUPERIOR COURT

ASC TRUST CORPORATION,
Petitioner,

) SPECIAL
) CASE

10-07-09

v.

GOVERNMENT OF GUAM
RETIREMENT FUND AND PAULA M.
BLAS, IN HER CAPACITY AS
DIRECTOR OF THE GOVERNMENT OF
GUAM RETIREMENT FUND,

NOTICE OF DISMISSAL

Respondents.

PLEASE TAKE NOTICE that the above-entitled action is hereby dismissed, pursuant to Rule 41(a)(1)(i) of the Rules of Civil Procedure.

DATED this 7th day of October, 2009.

BLAIR STERLING JOHNSON
MARTINEZ & LEON GUERRERO
A PROFESSIONAL CORPORATION

BY William J. Blair
WILLIAM J. BLAIR

Attorneys for Petitioner, ASC Trust Corporation

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Superior Court of Guam Dated at Hagatna, Guam

G62\03079-01
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RE ASC TRUST CORP V GGRF ET AL.DOC

OCT 08 2009

Benny O. Cruz
Clerk of Court

61

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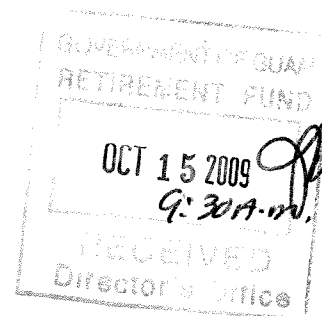
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October 15, 2009

VIA HAND DELIVERY

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RETIREMENT FUND
424 Route 8
Maite, Guam 96910



**RE: RFP #GGRF-028-06
NOTICE OF PROTEST OF AWARD OF CONTRACT**

Dear Ms. Blas:

This firm represents ASC Trust Corporation ("ASC").

Notice of Protest

Pursuant to 5 GCA 5425(a), ASC hereby protests the award to Great-West Retirement Services ("GWRS") of the contract to provide Investment Management and Plan Administration Services related to 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan pursuant to the above-referenced request for proposals (the "Contract").¹

Timeliness of Protest

Notice of the award of the Contract to GWRS was sent to ASC on August 21, 2009. The information on which this protest is based was not, however, provided to ASC by the

¹ Specifically, the Contract is that certain Investment Management and Plan Administration Services Agreement, dated effective August 21, 2009, by and between the Board of Trustees and the Fund and Great-West Life and Annuity Insurance Company.

To Paula M. Blas

Date October 15, 2009

Page 2

Fund until October 6, 2009, despite ASC's several earlier efforts to obtain it. A protest must be filed within 14 days of when the aggrieved bidder knows or should know of the facts giving rise to the protest. 5 GCA 5425(a). Thus, ASC had until October 20, 2009 to file a protest.

Grounds for Protest

1. In response to the above-referenced RFP, ASC submitted a proposal to the Fund in November, 2006.

2. The RFP documents set forth the evaluation criteria that were to be used in evaluating proposals and the relative weight those criteria would be given. According to the RFP, the price to be charged for the services to be rendered was one of the factors to be evaluated and it was assigned a weight of 40% of the total evaluation score. Under the applicable procurement regulations, the evaluation factors stated in the RFP were the only permissible basis for evaluating the proposals. 2 GAR, Division 4, section 3114(f)(2). Specifically, the RFP stated:

Based on the [technical] factors above, the proposals will be initially evaluated. Then the price proposals will be opened and the price proposals will be incorporated into the evaluation effort. The price proposal will count for 40% of this evaluation and the technical merits will count for 60% of this evaluation. Based on the combination of the scores assigned from the technical merit and pricing, the GGRF will enter into negotiations with the company with the highest combined score. If these negotiations do not result in a successful contract, then the GGRF will enter into negotiations with the next highest ranked company.²

² RFP, Section VI.C.10., p. 29.

To Paula M. Blas

Date October 15, 2009

Page 3

3. The price offered by ASC to perform the services required under the Contract was substantially lower than that initially offered by GWRS. The Fund essentially conceded this fact in its Agency Report filed in connection with GWRS' bid protest appeal to the Office of the Public Auditor.³

4. Despite the fact that ASC's proposed pricing was substantially lower than that initially proposed by GWRS, one of the three members of the Fund's evaluation team gave ASC a lower evaluation score for its pricing proposal. Specifically, this evaluator gave ASC a numerical rating of 5 for its lower price and gave GWRS a numerical rating of 9 for its substantially higher price.⁴ There was no rational basis for these ratings. Giving ASC a lower rating for a lower, more favorable price was necessarily arbitrary and capricious. Indeed, 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.⁵ It goes without saying that a lower price should have resulted in a higher rating.

³ See Agency Report, filed July 6, 2007, in Docket No. OPA-PA-07-007, p. 6 (asserting that GWRS was a "qualified, but over-priced competitor" and claiming that the Fund's determination that GWRS' reduced price offer was not fair and reasonable was not arbitrary and capricious when that price offer was compared to "the bids and pricing from the pool of other offerors"). The "pool" included ASC.

⁴ See summary evaluation sheets and summary of results attached as Exhibit A. These documents were provided to ASC on October 6, 2009, and the information revealed by them forms the factual basis for this protest. Although ASC had ample reason to believe its price proposal was more favorable than that of GWRS, until it received the individual evaluation sheets it had no reason to believe it was given a lower score than GWRS on this evaluation criterium. To the contrary, ASC had to assume it received lower evaluation scores on the technical criteria and that such lower scores offset the presumed advantage it had on pricing.

⁵ ASC believes the scores given to it by the same evaluator on the technical criteria also demonstrate a bias either in favor of GWRS or against ASC, but that is not a basis for this protest. ASC focuses 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.

To Paula M. Blas

Date October 15, 2009

Page 4

5. The total combined score given to ASC by the three evaluators was 21.64. See Exhibit A. The total combined score for GWRS was 22.42. Based solely on the 0.78 point difference between the two combined scores, GWRS was deemed the best qualified to provide the required services and the Fund entered into negotiations with it, which negotiations eventually led to the award of the Contract.

6. The 5 rating given to ASC on its price proposal by the one evaluator resulted in a score of 2.00 on the price criterium ($5 \times .40$). The 9 rating given to GWRS by the same evaluator on its higher price resulted in a score of 3.60 ($9 \times .40$). The resulting impact on the difference between ASC's total combined evaluation score and that of GWRS was thus 1.60 ($3.60 - 2.00$), which was more than the 0.78 difference between ASC's and GWRS' combined scores. The irrational scoring by this one evaluator thus changed the result. If the evaluator had fairly and rationally applied the price evaluation criterium, ASC would have been given a higher score than GWRS for its price proposal, not lower. It would have then been determined to be best qualified to provide the required services, not GWRS, and the Fund would have negotiated first with ASC, not GWRS.

7. Back in 2007, when the Fund terminated negotiations with GWRS because its pricing was considered not fair and reasonable, the Fund commenced negotiations with ASC as the next most qualified proponent. The Fund proposed pricing terms to ASC which ASC said it would accept. It is only fair to assume that, but for the outcome of GWRS' bid protest appeal, the Contract would have been awarded to ASC.

Summary

As the Fund's attorneys themselves once stated in connection with the prior bid protest relating to this very same procurement, "[t]he procurement process itself is designed to encourage fair competition among providers so that the Government of Guam can get the most value for its

To Paula M. Blas

Date October 15, 2009

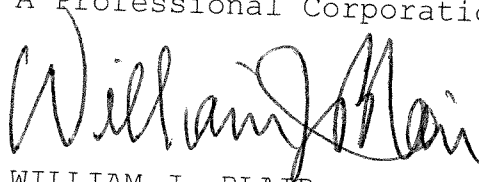
Page 5

dollar.”⁶ Clearly, that did not occur here. One of the Fund’s evaluators acted in bad faith by arbitrarily and capriciously determining that paying more was better than paying less for the same services. That is directly contrary to the purpose and intent of the procurement process. The result is unfair not only to ASC, but also to the Fund and its members. They are not getting the most value for their dollars. The result also undermines the integrity of the procurement process itself.

The facts undeniably show that ASC’s proposal was not fairly evaluated. The award of the Contract to GWRS was not in accordance with the evaluation criteria set forth in the RFP. Pursuant to 5 GCA 5452(a), the award of the Contract to GWRS should be set aside and the Contract terminated. The Fund should thereafter issue a new RFP for the services required by the Fund.

Very truly yours,

BLAIR STERLING JOHNSON
MARTINEZ & LEON GUERRERO
A Professional Corporation



WILLIAM J. BLAIR

Attachment: Exhibit A

cc: Elyze J.T. McDonald, Esq.
Mr. David John

G62\03079-01
G:\WORDDOC\LTR\WJB\1525-P BLAS (HD) RE RFP NO. GGRF-
028-06 (NTC OF PROTEST OF AWARD OF CONTRACT).DOC

⁶ Appellee Government of Guam Retirement Fund’s Rebuttal to Appellant’s Comment on Agency Report, filed on July 23, 2007, in Office of the Public Auditor Docket No. OPA-PA-07-006, *In the Appeal of Great-West Retirement Services*, p. 3.

RFP NO. GGRF-028-06: INVESTMENT MANAGEMENT AND PLAN ADMINISTRATION SERVICES
 related to the 401(a) Defined Contribution Plan / 457 Deferred Compensation Plan and Welfare Benefit Plan

SUMMARY

Evaluator	GWRS	ASC
J.T. San Agustin	7.37	7.31
G. Cruz	6.35	8.76
K.T.E. Taitano	8.70	5.57
TOTAL:	22.42	21.64

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. _____

JOE T. SAN AGUSTIN

Date: _____

7-Feb-07

1.	EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWRS			ASC		
			pts.	Total	pts.	Total	pts.	Total
1.	The plan for performing the required services.	0.15		0.00	9	1.35	9	1.35
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15		0.00	10	1.50	10	1.50
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15		0.00	8	1.20	8	1.20
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10		0.00	8	0.80	8	0.80
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10		0.00	9	0.90	9	0.90
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10		0.00	10	1.00	10	1.00
7.	Educational resources and ability to provide ongoing training.	0.10		0.00	9	0.90	8	0.80
8.	Record of past performance of similar work.	0.10		0.00	9	0.90	9	0.90
9.	Other Factors	0.05		0.00	8	0.40	8	0.40
	TECHNICAL - TOTAL POINTS POSSIBLE:	1.00		0.00		8.95		8.85
10.	Technical Factors	0.60	0.00	0.00	8.95	5.37	8.85	5.31
	Price	0.40		0.00	5	2.00	5	2.00
	OVERALL SCORE:	1.00		0.00		7.37		7.31

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. _____ Date: 7-Feb-07
 _____ Date: 7-Feb-07
 GERRY A. CRUZ

EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWFRS			ASC		
		pts.	Total	Total	pts.	Total	Total
1. The plan for performing the required services.	0.15		0.00	8	1.20	8	1.20
2. Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15		0.00	4	0.60	8	1.20
3. Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15		0.00	8	1.20	9	1.35
4. Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10		0.00	7	0.70	9	0.90
5. Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10		0.00	9	0.90	9	0.90
6. Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10		0.00	6	0.60	9	0.90
7. Educational resources and ability to provide ongoing training.	0.10		0.00	8	0.80	8	0.80
8. Record of past performance of similar work.	0.10		0.00	8	0.80	9	0.90
9. Other Factors	0.05		0.00	9	0.45	9	0.45
TECHNICAL - TOTAL POINTS POSSIBLE:	1.00		0.00		7.25		8.60
10. Technical	0.60	0.00	0.00	7.25	4.35	8.60	5.16
Price	0.40	0.00	0.00	5	2.00	9	3.60
OVERALL SCORE:	1.00		0.00		6.35		8.76

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. _____

KATHERINE T.E. TAITANO

Date: 7-Feb-07

1.	EVALUATION FACTORS (Score between 1 - 10)	Wt.	GWRS			ASC		
			pts.	Total	Total	pts.	Total	Total
	The plan for performing the required services.	0.15	8	1.20	5	0.75		
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15	9	1.35	6	0.90		
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15	9	1.35	6	0.90		
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10	10	1.00	6	0.60		
5.	Knowledge of legislative, operational and legal aspects of Guam public pensioner's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10	9	0.90	6	0.60		
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10	8	0.80	7	0.70		
7.	Educational resources and ability to provide ongoing training.	0.10	7	0.70	7	0.70		
8.	Record of past performance of similar work.	0.10	8	0.80	5	0.50		
9.	Other Factors	0.05	8	0.40	6	0.30		
	TECHNICAL - TOTAL POINTS POSSIBLE:	1.00		8.50		5.95		
10.	Technical	0.60	0.00	8.50	5.10	3.57		
	Price	0.40	0.00	0.00	3.60	2.00		
	OVERALL SCORE:	1.00	0.00	8.70		5.57		

62

424 Route 8
Maite, Guam 96910
Tel: 671.475.8952
Fax: 671.475.8922

R
GOVERNMENT OF GUAM
RETIREMENT FUND
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TRANSMITTAL RECEIPT

ADMINISTRATIVE SERVICES DIVISION

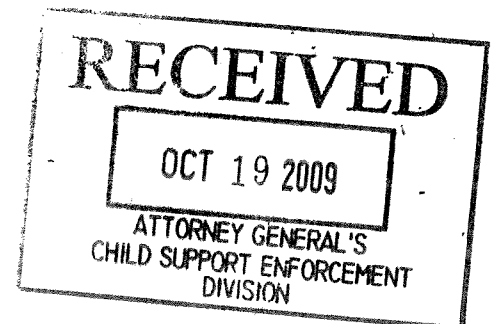
DATE: **October 19, 2009**

SUBJECT: **PROTEST LETTER DATED 10-15-09 FROM LAW OFFICES OF BLAIR STERLING JOHNSON MARTINEZ & LEON GUERRERO REPRESENTING ASC TRUST CORPORATION (IN REFERENCE TO RFP NO. GGRF-028-06)**

Chris:

Please deliver this to AG's Office this afternoon. Deadline is today.

*Thank You,
A. Deb*



DELIVER TO: **ATTORNEY GENERAL, DEPARTMENT OF LAW**

RECEIVED BY: N. DIAZ
PRINT NAME/SIGN

DATE/TIME: 10/19/09 1428

DLU
Please return to: **Debbie U.**

Thank You and Have a Great Day!!!



GOVERNMENT OF GUAM
RETIREMENT FUND
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Felix P. Camacho
 Governor

Michael W. Cruz, M.D.
 Lieutenant Governor

Paula M. Blas
 Director

October 19, 2009

MEMORANDUM

To: Attorney General, Department of Law

From: Director, Retirement Fund

Subject: Protest Letter dated 10-15-09 from Law Offices of Blair Sterling Johnson Martinez & Leon Guerrero representing ASC Trust Corporation

Re: RFP No. GGRF-028-06
 Notice of Protest of Award of Contract

In compliance with 2 GAR Division 4, §9101(c)(4), we are forwarding a copy of "Notice of Protest of Award of Contract" letter referenced above, and applies only to the following:

- We are currently reviewing the concerns and this transmittal is submitted for information purposes only.
- Please render an opinion.
- The information provided is as per your request.
- Other: _____

D. T. Bernard
 for **PAULA M. BLAS**

Attachment

Trustees:

Joe T. San Agustin
 Chairman

Wilfred P. Leon Guerrero, Ed.D.
 Vice-Chairman
 Investment Committee, Chairman

Antolina S. Leon Guerrero
 Secretary

Gerard A. Cruz
 Treasurer
 Audit & Operations Committee,
 Chairman

George A. Santos
 Members' & Benefits Committee,
 Chairman

Katherine T.E. Taitano
 Trustee

Wilfred G. Aflague
 Trustee

63

Felix P. Camacho
Governor

Michael W. Cruz, M.D.
Lieutenant Governor

Paula M. Blas
Director



Joe T. San Agustin
Chairman
Wilfred P. Leon Guerrero
Vice-Chairman
Antolina S. Leon Guerrero
Secretary
Gerard A. Cruz
Treasurer
Wilfred G. Aflague
Trustee
George A. Santos
Trustee
Katherine T.E. Taitano
Trustee

LETTER OF TRANSMITTAL

To: Mr. David J. John
ASC Trust Corporation
c/o William J. Blair

Date: October 26, 2009
Re: ASC Protest 10/15/09

Law Offices of BLAIR STERLING JOHNSON MARTINEZ & LEON GUERRERO
Suite 100B DNA Building
Hagatna, Guam 96910-5205

RECEIVED
OCT 26 2009

Mailed Hand Delivered Fax

10/11/09
BLAIR STERLING JOHNSON
MARTINEZ & LEON GUERRERO
A PROFESSIONAL CORPORATION

THE FOLLOWING IS (ARE) TRANSMITTED HEREWITH:

COPIES	DATE	DESCRIPTION
1		Response to ASC's October 15, 2009 Protest of RFP No. GGRF-028-06

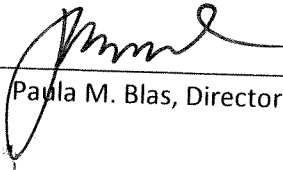
- | | |
|---|---|
| <input type="checkbox"/> For Your Information | <input type="checkbox"/> For Review and Comment |
| <input type="checkbox"/> For Your Files | <input type="checkbox"/> For Necessary Action |
| <input type="checkbox"/> Per Your Request | <input type="checkbox"/> For Signature and Return (Black Ink) |
| <input type="checkbox"/> Per Our Conversation | <input type="checkbox"/> See Remarks Below |

REMARKS:

Rec'd by:

Print Name/ Sign

Date:


Paula M. Blas, Director



GOVERNMENT OF GUAM
RETIREMENT FUND
STABILITY · SECURITY · REWARDS

Felix P. Camacho
Governor

Michael W. Cruz, M.D.
Lieutenant Governor

Paula M. Blas
Director

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Joe T. San Agustin
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Investment Committee, Chairman

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Secretary

Gerard A. Cruz
Treasurer
Audit & Operations Committee,
Chairman

George A. Santos
Members' & Benefits Committee,
Chairman

Katherine T.E. Taitano
Trustee

Wilfred G. Aflague
Trustee

October 26, 2009

VIA HAND DELIVERY

Mr. David J. John
ASC Trust Corporation
c/o William J. Blair
Law Offices of Blair Sterling Johnson Martinez & Leon Guerrero
Suite 100B DNA Building
238 Archbishop F.C. Flores Street
Hagåtña, Guam 96910-5205

Re: ASC's October 15, 2009 Protest of RFP No. GGRF-028-06

Dear Mr. John:

This letter is in response to the protest submitted by ASC Trust Corporation ("ASC") to the Government of Guam Retirement Fund on October 15, 2009. ASC protests the ratings it received from the evaluation panel with regard to the above-mentioned Request for Proposal. ASC claims that it did not review its evaluation sheets until October 6, 2009. However, because a timely protest should have been submitted no later than fourteen days after May 7, 2007, May 11, 2007, July 6, 2007, or at the latest, September 4, 2009, the Retirement Fund hereby declines to consider the Protest on the grounds of untimeliness.

According to 5 G.C.A. § 5425(a), a protest "shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." The regulations, 2 GAR Div. 4, § 9101(c)(1), confirm the statute, Section 5425(a): a Protest must be made in writing "within 14 days after the protestor knows or should have known of the facts giving rise thereto. . . . Protests filed after the 14 day period shall not be considered."

ASC is extremely dilatory in filing its Protest on October 15, 2009, as a timely protest should have been made more than two years ago. On May 7, 2007, the Retirement Fund sent ASC a letter advising that ASC "has been evaluated and

deemed to be the next qualified to provide the required services."¹ This notice alerted ASC that it was not rated or evaluated to be the best qualified offeror for RFP No. GGRF-028-06. At that time, and for 14 days after May 7, 2007, ASC could have requested its evaluation sheets and could have protested its ratings, but failed to do so.

A second opportunity for ASC to protest occurred on May 11, 2007, when the Retirement Fund sent a letter advising ASC that the Retirement Fund had executed a Stay of Procurement on the RFP as a result of a protest by the best qualified offeror, Great-West Retirement Services. At that time it became clear to ASC that Great-West was ranked higher than ASC. Again, at that time, ASC could have asked for its evaluation sheets and could have submitted a protest on its ratings, but failed to do so.

ASC was aware that the Retirement Fund denied Great-West's Protest, and that Great-West appealed the denial on June 22, 2007. ASC also entered an appearance in the OPA proceedings and presented argument. While the OPA was considering Great-West's Protest, ASC may have at that time also protested its rankings and sought review by the Office of the Public Auditor. However, once again, ASC elected not to protest. Also, the OPA ruled that the Retirement Fund must continue its negotiations with Great-West. A significant amount of time - a year and a half - has passed since the OPA made her ruling. During this period, ASC knew that it was ranked lower than Great-West, yet it failed to protest the rankings.

The fact that ASC did not ask for and receive its evaluation sheets until recently has no impact on this analysis. ASC knew that it was ranked lower than Great-West, and could have asked the Retirement Fund to produce the evaluation sheets once it gained that knowledge - on May 7, 2007, May 11, 2007, or at the latest, July 6, 2007. Even as ASC admits in footnote 3 of its Protest, it learned on July 6, 2007, when the Fund filed its Agency Report stating that "GWRS was a 'qualified, but over-priced competitor'", that ASC's price was lower than Great-West's price but that its overall ranking was inferior to Great-West. As both section 5425(a) and 9101(c)(1) state, the time to protest begins when ASC "knows or should have known of the facts giving rise" to its protest. ASC knew back in July 6, 2007, of the grounds underlying its present Protest. It, however, failed to protest.

The Retirement Fund has invested a great deal of resources and time in negotiations, all the while ASC's ranking has always been known to ASC. In summary, ASC could have submitted a Protest on the grounds of its rankings within 14 days after May 7, 2007. Construing the timeline even more liberally in favor of ASC, ASC may have been timely if it submitted a Protest within 14 days after May 11, 2007, or even 14 days after July 6, 2007. However, ASC sat on its rights for over two years, deeming its current Protest untimely.

¹ This May 7, 2007 letter, and other relevant correspondence and documents referred to in this Response to ASC's Protest, are attached.

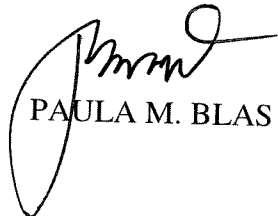
Mr. David J. John
ASC Trust Corporation
c/o William J. Blair
October 26, 2009
Page 3 of 3

Finally, ASC's Protest is untimely even when viewed in context of ASC's awareness on August 21, 2009, that the Retirement Fund had entered into a contract with Great-West. Upon becoming aware that the Retirement Fund had finalized the contract with Great-West, ASC knew, as it knew back in 2007, that it was ranked lower than Great-West. To make a timely protest based on the finalization of the contract with Great-West, ASC had until September 4, 2009. Its October 15, 2009 Protest is six weeks beyond that deadline.

For each and every above-stated reasons, pursuant to Sections 5425(a) and 9101(c)(1), ASC's untimely Protest will not be considered.

Pursuant to 5 G.C.A. § 5425(c), ASC may pursue judicial and administrative 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).

Very truly yours,



PAULA M. BLAS

Enclosures

ORIGINAL

CARLSMITH BALL LLP
Bank of Hawaii Bldg., Suite 401
134 West Soledad Avenue, P.O. Box BF
Hagåtña, Guam 96932-5027
Tel No. 671.472.6813

Attorneys for Appellee
Government of Guam Retirement Fund

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT

JUL 06 2007

TIME: 406 pm
BY: [Signature]
FILE NO. OPA-PA 07-006

RECEIVED

2007 JUL -6 PM 3:56

GOVT OF GUAM
RETIREMENT FUND

OFFICE OF THE PUBLIC AUDITOR
GUAM

IN THE APPEAL OF
GREAT-WEST RETIREMENT SERVICES,
Appellant.

DOCKET NO. OPA-PA-07-006
AGENCY REPORT

INTRODUCTION

Pursuant to 2 GAR, Div. 4, Chapter 12 §§ 12104-12105, the Government of Guam Retirement Fund ("GGRF") hereby submits its Agency Report answering all allegations set forth in the Appeal filed by Great-West Retirement Services ("Great-West"). All documents required under 2 GAR, Div. 4, Chapter 12 § 12105 were submitted to the Office of the Public Auditor as part of the official procurement record.

BACKGROUND

On September 28, 2006, GGRF issued RFP No. GGRF-028-06 in search of professional services related to providing Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan, to GGRF as described in detail under Section IV, Scope of Work of RFP No. GGRF-028-06. (See Tab #1 of the Procurement Record.)

allowances and 12b-1 fee rebates to GGRF.

By letter dated March 18, 2007, GGRF notified Great-West that its pricing had not been accepted, and requested Great-West's "best and final offer" in an attempt to reach a successful negotiation. In Great-West's response letter dated March 21, 2007, it again ignored three of the four requests made by GGRF and simply reiterated a fee of .27% of total plan assets.

After considering Great-West's responses, GGRF's selection panel decided to terminate negotiations on April 27, 2007 because it deemed the offer not fair or reasonable given the estimated value, scope, complexity, and professional nature of the services required. Immediately upon making said decision, a letter was drafted and dated April 27, 2007 notifying Great-West of GGRF's decision. Great-West acknowledged receipt of this letter by fax on April 30, 2007.

Great-West submitted a protest on May 9, 2007 asserting that it is the number one provider of services to U.S. states and territories, that its pricing is "fair and reasonable" based on comparison with services it renders in the State of Montana, and that GGRF did not provide a factual basis for its decision to terminate negotiations. The protest was fully considered and denied by Paula Blas at GGRF on June 1, 2007. Great-West filed its Notice of Appeal as to Ms. Blas' decision with the Office of the Public Auditor on June 22, 2007.

RESPONSE TO STATED GROUNDS FOR APPEAL

a. **GGRF conducted proper price analysis of the fees offered by Great West and found them not to be fair or reasonable:** On page four (4) of its Appeal, Great-West states that GGRF "did not make any specific finding that the cost and pricing data submitted by GWRS. ... was inaccurate, incomplete, or non-current." It cites 2 G.A.R., Div. 4, Chap. 3, § 3118(f) to support its assertion that such findings be made. This support is misplaced. 2 G.A.R., Div. 4, Chap. 3, § 3118(f) applies to adjustments in contract prices which have already been

not occur, the statute provides that negotiation will be terminated and negotiations will begin with the next best qualified offeror. *Id.* Because it was obvious that negotiations would not be successful with Great-West, GGRF terminated negotiations and sought to begin negotiations with the next best qualified offeror.

b. GGRF afforded Great-West the opportunity to negotiate, but Great-West failed to properly respond to GGRF's requests and negotiate a fair and reasonable fee: Although Great-West was chosen as the best qualified offeror initially, they were unresponsive to requests made in negotiations. In particular, although GGRF specifically requested cost or pricing data on four items, Great-West failed to address these four items and instead re-submitted its initial proposal. As stated in the background facts, no 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.*

While Great-West accuses GGRF of not negotiating, the fact is that Great-West was given multiple opportunities to respond with pricing data and information supporting their quote, but instead chose to be non-responsive by either ignoring the request or re-submitting quotes nearly identical to their initial proposal. No option presented by Great-West addressed all of the requests by GGRF and those options presented did not move toward accomplishing GGRF's goals for its plan administration in the coming years.

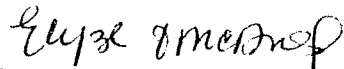
not the statement of supporting reasons. The decision to terminate negotiations was made on April 27, 2007 and a letter notifying Great-West of the termination was sent on that same day. Not only was notification sent within three days of the decision to terminate in accordance with the statutory requirement, it was received by Great-West within three days, as evidenced by GGRF's fax confirmation dated April 27, 2007, attached hereto as Exhibit A.

After notifying Great-West that negotiations had been terminated and prior to receiving Great-West's protest, GGRF notified the next best qualified offeror, ASC Trust Corporation ("ASC"), that it intended to begin negotiations with ASC and requested the same pricing data it had previously requested from Great-West. (See Tab #12 of the Procurement Record.) GGRF has received an initial response from ASC which, although confidential at present, is more favorable to GGRF than Great-West's "best and final offer."

d. **Conclusion:** All of GGRF's decisions and actions are well-documented, supported by factual evidence, and in accordance with Guam's procurement procedures. GGRF acted in good faith in initially choosing Great-West and in its later termination of negotiations. Therefore, Great-West's Appeal should be denied.

SUBMITTED this ^{17th} day of July, 2007, Hagåtña, Guam.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
CAREY MCALISTER AUSTIN

Attorneys for Appellee
GOVERNMENT OF GUAM RETIREMENT
FUND

Confirmation Report - Memory Send

Page : 001
Date & Time: Apr-27-07 04:26pm
Line 1 : +6714779491
Machine ID : Gov Guam Retirement Employee

Job number : 378
Date : Apr-27 04:25pm
To : 8101648319494741707
Number of pages : 002
Start time : Apr-27 04:25pm
End time : Apr-27 04:26pm
Pages sent : 002
Status : OK
Job number : 378

*** SEND SUCCESSFUL ***

424 Route 8
Maite, Guam 96910
Tel: 671.475.8951/52
Fax: 671.475.8922

R
GOVERNMENT OF GUAM
RETIREMENT FUND
STABILITY · SECURITY · REWARDS



Fax Transmittal

To: Gregory E. Seller	From: Debbie Ulloa		
Great-West Retirement Services			
Fax: 949.474.1707	Date: April 27, 2007		
Phone: 800.933.9808	No. of Pages: Two (2)		
Re: RFP No. GGRF-028-06			
<input checked="" type="checkbox"/> Urgent	<input checked="" type="checkbox"/> For Review	<input type="checkbox"/> Please Comment	<input type="checkbox"/> Please Reply

● **Message:**

Dear Mr. Seller:

Please find copy of letter regarding RFP No. GGRF-028-06 for Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan. Original letter will be mailed to your office.

Thank You,
Debbie Ulloa
Debbie Ulloa
Administrative Assistant

NOTICE: THIS MESSAGE IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE. If the reader of this message is not the intended recipient or an employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication by error, please notify us immediately by telephone and discard the original message.



GOVERNMENT OF GUAM
RETIREMENT FUND
STABILITY · SECURITY · REWARDS

Felix P. Camacho
Governor

Michael W. Cruz, M.D.
Lieutenant Governor

Paula M. Blas
Director

May 7, 2007

Mr. David J. John
President
ASC TRUST CORPORATION
Capitol Plaza, Suite 110
120 Father Duenas Avenue
Hagåtña, Guam 96910

Re: RFP No. GGRF-028-06 – Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan

Dear Mr. John:

Thank you for the submission of your proposal in response to the Government of Guam Retirement Fund's RFP for professional services related to providing Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan. Your firm has been evaluated and deemed to be the next qualified to provide the required services.

The cost pricing you submitted has been reviewed. In accordance with GAR §3114(k), please submit cost or pricing data inclusive of the following:

Custodial Services:

- 1) The Custodian selected by ASC to provide the trust services must be independent of ASC; and
- 2) A local Trust Company would be preferred.

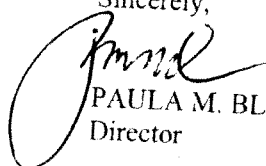
Pricing:

- 1) ASC would not assess a fee to the Participant account balances;
- 2) ASC would charge 0.25% of total assets as their fee; and
- 3) All re-allowances and rebates of the 12b-1 fees received from the investment option managers shall be remitted to the Fund.

Please provide a response to the Retirement Fund no later than Monday, May 14, 2007.

If you require additional information or have any additional questions or concerns, please do not hesitate to contact me or Ms. Debbie I. Ulloa at (671) 475-8952/51 or by email at dliulloa@ggrf.com.

Sincerely,


PAULA M. BLAS
Director

Trustees:

Joe T. San Agustin
Chairman

Wilfred P. Leon Guerrero, Ed.D.
Vice-Chairman
Investment Committee, Chairman

James J. Taylor, Ph.D.
Secretary
Investment Committee, Vice-Chairman

Gerard A. Cruz
Treasurer
Audit & Operations Committee,
Chairman

George A. Santos
Members' & Benefits Committee,
Chairman

Katherine T.E. Taitano
Trustee

424 Route 8
Maite, Guam 96910
Tel: 671.475.8900
Fax: 671.475.8922

R
GOVERNMENT OF GUAM
RETIREMENT FUND
STABILITY · SECURITY · REWARDS

Felix P. Camacho
Governor

Michael W. Cruz, M.D.
Lieutenant Governor

Paula M. Blas
Director

Trustees:

Joe T. San Agustin
Chairman

Wilfred P. Leon Guerrero, Ed.D.
Vice-Chairman
Investment Committee, Chairman

James J. Taylor, Ph.D.
Secretary
Investment Committee, Vice-Chairman

Gerard A. Cruz
Treasurer
Audit & Operations Committee,
Chairman

George A. Santos
Members' & Benefits Committee,
Chairman

Katherine T.E. Taltano
Trustee

May 11, 2007

Mr. David J. John
President
ASC TRUST CORPORATION
Capitol Plaza, Suite 110
120 Father Duenas Avenue
Hagåtña, Guam 96910

Re: RFP No. GGRF-028-06 – Investment Management and Plan
Administration Services related to the 401(a) Defined
Contribution Plan, 457 Deferred Compensation Plan and
Welfare Benefit Plan: Stay of Procurement

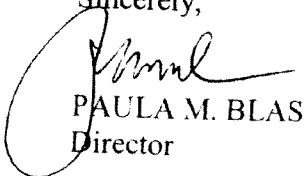
Dear Mr. John:

Please be advised that the Government of Guam Retirement Fund has executed a "Stay of Procurement" on the above subject Request for Proposal as a result of Great-West Retirement Services' letter dated May 9, 2007, and until such time a final resolution has been reached.

If you should have any questions, please feel free to contact the undersigned.

Thank you for your cooperation.

Sincerely,


PAULA M. BLAS
Director

64

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

OCT 29 2009

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Director's Office

OCT 29 2009

TIME: 3:05 PM
BY: R. MARQUEZ
FILE No. OPA-PA -09-010

1 WILLIAM J. BLAIR
2 BLAIR STERLING JOHNSON
3 MARTINEZ & LEON GUERRERO
4 A PROFESSIONAL CORPORATION
5 SUITE 1008 DNA BUILDING
6 238 ARCHBISHOP F.C. FLORES STREET
7 HAGÁTÑA, GUAM 96910-5205
8 TELEPHONE: (671) 477-7857

9 *Appellant's Duly Authorized Representative*

10 **OFFICE OF PUBLIC ACCOUNTABILITY**
11 **PROCUREMENT APPEAL**

12 IN THE APPEAL OF) APPEAL NO. OPA-PA-09-____
13)
14 ASC TRUST CORPORATION,) **NOTICE OF APPEAL**
15)
16 Appellant.)

17 **APPELLANT INFORMATION**

18 Name: ASC Trust Corporation
19 Mailing Address: c/o Blair Sterling Johnson
20 Martinez & Leon Guerrero, P.C.
21 1008 DNA Building
22 238 Archbishop F.C. Flores Street
23 Hagåtña, Guam 96910
24 Daytime Contact No.: c/o William J. Blair, Esq.
25 (671) 477-7857

26 **APPEAL INFORMATION**

- 27 A) Purchasing Agency: Government of Guam Retirement Fund (the
28 "Fund")
B) Identification Number of Procurement: RFP No. GGRF-028-06
C) Decision being appealed was made on October 26, 2009 by the
Director of the Fund.
D) Appeal is made from Decision on Protest of Award. Copies of
the notice of protest and the Fund's decision are attached
as Exhibits 1 and 2.
E) Names of Competing Offerors: Great-West Retirement Services
Lincoln Financial Group/Bank
of Hawaii

1
2 **DECLARATION RE COURT ACTION**

3 The undersigned party does hereby confirm that to the best
4 of its knowledge, no case or action concerning the subject of
5 this Appeal has been commenced in court. All parties are
6 required to and the undersigned party agrees to notice the Office
7 of Public Accountability within 24 hours if court action
8 commences regarding this Appeal or the underlying procurement
9 action.

10
11 **STATEMENT OF GROUNDS FOR APPEAL**

12 ASC appeals the denial of its protest of the Fund's award to
13 Great-West Retirement Services ("GWRS") of the contract (the
14 "Contract") to provide certain investment management and
15 administrative services pursuant to RFP No. GGRF-028-06.¹

16 Notice of the award of the Contract was sent to ASC on
17 August 21, 2009. Based on information obtained from the Fund on
18 October 6, 2009, ASC protested the award of the Contract on
19 October 15, 2009. See Ex. 1. ASC's protest was denied on
20 October 26, 2009, by Paula M. Blas, the Fund's Director on the
21 grounds that it was untimely. See Ex. 2.

22
23 **BACKGROUND FACTS**

24 The RFP. On September 28, 2006, the Fund issued its RFP for
25 investment management and plan administration services for its
26

27 ¹ This procurement was the subject of a prior appeal to the OPA by GWRS,
28 Docket No. OPA-PA-07-006. It is requested, pursuant to 2 GAR, Div. 4, section
12108(h), that judicial notice be taken of all filings in that docket.

1 401(a) defined contribution plan, it 457 deferred compensation
2 plan and its welfare benefit plan.² Three companies responded
3 with proposals—ASC, GWRs, and Lincoln Financial Group/Bank of
4 Hawaii. *Id.*

5
6 The RFP documents set forth the evaluation criteria that
7 were to be used in evaluating proposals and the relative weight
8 those criteria would be given. According to the RFP, the price
9 to be charged for the services to be rendered was one of the
10 factors to be evaluated, and it was assigned a weight of 40% of
11 the total evaluation score. Under the applicable procurement
12 regulations, the evaluation factors stated in the RFP were the
13 only permissible basis for evaluating the proposals. 2 GAR,
14 Division 4, section 3114(f)(2). Specifically, the RFP stated:
15

16 Based on the [technical] factors above, the proposals
17 will be initially evaluated. Then the price proposals
18 will be opened and the price proposals will be
19 incorporated into the evaluation effort. The price
20 proposal will count for 40% of this evaluation and the
21 technical merits will count for 60% of this evaluation.
22 Based on the combination of the scores assigned from the
23 technical merit and pricing, the GGRF will enter into
24 negotiations with the company with the highest combined
25 score. If these negotiations do not result in a
26 successful contract, then the GGRF will enter into
27 negotiations with the next highest ranked company.³

28 ASC's and GWRs' Price Proposals. ASC and GWRs submitted
proposals in November 2006. As required by the RFP, the pricing
proposals were submitted separately. GWRs offered two pricing

² See September 7, 2009 Memorandum of Evaluation and Negotiation (the "Evaluation Memo"), attached hereto as Ex. 3.

³ RFP, Section VI.C.10., p. 29, Ex. 4 attached hereto.

1 options. See Ex. 5, attached hereto. Under GWRS option one, the
2 fees were:

3 \$48 per participant per year (pro-rated quarterly, plus:
4 GWRS' actual costs for local staff and communication
5 services,⁴ plus a fixed a fixed fee of \$34,000 per year
6 Revenue sharing of 100% of all 12(b)(1) fees paid by
mutual fund companies per annum, plus .25% on average
fund balances per year

7 In comparison, ASC's pricing proposal was an annual
8 participant administrative fee of \$16 (payable \$4 quarterly), a
9 custodial/trustee fee of 2.5 basis points (0.025%) per quarter
10 (0.10% annually) and a financial investment advisory services fee
11 of 2.5 basis points (0.025%) per quarter (0.10% annually). Like
12 GWRS, ASC proposed revenue sharing of 100% of all 12(b)(1) fees.
13 See ASC pricing proposal, Ex. 6 attached hereto.

14 Thus, ASC's pricing proposal called for an annual
15 administrative fee of \$16 a year per participant, plus fees equal
16 to 0.20% of trust balances annually. Based on an estimated
17 numbers of participants of 8,700 and the Fund asset balances of
18 \$133,000,000, this resulted in an estimated annualized base
19 administrative fee of \$405,250 (8,700 x \$16 + \$133,000,000 x
20 0.002). See, ASC Pricing Analysis, Ex. 6, p. XV-9. Using the
21 same assumptions, GWRS' pricing proposal under option one was
22
23
24

25
26 ⁴ The proposal does not provide any estimate of these costs, but in its
27 March 21, 2007 letter to the Fund, which communicated GWRS' best and final
28 offer, GWRS represented that its local "field service cost" was \$334,000. See,
Exhibit D to GWRS' Notice of Appeal in Docket No. OPA-PA-07-006. Subtracting
the "fixed fee" of \$34,000 in the pricing proposal, this suggests GWRS' assumed
local staff and administrative costs, which under its original pricing proposal
would have been paid by the Fund, were about \$300,000 a year.

1 \$751,600 (8,700 x \$48 + \$300,000 + \$34,000). Under GWRS' option
2 two its fee would have been \$438,900 (\$133,000,000 x 0.0033).⁵

3
4 ASC's pricing proposal was thus less than either of GWRS'
5 proposals.

6 The Evaluation Process. The Fund appointed a three-person
7 selection panel, whose members met on February 7, 2007, evaluated
8 the three proposals and rated them. Evaluation Memo., p. 2.⁶
9 Based on the scores given by the three members of the panel,
10 GWRS, with a total score of 22.42, was deemed the best qualified
11 offeror to provide the required services. ASC, with a total
12 score of 21.64, was ranked second. *Id.*

13
14 Negotiations. The Fund commenced negotiations with GWRS.
15 *Id.* The course and outcome of those negotiations were the
16 subjects of GWRS' prior procurement appeal. To briefly
17 summarize, the Fund asked GWRS to accept a lower price that that
18 which it had proposed. The basis asserted by the Fund for
19 seeking a lower cost proposal from GWRS was that the cost
20 proposals of ASC and the third proponent were lower than that of
21 GWRS. Agency Report filed by the Fund on July 6, 2007, in Docket
22 No. OPA-PA-07-006.⁷ When GWRS refused to lower its price, the
23

24
25 ⁵ Under option two, the investment options of Fund participants would
have been limited to mutual funds linked to GWRS.

26 ⁶ The Evaluation Memo was provided to ASC on September 15, 2009, in
27 response to ASC's second attempt under the Sunshine Reform Act to obtain
information from the Fund regarding the evaluation process.

28 ⁷ In its Agency Report, the Fund asserted that GWRS was a "qualified, but
over-priced competitor" and claimed that the Fund's determination that GWRS'
reduced price offer was not fair and reasonable was not arbitrary and

1 Fund terminated negotiations with it on the basis that its best
2 and final offer was not "fair and reasonable." The Fund then
3 commenced negotiations with ASC as the next qualified firm.
4 Evaluation Memo., pp. 2-3.

5
6 GWRS protested the determination that its price proposal was
7 not fair and reasonable and, after the Fund denied that protest,
8 appealed to the OPA on June 22, 2007. Evaluation Memo., p. 3.

9 The Public Auditor issued a decision sustaining GWRS' appeal
10 on March 12, 2008, later amending it on April 11, 2008. The Fund
11 was ordered to continue negotiating with GWRS. Negotiations
12 regarding GWRS' fees resumed on April 2, 2008 and its reduced fee
13 offer was accepted by the Fund's negotiation panel on August 1,
14 2008. The Fund then commenced contract negotiations with GWRS on
15 August 28, 2008. Evaluation Memo, pp. 3-4.

16
17 A week short of one year later, the Fund signed the Contract
18 with GWRS, with an effective date of August 21, 2009. That same
19 day ASC and the other offeror were given notice of the award of
20 the Contract. *Id.*, p. 4.

21
22 ASC's Efforts to Obtain Information Regarding the Evaluation
23 Process. Following the notice of award, ASC filed a request for
24 documents under the Sunshine Reform Act of 1999, Guam's freedom
25 of information act. The Fund provided some documents, but
26 refused to provide documents reflecting the evaluation scoring of
27

28 capricious when that offer was compared to "the bids and pricing from the pool
of other offerors." Agency Report, p. 6.

1 ASC's proposal by the individual selection panel members,
2 claiming such information was exempted from production under the
3 Sunshine Act.

4
5 ASC tried again. On September 10, 2009, ASC retained
6 counsel to make a renewed Sunshine Act request, specifically
7 asking for the evaluation sheets for ASC's own proposal. In
8 response, the Fund asserted that it was "barred" by the
9 procurement law from producing the requested evaluation sheets,
10 because ASC had not been awarded the Contract. See September 15,
11 2009 letter from Paula Blas, Ex. 7, attached hereto. The Fund
12 did, however, provide the Evaluation Memo.⁸

13
14 ASC tried one more time. Dissatisfied with the September
15 15, 2009 response of Fund to its request for documents related to
16 the evaluation of its own proposal, ASC made a final demand for
17 the requested evaluation sheets. See September 21, 2009 letter
18 to Paula Blas, Ex. 8 attached hereto. In response, the Fund
19 again stonewalled ASC. See September 29, 2009 letter from Elyze
20 McDonald, the Fund's attorney, Ex. 9 attached hereto, reasserting
21 that the requested information regarding the evaluation of ASC's
22 own proposal was "confidential" and that the Fund was expressly
23 prohibited from disclosing it. It was further asserted that
24 ASC's status as one of the offerors made no difference.
25
26
27

28 ⁸ Ms. Blas' September 15, 2009 letter represented that the Evaluation
Memo, which is dated September 7, 2009, was "finalized" after ASC's FOIA
request was received.

1 ASC was thus forced to go to court to get the information.
2 On October 5, 2009, ASC filed a petition for writ of mandamus
3 from the Superior Court of Guam to obtain the requested
4 information. See, Petition for Writ of Mandate Under Sunshine
5 Reform Act of 1999, Superior Court of Guam Special Proceeding
6 Case No. SP 0193-09, Ex. 10, attached hereto.
7

8 The day after ASC filed its writ petition, October 6, 2009,
9 the Fund's attorney provided the requested documents to ASC,
10 ostensibly not under the Sunshine Act, but in light of its
11 capacity as an offeror. See October 6, 2009 letter from Ms.
12 McDonald, Ex. 11, attached hereto.⁹
13

14 ASC First Learns the Truth—its Proposal was Not Fairly
15 Evaluated. Despite the fact that ASC's proposed pricing was
16 lower than either of those initially proposed by GWRS, one of the
17 three members of the Fund's selection panel gave ASC a lower
18 evaluation score for its pricing proposal. Specifically, this
19 member of the panel gave ASC a numerical rating of 5 for its
20 lower price proposal and gave GWRS a numerical rating of 9 for
21 its higher ones.¹⁰ There was no rational basis for these ratings.
22 Giving ASC a lower rating for a lower, more favorable price was
23

24 ⁹ The Fund's about face is inexplicable, in view of the fact that it
25 expressly relied on provisions in the procurement law as the grounds for
26 claiming it could not provide to ASC the information it had requested under the
27 Sunshine Act. Indeed, the Fund had previously claimed ASC's status as an
28 offeror made no difference. Compare Ex. 9 with Ex. 11.

¹⁰ See summary evaluation sheets for ASC and summary of results attached
to Exhibit 10. It is unknown which of GWRS' higher pricing proposals earned
the 9 rating on this member's scorecard.

1 necessarily arbitrary and capricious. Indeed, it suggests
2 intentional and deliberate manipulation of the evaluation
3 criteria to favor GWRS (or disfavor ASC), to the detriment of the
4 Fund and its members.¹¹ It goes without saying that a lower price
5 for providing the required services should have resulted in a
6 higher rating on this criterion.
7

8 The irrational score by the one member of the selection
9 panel skewed the result of the evaluation process. The total
10 combined score given to ASC by the three members of the panel was
11 21.64. See evaluation sheets attached to Exhibit 9. The total
12 combined score for GWRS was 22.42. Based solely on the 0.78
13 point difference between the two combined scores, GWRS was deemed
14 the best qualified to provide the required services and the Fund
15 entered into negotiations with it, which negotiations eventually
16 led to the award of the Contract.
17

18 The 5 rating given to ASC on its price proposal by the one
19 panel member resulted in a score of 2.00 on the price criterion
20 (5 x .40). The 9 rating given to GWRS by the same evaluator on
21 its higher price resulted in a score of 3.60 (9 x .40). The
22 resulting impact on the difference between ASC's total combined
23 evaluation score and that of GWRS was thus 1.60 (3.60 - 2.00),
24

25
26 ¹¹ ASC believes the scores given to it by the same evaluator on the
27 technical criteria also demonstrate a bias either in favor of GWRS or against
28 ASC, but that was not a basis for its protest or this appeal. ASC focuses
solely on the objective criterion 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.

1 which was more than twice the 0.78 difference between ASC's and
2 GWRS' combined scores. The scoring by this one evaluator thus
3 changed the result. If the evaluator had fairly and rationally
4 applied the price evaluation criterion, ASC would have been given
5 a higher score than GWRS for its price proposals, not a lower
6 one. ASC would have then been determined to be best qualified to
7 provide the required services, not GWRS, and the Fund would have
8 negotiated first with ASC, not GWRS.
9

10 ARGUMENT

11 After working through the obduracy of the Fund to obtain the
12 pieces of the puzzle that showed that the evaluation process was
13 unfair and biased, ASC filed its protest. That protest was
14 summarily denied, not on the merits, but on the grounds that it
15 was time barred.
16

17 The Fund claims that ASC was "extremely dilatory" in filing
18 its protest. It says the protest should have been filed no later
19 than 14 days after May 7, 2007, May 11, 2007, July 6, 2007 or, at
20 the latest, September 4, 2009. Ex. 2. Let us examine each of
21 those dates.
22

23 May 7, 2007. On May 7, 2007, the Fund sent ASC a letter
24 advising that it was not rated or evaluated to be the best
25 qualified offer. According to the Fund, ASC could have then
26 requested its evaluation sheets, and protested its ratings.
27

28 This is sophistry. First, it presupposes that the Fund
lawfully could have and voluntarily would have provided ASC with

1 not only its own evaluation sheets prior to the award of a
2 contract, but also those of GWRS. Given the lengths to which the
3 Fund has gone to avoid having to provide this information, it is
4 patently unreasonable to assume that ASC would have been provided
5 the information, if only ASC had thought to ask. Second, the raw
6 scores would have meant nothing unless ASC was also provided with
7 GWRS' pricing proposals, which the Fund clearly was not permitted
8 by law to make available at that time. ASC would have had no
9 basis to know that the scoring had been slanted to favor GWRS on
10 the pricing criteria.
11

12
13 Finally, it is beyond ridiculous when one considers that on
14 May 7, 2007, the Fund had terminated negotiations with GWRS and
15 *was negotiating with ASC.* What exactly would have been ASC's
16 grounds for a protest at that time?

17 May 11, 2007. The next date the Fund says triggered the 14
18 day protest period was May 11, 2007. That was the day the Fund
19 issued a "Stay of Procurement" and suspended its negotiations
20 with ASC in light of the protest by GWRS. See Evaluation Memo,
21 p. 3. According to the Fund, ASC should have learned that GWRS
22 had been initially rated higher than it. That was no secret.
23 ASC had no reason at the time to question why its total
24 evaluation score was less than GWRS. Price was not the only
25 evaluation criterion, and ASC had no knowledge that its price
26 proposal was less than that of GWRS. The Fund could not have
27 provided ASC with any information related to GWRS' proposal at
28

1 that time. Moreover, as of May 11, 2007, the Fund had already
2 terminated negotiations with GWRS, and its negotiations with ASC
3 were stayed only as the result of GWRS' appeal. Again, what
4 exactly would ASC have protested?
5

6 July 6, 2007. On this date, the Fund filed its Agency
7 Report in the GWRS procurement appeal, wherein the Fund appeared
8 to concede or admit that GWRS' price proposal was higher than
9 either of the other two proponents. So what? That fact,
10 standing alone, did not mean or even suggest that the scoring on
11 ASC' pricing proposal by one panel member had been arbitrary and
12 capricious, if not worse. Rather, ASC rightfully could only have
13 assumed that GWRS had been rated much higher than it on the
14 technical evaluation criteria which accounted for 60% of the
15 total score, and that GWRS' higher technical scores offset any
16 competitive advantage ASC' lower cost proposal might have given
17 it. ASC had no reason at that time to believe the integrity of
18 the procurement process had been compromised, as has now been
19 established was the case.
20

21
22 Moreover, as of July 6, 2007, no contract had been awarded
23 to GWRS. GWRS' appeal had not yet been sustained. The Fund had
24 not yet been ordered to resume negotiations with GWRS. The Fund
25 had been negotiating with ASC, not GWRS. If the Fund's position
26 in the appeal had been upheld, then the Fund would have resumed
27 negotiations with ASC, not GWRS. What was there to protest at
28 this point in time?

1 August 21, 2009. Lastly, the Fund asserts that the 14 day
2 protest period commenced, "at the latest," on August 21, 2009,
3 the date ASC was advised the Contract had been awarded to GWRS.
4 The Fund claims that ASC knew it had been lower-rated than GWRS
5 as far back as 2007, so it should have protested. More
6 correctly, the Fund seems to be saying that ASC should have asked
7 for the evaluation sheets at this time so it could have learned
8 the true facts and then filed a timely protest, all within 14
9 days.
10

11 The Fund's position entirely misses or deliberately avoids
12 the point of ASC's protest. ASC did not protest simply because
13 it was initially ranked lower than GWRS, as the Fund's denial of
14 its protest seems to assume. Of course ASC knew this fact.
15 Rather, ASC's protest is based on *why it was rated lower*, the
16 truth about which was not learned until October 6, 2009. The
17 evaluation criterion related to price was objective and the
18 weight assigned to the criterion was fixed by the RFP. Even if
19 ASC's price proposal was lower, however, that would not have
20 necessarily meant that its total score, when the other criteria
21 were considered, should have been higher than GWRS. Only when
22 you have the actual scores is the skewing and its effect on the
23 total scores made apparent. It was those very scores which the
24 Fund vigorously fought against having to disclose. ASC did not
25 get those scores until October 6, 2009, after it had been forced
26 to file a writ proceeding in the Superior Court.
27
28

1 There are no facts that would support any assertion that ASC
2 "knew or should have known" that one selection panel member
3 arbitrarily and capriciously, if not deliberately, misapplied the
4 evaluation criteria in violation of the RFP and Guam law. The
5 Fund cannot actively seek to conceal the truth and then claim ASC
6 should have learned it sooner. This would make a mockery of the
7 procurement laws and the protest process.

9 SUMMARY

10 ASC appreciates the fact that this particular procurement
11 has dragged on for years due to the prior procurement appeal and
12 the Fund's subsequent year long negotiation process with GWRS.
13 That does not take away from the fact that information only
14 recently revealed by the Fund in the face of a Sunshine Act writ
15 petition establishes that the procurement process was flawed. As
16 a consequence, the award of the Contract to GWRS was made in
17 violation of the letter and spirit of the procurement laws of
18 Guam, the integrity of which the Public Auditor is charged with
19 upholding.

20
21 As noted in ASC's bid protest letter, the Fund in the
22 earlier GWRS appeal asserted, quite correctly, that "[t]he
23 procurement process itself is designed to encourage fair
24 competition among providers so that the Government of Guam can
25 get the most value for its dollar."¹² That did not happen here.

26
27
28 ¹² Fund's Rebuttal to Appellant's Comment on Agency Report, filed on July
23, 2007, in Docket No. OPA-PA-07-006, *In the Appeal of Great-West Retirement
Services*, p. 3.

1 The procurement process was perverted by the arbitrary and
2 capricious action of one member of the Fund's selection panel.
3 If the evaluation criteria set forth in the RFP had been fairly
4 and rationally applied, ASC would have been rated the best
5 qualified proponent, not GWRS. The Fund would have first
6 negotiated with ASC, not GWRS, and, given that ASC had originally
7 made a lower price proposal than GWRS, it is fair to assume there
8 was a reasonable likelihood that ASC would have successfully
9 negotiated a contract with the Fund—all back in 2007.
10

11 The Fund attempts to avoid dealing with the merits of ASC's
12 protest by claiming that ASC should have protested sooner.
13 However, once the Contract was finally awarded in August, ASC
14 promptly sought to obtain from the Fund information relating to
15 the evaluation process, information that the Fund could not
16 lawfully have provided any earlier. The Fund stonewalled ASC in
17 its efforts, thus denying to it the information needed to
18 determine if there were any grounds to protest. Finally, in the
19 face of ASC's writ petition, the Fund provided the information on
20 October 6, 2009. That is the date ASC first gained knowledge of
21 the facts on which its protest was based and the date the 14 day
22 protest period commenced. ASC's protest was thus timely, the
23 Fund's desire to avoid facing it notwithstanding.
24
25

26 **REQUESTED RULING**

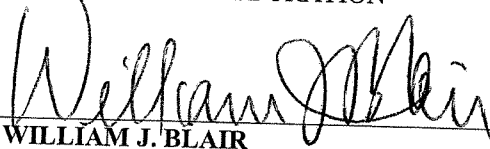
27 The Contract has improperly been awarded to GWRS. ASC has
28 no reason to believe that GWRS itself has acted improperly.

1 Thus, the remedies available under the procurement law are
2 limited. Pursuant to 5 GCA 5452(a), the award of the Contract
3 should be set aside and the Contract terminated. The Fund should
4 be ordered to then enter into negotiations with ASC or else issue
5 a new RFP for the services needed by it.
6

7 In addition, pursuant to 5 GCA 5452(e), ASC should be
8 awarded its reasonable costs incurred in connection with the RFP
9 and protest. ASC should have been determined the best qualified
10 offeror and there is a reasonable likelihood that it would have
11 been awarded the Contract but for arbitrary and capricious
12 scoring of ASC's proposal in direct contravention of the
13 evaluation criteria set forth in the RFP.
14

15 SUBMITTED this 14th day of October, 2009.

16 **BLAIR STERLING JOHNSON**
17 **MARTINEZ & LEON GUERRERO**
18 **A PROFESSIONAL CORPORATION**

19 BY: 
20 **WILLIAM J. BLAIR**
Appellant's Duly Authorized Representative

21 **ENCLOSURES:**

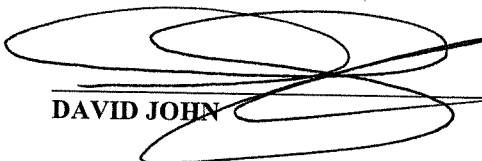
- 21 EXHIBIT 1: NOTICE OF PROTEST
- 22 EXHIBIT 2: DECISION ON PROTEST
- 23 EXHIBIT 3: SEPTEMBER 7, 2009 MEMORANDUM OF EVALUATION AND NEGOTIATION
- 24 EXHIBIT 4: RFP EXCERPT RE VALUATION CRITERIA
- 25 EXHIBIT 5: GWRS NOVEMBER 2006 COST PROPOSAL
- 26 EXHIBIT 6: ASC NOVEMBER 2006 COST PROPOSAL
- 27 EXHIBIT 7: SEPTEMBER 15, 2009 LETTER FROM PAULA BLAS
- 28 EXHIBIT 8: SEPTEMBER 21, 2009 LETTER TO PAULA BLAS
- EXHIBIT 9: SEPTEMBER 29, 2009 LETTER FROM ELYZE MCDONALD, THE FUND'S ATTORNEY
- EXHIBIT 10: PETITION FOR WRIT OF MANDATE UNDER SUNSHINE REFORM ACT OF 1999
- EXHIBIT 11: OCTOBER 6, 2009 LETTER FROM MS. MCDONALD

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TRUST CORPORATION.DOC

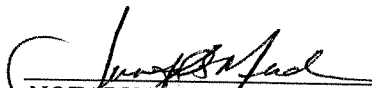
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2 **VERIFICATION**

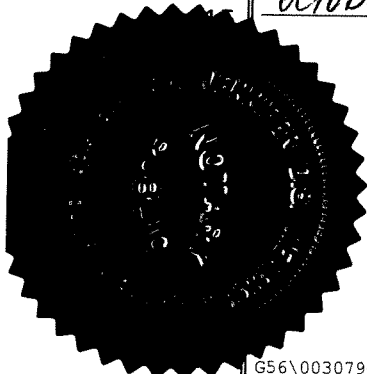
3 **ISLAND OF GUAM**)
4) ss:
5 **CITY OF HAGÁTÑA**)

6 I, **DAVID JOHN**, being first duly sworn, do state that I am the
7 Duly Authorized Representative for **ASC TRUST CORPORATION**; that I
8 have read the foregoing **NOTICE OF APPEAL** and that the same is true of
9 my own knowledge, except as to those matters which are stated on
10 information and belief, and as to those matters, I believe them
11 to be true.

12 
13 **DAVID JOHN**

14 **SUBSCRIBED AND SWORN** to before me this 29TH day of
OCTOBER, 2009, by **DAVID JOHN**.


NOTARY PUBLIC



JENNIFER D.S. MENDIOLA
NOTARY PUBLIC
In and for Guam, U.S.A.
My Commission Expires: Apr. 13, 2013
1008 DNA Building, 238 Archbishop
F.C. Flores St., Hagatna, Guam 96910

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23 TRUST CORPORATION.DOC
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EXHIBIT

“1”

WILLIAM J. BLAIR
THOMAS C. STERLING
RICHARD L. JOHNSON
JEHAN'AD G. MARTINEZ
VINCENT E. LEON GUERRERO

JAMES F. BALDWIN
MARTIN F. DEINHART
OF COUNSEL
J. BRADLEY KLEMM

LAW OFFICES
**BLAIR STERLING JOHNSON
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A PROFESSIONAL CORPORATION

SUITE 1008 DNA BUILDING
238 ARCHBISHOP F.C. FLORES STREET
HAGÁTÑA, GUAM 96910-5205

TELEPHONE:
(671) 477-7857

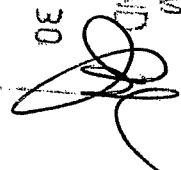
FACSIMILE:
(671) 472-4290

WRITER'S E-MAIL:
wjblair@kbsjlaw.com

October 15, 2009

VIA HAND DELIVERY

Paula M. Blas
Director
GOVERNMENT OF GUAM
RETIREMENT FUND
424 Route 8
Maite, Guam 96910

2009 OCT 15 AM 9:30
GOVT OF GUAM
RETIREMENT FUND


**RE: RFP #GGRF-028-06
NOTICE OF PROTEST OF AWARD OF CONTRACT**

Dear Ms. Blas:

This firm represents ASC Trust Corporation ("ASC").

Notice of Protest

Pursuant to 5 GCA 5425(a), ASC hereby protests the award to Great-West Retirement Services ("GWRS") of the contract to provide Investment Management and Plan Administration Services related to 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan pursuant to the above-referenced request for proposals (the "Contract").¹

Timeliness of Protest

Notice of the award of the Contract to GWRS was sent to ASC on August 21, 2009. The information on which this protest is based was not, however, provided to ASC by the

¹ Specifically, the Contract is that certain Investment Management and Plan Administration Services Agreement, dated effective August 21, 2009, by and between the Board of Trustees and the Fund and Great-West Life and Annuity Insurance Company.

To Paula M. Blas

Date October 15, 2009

Page 2

Fund until October 6, 2009, despite ASC's several earlier efforts to obtain it. A protest must be filed within 14 days of when the aggrieved bidder knows or should know of the facts giving rise to the protest. 5 GCA 5425(a). Thus, ASC had until October 20, 2009 to file a protest.

Grounds for Protest

1. In response to the above-referenced RFP, ASC submitted a proposal to the Fund in November, 2006.

2. The RFP documents set forth the evaluation criteria that were to be used in evaluating proposals and the relative weight those criteria would be given. According to the RFP, the price to be charged for the services to be rendered was one of the factors to be evaluated and it was assigned a weight of 40% of the total evaluation score. Under the applicable procurement regulations, the evaluation factors stated in the RFP were the only permissible basis for evaluating the proposals. 2 GAR, Division 4, section 3114(f)(2). Specifically, the RFP stated:

Based on the [technical] factors above, the proposals will be initially evaluated. Then the price proposals will be opened and the price proposals will be incorporated into the evaluation effort. The price proposal will count for 40% of this evaluation and the technical merits will count for 60% of this evaluation. Based on the combination of the scores assigned from the technical merit and pricing, the GGFR will enter into negotiations with the company with the highest combined score. If these negotiations do not result in a successful contract, then the GGFR will enter into negotiations with the next highest ranked company.²

² RFP, Section VI.C.10., p. 29.

To Paula M. Blas

Date October 15, 2009

Page 3

3. The price offered by ASC to perform the services required under the Contract was substantially lower than that initially offered by GWRS. The Fund essentially conceded this fact in its Agency Report filed in connection with GWRS' bid protest appeal to the Office of the Public Auditor.³

4. Despite the fact that ASC's proposed pricing was substantially lower than that initially proposed by GWRS, one of the three members of the Fund's evaluation team gave ASC a lower evaluation score for its pricing proposal. Specifically, this evaluator gave ASC a numerical rating of 5 for its lower price and gave GWRS a numerical rating of 9 for its substantially higher price.⁴ There was no rational basis for these ratings. Giving ASC a lower rating for a lower, more favorable price was necessarily arbitrary and capricious. Indeed, 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.⁵ It goes without saying that a lower price should have resulted in a higher rating.

³ See Agency Report, filed July 6, 2007, in Docket No. OPA-PA-07-007, p. 6 (asserting that GWRS was a "qualified, but over-priced competitor" and claiming that the Fund's determination that GWRS' reduced price offer was not fair and reasonable was not arbitrary and capricious when that price offer was compared to "the bids and pricing from the pool of other offerors"). The "pool" included ASC.

⁴ See summary evaluation sheets and summary of results attached as Exhibit A. These documents were provided to ASC on October 6, 2009, and the information revealed by them forms the factual basis for this protest. Although ASC had ample reason to believe its price proposal was more favorable than that of GWRS, until it received the individual evaluation sheets it had no reason to believe it was given a lower score than GWRS on this evaluation criterium. To the contrary, ASC had to assume it received lower evaluation scores on the technical criteria and that such lower scores offset the presumed advantage it had on pricing.

⁵ ASC believes the scores given to it by the same evaluator on the technical criteria also demonstrate a bias either in favor of GWRS or against ASC, but that is not a basis for this protest. ASC focuses 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.

To Paula M. Blas

Date October 15, 2009

Page 4

5. The total combined score given to ASC by the three evaluators was 21.64. See Exhibit A. The total combined score for GWRS was 22.42. Based solely on the 0.78 point difference between the two combined scores, GWRS was deemed the best qualified to provide the required services and the Fund entered into negotiations with it, which negotiations eventually led to the award of the Contract.

6. The 5 rating given to ASC on its price proposal by the one evaluator resulted in a score of 2.00 on the price criterium ($5 \times .40$). The 9 rating given to GWRS by the same evaluator on its higher price resulted in a score of 3.60 ($9 \times .40$). The resulting impact on the difference between ASC's total combined evaluation score and that of GWRS was thus 1.60 ($3.60 - 2.00$), which was more than the 0.78 difference between ASC's and GWRS' combined scores. The irrational scoring by this one evaluator thus changed the result. If the evaluator had fairly and rationally applied the price evaluation criterium, ASC would have been given a higher score than GWRS for its price proposal, not lower. It would have then been determined to be best qualified to provide the required services, not GWRS, and the Fund would have negotiated first with ASC, not GWRS.

7. Back in 2007, when the Fund terminated negotiations with GWRS because its pricing was considered not fair and reasonable, the Fund commenced negotiations with ASC as the next most qualified proponent. The Fund proposed pricing terms to ASC which ASC said it would accept. It is only fair to assume that, but for the outcome of GWRS' bid protest appeal, the Contract would have been awarded to ASC.

Summary

As the Fund's attorneys themselves once stated in connection with the prior bid protest relating to this very same procurement, "[t]he procurement process itself is designed to encourage fair competition among providers so that the Government of Guam can get the most value for its

To Paula M. Blas

Date October 15, 2009

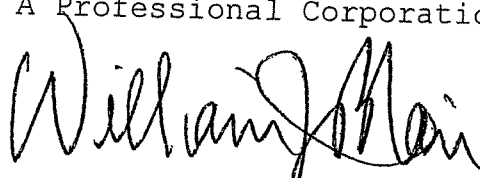
Page 5

dollar.”⁶ Clearly, that did not occur here. One of the Fund’s evaluators acted in bad faith by arbitrarily and capriciously determining that paying more was better than paying less for the same services. That is directly contrary to the purpose and intent of the procurement process. The result is unfair not only to ASC, but also to the Fund and its members. They are not getting the most value for their dollars. The result also undermines the integrity of the procurement process itself.

The facts undeniably show that ASC’s proposal was not fairly evaluated. The award of the Contract to GWRS was not in accordance with the evaluation criteria set forth in the RFP. Pursuant to 5 GCA 5452(a), the award of the Contract to GWRS should be set aside and the Contract terminated. The Fund should thereafter issue a new RFP for the services required by the Fund.

Very truly yours,

BLAIR STERLING JOHNSON
MARTINEZ & LEON GUERRERO
A Professional Corporation



WILLIAM J. BLAIR

Attachment: Exhibit A

cc: Elyze J.T. McDonald, Esq.
Mr. David John

G62\03079-01
G:\WORDDOC\LTR\WJB\1525-P BLAS (HD) RE RFP NO. GGFR-
028-06 (NTC OF PROTEST OF AWARD OF CONTRACT).DOC

⁶ Appellee Government of Guam Retirement Fund’s Rebuttal to Appellant’s Comment on Agency Report, filed on July 23, 2007, in Office of the Public Auditor Docket No. OPA-PA-07-006, *In the Appeal of Great-West Retirement Services*, p. 3.

RFP NO. GGRF-028-06: INVESTMENT MANAGEMENT AND PLAN ADMINISTRATION SERVICES
 related to the 401(a) Defined Contribution Plan / 457 Deferred Compensation Plan and Welfare Benefit Plan

SUMMARY

Evaluator	GWRS	ASC
J.T. San Agustin	7.37	7.31
G. Cruz	6.35	8.76
K.T.E. Taitano	8.70	5.57
TOTAL:	22.42	21.64

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. JOE T. SAN AGUSTIN Date: 7-Feb-07

EVALUATION FACTORS (Score between 1 - 10)		Wt.	GWS			ASC		
			pts.	Total	pts.	Total	pts.	Total
1.	The plan for performing the required services.	0.15		0.00	9	1.35	9	1.35
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15		0.00	10	1.50	10	1.50
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15		0.00	8	1.20	8	1.20
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10		0.00	8	0.80	8	0.80
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10		0.00	9	0.90	9	0.90
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10		0.00	10	1.00	10	1.00
7.	Educational resources and ability to provide ongoing training.	0.10		0.00	9	0.90	8	0.80
8.	Record of past performance of similar work.	0.10		0.00	9	0.90	9	0.90
9.	Other Factors	0.05		0.00	8	0.40	8	0.40
TECHNICAL - TOTAL POINTS POSSIBLE:		1.00		0.00		8.95		8.85
Technical Factors		0.60	0.00	0.00	8.95	5.37	8.85	5.31
Price		0.40		0.00	5	2.00	5	2.00
OVERALL SCORE:		1.00		0.00		7.37		7.31

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. GERRY A. CRUZ Date: 7-Feb-07

EVALUATION FACTORS (Score between 1 - 10)		Wt.	pts.	Total	pts.	Total	pts.	Total	pts.	Total
1.	The plan for performing the required services.	0.15		0.00	8	1.20	8	1.20		
2.	Ability to administer the plan and benefits administration process in a cost-effective manner.	0.15		0.00	4	0.60	8	1.20		
3.	Breadth and depth of experience, specialized training and industry recognition of professional staff.	0.15		0.00	8	1.20	9	1.35		
4.	Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants.	0.10		0.00	7	0.70	9	0.90		
5.	Knowledge of legislative, operational and legal aspects of Guam public pension's funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan.	0.10		0.00	9	0.90	9	0.90		
6.	Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund.	0.10		0.00	6	0.60	9	0.90		
7.	Educational resources and ability to provide ongoing training.	0.10		0.00	8	0.80	8	0.80		
8.	Record of past performance of similar work.	0.10		0.00	8	0.80	9	0.90		
9.	Other Factors	0.05		0.00	9	0.45	9	0.45		
TECHNICAL - TOTAL POINTS POSSIBLE:		1.00		0.00		7.25		8.60		
10.	Technical	0.60	0.00	0.00	7.25	4.35	8.60	5.16		
	Price	0.40		0.00	5	2.00	9	3.60		
OVERALL SCORE:		1.00		0.00		6.35		8.76		

RFP No. GGRF-028-06 - SUMMARY EVALUATION SHEET

Eval. KATHERINE T.E. TAITANO Date: 7-Feb-07

EVALUATION FACTORS (Score between 1 - 10)		GWRS			ASC		
	Wt.	pls.	Total	pls.	Total	pls.	Total
1.		0.15	0.00	8	1.20	5	0.75
2.		0.15	0.00	9	1.35	6	0.90
3.		0.15	0.00	9	1.35	6	0.90
4.		0.10	0.00	10	1.00	6	0.60
5.		0.10	0.00	9	0.90	6	0.60
6.		0.10	0.00	8	0.80	7	0.70
7.		0.10	0.00	7	0.70	7	0.70
8.		0.10	0.00	8	0.80	5	0.50
9.		0.05	0.00	8	0.40	6	0.30
TECHNICAL - TOTAL POINTS POSSIBLE:		1.00	0.00		8.50		5.95
10.	Technical	0.60	0.00	8.50	5.10	5.95	3.57
	Price	0.40	0.00	9	3.60	5	2.00
OVERALL SCORE:		1.00	0.00		8.70		5.57

EXHIBIT

“2”



GOVERNMENT OF GUAM
RETIREMENT FUND
 STABILITY · SECURITY · REWARDS

Felix P. Camacho
 Governor

Michael W. Cruz, M.D.
 Lieutenant Governor

Paula M. Blas
 Director

October 26, 2009

RECEIVED

HD 1132
 OCT 26 2009 *[Signature]*

VIA HAND DELIVERY

Mr. David J. John
 ASC Trust Corporation
 c/o William J. Blair
 Law Offices of Blair Sterling Johnson Martinez & Leon Guerrero
 Suite 100B DNA Building
 238 Archbishop F.C. Flores Street
 Hagåtña, Guam 96910-5205

**BLAIR STERLING JOHNSON
 MARTINEZ & LEON GUERRERO**
 A PROFESSIONAL CORPORATION

Trustees:

Joe T. San Agustin
 Chairman

Wilfred P. Leon Guerrero, Ed.D.
 Vice-Chairman
 Investment Committee, Chairman

Antolina S. Leon Guerrero
 Secretary

Gerard A. Cruz
 Treasurer
 Audit & Operations Committee,
 Chairman

George A. Santos
 Members' & Benefits Committee,
 Chairman

Katherine T.E. Taitano
 Trustee

Wilfred G. Aflague
 Trustee

Re: ASC's October 15, 2009 Protest of RFP No. GGRF-028-06

Dear Mr. John:

This letter is in response to the protest submitted by ASC Trust Corporation ("ASC") to the Government of Guam Retirement Fund on October 15, 2009. ASC protests the ratings it received from the evaluation panel with regard to the above-mentioned Request for Proposal. ASC claims that it did not review its evaluation sheets until October 6, 2009. However, because a timely protest should have been submitted no later than fourteen days after May 7, 2007, May 11, 2007, July 6, 2007, or at the latest, September 4, 2009, the Retirement Fund hereby declines to consider the Protest on the grounds of untimeliness.

According to 5 G.C.A. § 5425(a), a protest "shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." The regulations, 2 GAR Div. 4, § 9101(c)(1), confirm the statute, Section 5425(a): a Protest must be made in writing "within 14 days after the protestor knows or should have known of the facts giving rise thereto. . . . Protests filed after the 14 day period shall not be considered."

ASC is extremely dilatory in filing its Protest on October 15, 2009, as a timely protest should have been made more than two years ago. On May 7, 2007, the Retirement Fund sent ASC a letter advising that ASC "has been evaluated and

deemed to be the next qualified to provide the required services."¹ This notice alerted ASC that it was not rated or evaluated to be the best qualified offeror for RFP No. GGRF-028-06. At that time, and for 14 days after May 7, 2007, ASC could have requested its evaluation sheets and could have protested its ratings, but failed to do so.

A second opportunity for ASC to protest occurred on May 11, 2007, when the Retirement Fund sent a letter advising ASC that the Retirement Fund had executed a Stay of Procurement on the RFP as a result of a protest by the best qualified offeror, Great-West Retirement Services. At that time it became clear to ASC that Great-West was ranked higher than ASC. Again, at that time, ASC could have asked for its evaluation sheets and could have submitted a protest on its ratings, but failed to do so.

ASC was aware that the Retirement Fund denied Great-West's Protest, and that Great-West appealed the denial on June 22, 2007. ASC also entered an appearance in the OPA proceedings and presented argument. While the OPA was considering Great-West's Protest, ASC may have at that time also protested its rankings and sought review by the Office of the Public Auditor. However, once again, ASC elected not to protest. Also, the OPA ruled that the Retirement Fund must continue its negotiations with Great-West. A significant amount of time - a year and a half - has passed since the OPA made her ruling. During this period, ASC knew that it was ranked lower than Great-West, yet it failed to protest the rankings.

The fact that ASC did not ask for and receive its evaluation sheets until recently has no impact on this analysis. ASC knew that it was ranked lower than Great-West, and could have asked the Retirement Fund to produce the evaluation sheets once it gained that knowledge - on May 7, 2007, May 11, 2007, or at the latest, July 6, 2007. Even as ASC admits in footnote 3 of its Protest, it learned on July 6, 2007, when the Fund filed its Agency Report stating that "GWRS was a 'qualified, but over-priced competitor'", that ASC's price was lower than Great-West's price but that its overall ranking was inferior to Great-West. As both section 5425(a) and 9101(c)(1) state, the time to protest begins when ASC "knows or should have known of the facts giving rise" to its protest. ASC knew back in July 6, 2007, of the grounds underlying its present Protest. It, however, failed to protest.

The Retirement Fund has invested a great deal of resources and time in negotiations, all the while ASC's ranking has always been known to ASC. In summary, ASC could have submitted a Protest on the grounds of its rankings within 14 days after May 7, 2007. Construing the timeline even more liberally in favor of ASC, ASC may have been timely if it submitted a Protest within 14 days after May 11, 2007, or even 14 days after July 6, 2007. However, ASC sat on its rights for over two years, deeming its current Protest untimely.

¹ This May 7, 2007 letter, and other relevant correspondence and documents referred to in this Response to ASC's Protest, are attached.

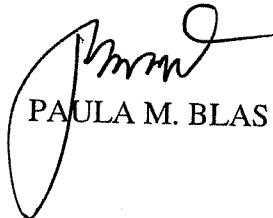
Mr. David J. John
ASC Trust Corporation
c/o William J. Blair
October 26, 2009
Page 3 of 3

Finally, ASC's Protest is untimely even when viewed in context of ASC's awareness on August 21, 2009, that the Retirement Fund had entered into a contract with Great-West. Upon becoming aware that the Retirement Fund had finalized the contract with Great-West, ASC knew, as it knew back in 2007, that it was ranked lower than Great-West. To make a timely protest based on the finalization of the contract with Great-West, ASC had until September 4, 2009. Its October 15, 2009 Protest is six weeks beyond that deadline.

For each and every above-stated reasons, pursuant to Sections 5425(a) and 9101(c)(1), ASC's untimely Protest will not be considered.

Pursuant to 5 G.C.A. § 5425(c), ASC may pursue judicial and administrative 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).

Very truly yours,



PAULA M. BLAS

Enclosures

EXHIBIT

“3”



RFP No. GGRF-028-06: Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan 457 Deferred Compensation Plan and Welfare Benefit Plan

MEMORANDUM OF EVALUATION AND NEGOTIATION

To: Procurement File
From: Director, Purchasing Official
Date: September 07, 2009

On September 28, 2006, the Government of Guam Retirement Fund issued RFP No. GGRF-028-06 in search of professional services related to providing Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan, to the Fund as described in detail in Section IV, Scope of Work of RFP No. GGRF-028-06.

Background

On November 6, 2006, the RFP closed with a total of three (3) proposals submitted to the Fund. All offerors responded to the RFP by submitting their proposals at or before the date and time announced for the receipt of the proposals.

Minimum Qualifications

In reviewing the three proposals submitted, the Procurement Officer determined that all three offerors met the minimum qualifications as stated in Section V.B. Minimum Qualifications of RFP No. GGRF-028-06, and eligible for further evaluation.

The three offerors are:

1. Lincoln Financial Group / Bank of Hawaii
2. Great-West Retirement Services
3. ASC Trust Corporation

Discussions

On January 23, 2007, the Selection Panel conducted individual discussions with all three offerors regarding the firm's respective proposals.

Evaluation Process

The Selection Panel for the Fund for RFP No. GGRF-028-06 convened at 12:00 noon, February 7, 2007 in the GGRF Conference Room. Selection Panel consisted of Joe San Agustin (Chair), Katherine T.E. Taitano (Trustee), and Gerry A. Cruz (Trustee).

The three offerors were found to comply with the mandatory and material requirements of this solicitation and were evaluated based upon technical merits and price.

In ranking qualified offerors, the Selection Panel first assigned a weight to each evaluation factor based on the importance of each factor. In rendering a numeric value between 1 and 10 for each factor, the Selection Panel was asked to consider and evaluate each qualified offeror's proposal with the following Evaluation Factors listed in Section VI.C. Evaluation Factors of RFP No. GGRF-028-06. The following table summarizes the results of the individual scoring ballots:

Evaluator	LFG/BOH	GWRS	ASC
J.T. San Agustin	6.24	7.37	7.31
G.A. Cruz	6.62	6.35	8.76
K.T.E. Taitano	5.90	8.70	5.57
TOTAL:	18.76	22.42	21.64

As evidenced by the scores above, the Selection Panel deemed GREAT-WEST RETIREMENT SERVICES (GWRS) to be the best qualified offeror to provide the required services. The Selection Panel concluded at 2:50 p.m. Further evaluation of GWRS cost proposal was completed. The Selection Panel convened at 12:00 p.m., February 27, 2007 to determine acceptable costs for the services to be performed. The Selection Panel concluded at 1:40 p.m.

Negotiations

The Fund proceeded with negotiations with GWRS. On March 6, 2007, a letter was sent to GWRS detailing the Fund's acceptable price and offer. A response was received from GWRS on March 12, 2007 providing a counter-offer to the Fund's March 6, 2007 letter.

Further communication between GWRS and the Fund took place discussing current pricing and acceptable pricing for RFP No. GGRF-028-06.

On March 18, 2007, a letter was sent to GWRS stating that the Fund reviewed their modified cost proposal and has not accepted the counter-offer. At this time, the Fund requested for the firm's "best and final offer". On March 21, 2007 GWRS provided their best and final offer.

On April 27, 2007, the Fund terminated negotiations with GWRS determining that the firm's best and final offer was not fair and reasonable for the following reasons:

1. The Fund determined the fair and reasonable costs for the estimated value, scope and complexity and professional nature of the services to be performed to be a flat fee of 0.25% of total assets.
2. The scope of services to be performed was available by the other offerors and costs were determined to be competitive.
3. Custodial Services indicated in GWRS letter dated March 12, 2007 were not provided in the best and final offer. This may have an impact on overall price.

GWRS acknowledged receipt of the Fund's letter dated April 27, 2007 on April 30, 2007. The Fund commenced negotiations with the next qualified firm.

Post Procurement Appeal Negotiations and Award of Contract

On May 9, 2007, GWRS officially protested GGRF's determination that GWRS's firm's best and final offer was not "fair and reasonable". As a result, on May 11, 2007 GGRF executed a "Stay of Procurement" on RFP No. GGRF-028-06. On May 11, 2007, notices of the "Stay of Procurement" was sent to all interested parties.

On June 1, 2007, GGRF denied GWRS's protest. On May 7, 2007, GGRF notified ASC Trust Corporation that it was the next qualified offeror and sought cost and pricing data. On June 8, 2007, notices lifting the "Stay of Procurement" were sent to all interested parties.

On June 22, 2007, GWRS filed a 'Notice of Appeal' with the Office of the Public Auditor. In turn, GGRF sent letters to all interested parties informing them of the Notice of Appeal filed by GWRS. On July 6, 2007, ASC filed an "Entry of Appearance and Request for Notice" with the OPA's Office, and also participated throughout the OPA proceedings.

The OPA issued her decision on the appeal on March 12, 2008, which was amended on April 11, 2008. The OPA sustained GWRS's appeal and overruled GGRF's Decision denying GWRS's protest. GGRF was ordered to continue negotiations with GWRS in an attempt to reach an agreement to provide Investment Management and Plan Administration Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan.

In addition, the OPA noted that the Chairman of the GGRF Board had a conflict of interest. The Chairman serves on the Board of the proposed Trustee named by ASC. The OPA recommended that the Chairman not participate in the negotiations with ASC and a substitute negotiator should be appointed by GGRF. On March 28, 2008, GGRF replaced the Chairman with Ms. Antolina S. Leon Guerrero on the selection and negotiations panel.

On April 2, 2008, GGRF resumed negotiations with GWRS. GGRF requested GWRS to submit their best and final offer.

On April 10, 2008, GWRS provided their best and final offer with a reduced administrative fee of 0.24% of total plan assets, in addition to the details of their offers and all fees that will be charged. Negotiations continued until the Negotiation Panel accepted the fees on August 1, 2008.

On August 28, 2008, GGRF and GWRS commenced contract negotiations.

Board Approval

At the GGRF regular Board meeting of July 31, 2009, the Board approved the amended Investment Management and Plan Administration Services Agreement and Service Level Guarantees with GWRS.

The Agreement was signed with an effective date of August 21, 2009.

On August 21, 2009, Notification of Award was sent to all offerors.

EXHIBIT

“4”

214. How many plans do you work with that have more than 15 payroll centers? Note that the GGRF Plan has 19 payroll centers and the recordkeeper will be responsible for processing payroll contributions and reconciling the payroll from all 19 centers. Describe how you currently handle the payroll contributions processing for another governmental or corporate client with more than 15 payroll centers.
215. Describe any presence your organization currently has in Guam. Do you intend to expand or create a presence in Guam should your firm be selected to provide the requested services? Include any business operations of your organization, any affiliates or subsidiary organizations, or any organizations that you are partnering with to provide the requested services.

WELFARE BENEFIT PLAN

The GGRF currently contracts with a third party provider to provide the welfare benefits (i.e. survivor death and pre-retirement disability) for Defined Contribution Plan participants. The Third-Party Administrator for the Defined Contribution Plan may be charged with the following administrative functions:

- a. Compute service vesting as required by the third party providing welfare benefits.
 - b. Provide contribution history on a participant as requested by the third party provider.
 - c. Respond to participant and employer questions and provide guidance about survivor death and pre-retirement disability benefits offered by the third party provider.
 - d. Coordinate documentation and submission of necessary documents to third party provider.
 - e. May serve as a liaison between third party provider, participant and employer in processing of pre-retirement disability coverage.
216. List your firm's experiences in administering (ancillary) welfare benefits.
217. Provide a statement expressing your firm's willingness to perform the administrative functions described above.

VI. EVALUATION AND SELECTION PROCEDURES

A. Minimum Qualifications

Proposing offerors shall satisfy the minimum requirements as outlined in section V.(B) Statement Regarding Minimum Qualifications. In addition, offerors must submit its full form ADV (Part I and II) with its applications to GGRF.

B. Selection Panel.

Proposals submitted may be evaluated by a selection panel consisting of the following:

- Retirement Fund Management and Board of Trustees

The selection panel may request additional technical assistance from other sources, which may assist in reviewing (not evaluating) the responses for completeness and compliance with technical requirements.

C. Evaluation Factors.

All proposals found to be in compliance with the mandatory and material requirements of this solicitation shall be evaluated based upon technical merits and price. The following factors shall be used to evaluate each proposal:

1. The plan for performing the required services. (.15)
2. Ability to administer the plan and benefits administration process in a cost-effective manner. (.15)
3. Breadth and depth of experience, specialized training and industry recognition of professional staff. (.15)
4. Ability to be responsive and accessible to the Retirement Fund and to DCRS and Deferred Compensation plan participants. (.10)
5. Knowledge of legislative, operational and legal aspects of Guam public pensions funds, as well as federal laws pertinent to the investment management and plan administration of the DCRS and Deferred Compensation plan. (.10)
6. Ability to improve participant satisfaction and benefits administration services received from the Retirement Fund. (.10)
7. Educational resources and ability to provide ongoing training. (.10)
8. Record of past performance of similar work. (.10)
9. Other factors. (.05)
10. Based on the factors above, the proposals will be initially evaluated. Then the price proposals will be opened and the price proposals will be incorporated into the evaluation effort. The price proposal will count for 40% of this evaluation and the technical merits will count for 60% of this evaluation. Based on the combination of the scores assigned from the technical merit and pricing, the GGRF will enter into negotiations with the company with the highest combined score. If these negotiations do not result in a successful contract, then the GGRF will enter into negotiations with the next highest ranked company.

D. Selection

Selection of the Best Qualified Offeror is described in Section II (General Procedures).

The contract will be conditionally awarded to the successful offeror subject to the requirement that within eight (8) weeks from the date of the award, or within such extended time period, if any, as the Board in its discretion may allow, and in all events prior to the successful offeror commencing work hereunder, the successful offeror shall be duly registered as an Investment Advisor pursuant to the provisions of the Guam Uniform Securities Act (Title 22, Chapter 46, Article 2 of the Guam Code Annotated), and a copy of the registration notification issued to the successful offeror by the office of the Administrator of the Guam Uniform Securities Act shall be provided to the Purchasing Agent. In addition, the successful offeror shall be duly registered to conduct business on Guam.