

31

CARLSMITH BALL LLP

ELYZE J. McDONALD
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
JUL 29 2007
4:50 pm
07-006

OFFICE OF THE PUBLIC AUDITOR
GUAM

RECEIVED
Date: 6/29/07
Time: 5:08pm
LAW OFFICE OF ANTHONY R. CAMACHO, ES
By: [Signature]

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

CIVIL CASE NO. OPA-PA-07-006

**NOTICE OF FILING UNDER SEAL -
NOTICE OF FILING OF
PROCUREMENT RECORD AND
CONFIDENTIAL PORTIONS OF
PROCUREMENT RECORD**

The PRIVATE VERSION of the Notice of Filing of Procurement Record and Confidential Portions of Procurement Record are being filed under seal.

DATED: Hagåtña, Guam, June 29, 2007.

CARLSMITH BALL LLP

Elyze J. McDonald
ELYZE J. MCDONALD
Attorneys for Appellee
Government of Guam Retirement Fund

RECEIVED
2007 JUL - 2 AM 10:42
GOVT OF GUAM
RETIREMENT FUND

[Handwritten initials]

CARLSMITH BALL LLP

ELYZE J. McDONALD
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 RECORDS

JUN 29 2007

TIME: 4:50 pm
BY: [Signature]
FILE No. OPA-PA 07-006

OFFICE OF THE PUBLIC AUDITOR
GUAM

RECEIVED
Date: 6/29/07
Time: 5:08 pm
LAW OFFICE OF ANTHONY R. CAMACHO, ESQ
By: [Signature]

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

CIVIL CASE NO. OPA-PA-07-006

NOTICE OF FILING OF
PROCUREMENT RECORD AND
CONFIDENTIAL PORTIONS OF
PROCUREMENT RECORD

RECEIVED

2007 JUL -2 AM 10:42

GOVT OF GUAM
RETIREMENT FUND
[Signature]

Appellee Government of Guam Retirement Fund ("GGRF"), by and through undersigned counsel, hereby files with the Office of Public Auditor a complete copy of the procurement record relevant to the above-captioned appeal in the form prescribed by 2 GAR 12104(c)(3).

Appellee has furthermore separated and submitted separately and under seal portions of the record which are confidential and/or proprietary. The confidential portions are designated in italics in the below table of contents to the record.

CHRONOLOGY OF EVENTS

TAB

September 28, 2006:	RFP No. GGRF-028-06.	1
October 23, 2006:	Responses to questions relating to RFP.	2
November 2006:	<i>Proposal for: Sections 401(A0, 457, and Welfare Benefit Plan Investment Management and Administration Services.</i>	3

COPY

December 11, 2006:	Letter sent to all offerors inviting them to participate in discussion meeting at GGRF Office.	4
<i>March 6, 2007:</i>	<i>Letter sent to GWRS informing them that they were the best qualified offeror to provide the required services and to request for cost or pricing data inclusive of specifics relating to custodial services and pricing.</i>	5
<i>March 13, 2007:</i>	<i>Received response from GWRS providing price proposal.</i>	6
March 18, 2007:	Letter sent to GWRS informing them that cost pricing was not accepted. In addition, GGRF made request for best and final offer.	7
<i>March 21, 2007:</i>	<i>Received response from GWRS with modified price proposal.</i>	8
April 27, 2007:	Letter sent to GWRS notifying them that best and final offer was not fair and reasonable and that negotiations would be terminated. In addition, GWRS was also informed that negotiations would take place with next qualified firm.	9
	<i>Termination of Negotiations memorandum.</i>	10
	<i>Comparative of Third Party Administrator Fees.</i>	11
May 7, 2007:	Letter sent to ASC informing them that they were next qualified offeror to provide required services and to request for submission of cost or pricing data inclusive of specifics relating to custodial services and pricing.	12
<i>May 9, 2007:</i>	<i>RFP protest received from GWRS.</i>	13
May 11, 2007:	Stay of Procurement letter/memorandum issued to all three (3) interested parties, Attorney General and Office of the Public Auditor.	14
	<i>Response received from ASC providing price proposal.</i>	15
June 1, 2007:	Letter sent to GWRS denying protest and indicating that this was GGRF's final decision.	16
June 8, 2007:	Letter sent to all interested parties, Attorney General and Office of the Public Auditor informing them that GGRF declared GWRS protest to be without merit and that Stay of Procurement was lifted.	17

32

JOAQUIN C. ARRIOLA, JR., ESQ.
ARRIOLA, COWAN & ARRIOLA
259 MARTYR STREET, SUITE 201
C&A BUILDING, HAGÁTÑA, GUAM
P.O. BOX X, HAGÁTÑA, GUAM 96932
TELEPHONE: (671) 477-9730/33
TELECOPIER: (671) 477-9734

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

JUL 06 2007

TIME: 3:22 pm
BY: [Signature]
FILE No. OPA-07-006

Counsel for *ADMINISTRATIVE SERVICES CORPORATION*

OFFICE OF THE PUBLIC AUDITOR
TERRITORY OF GUAM

IN THE APPEAL OF) Procurement Appeal No.
GREAT-WESTERN RETIREMENT SERVICES,) OPA-PA-07-006
Appellant.) **ENTRY OF APPEARANCE**
) **AND REQUEST FOR NOTICE**

The Law Firm of ARRIOLA, COWAN & ARRIOLA, by Joaquin C. Arriola, Jr., Esq., hereby enters its appearance herein on behalf of **ADMINISTRATIVE SERVICES CORPORATION**, an Interested Party in the above appeal. Arriola, Cowan & Arriola request that they be served with all papers and pleadings filed in this matter, and be given notice of any and all proceedings or hearings herein.

Dated at Hagåtña, Guam: July 6, 2007.

ARRIOLA, COWAN & ARRIOLA
Counsel for *ADMINISTRATIVE SERVICES CORPORATION*

JOAQUIN C. ARRIOLA, JR.

ORIGINAL

ARRIOLA, COWAN & ARRIOLA, HAGÁTÑA, GUAM 96910

COPY

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

2007 JUL -6 PM 3:56

GOVT OF GUAM
RETIREMENT FUND

SM

OFFICE OF THE PUBLIC AUDITOR

GUAM

IN THE APPEAL OF

GREAT-WEST RETIREMENT SERVICES,

Appellant.

DOCKET NO. OPA-PA-07-006

**DECLARATION REGARDING COURT
ACTION**

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of the Public Auditor will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to, and the undersigned party agrees to, notify the Office of the Public Auditor within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

SUBMITTED this 10th day of July, 2007. Hagåtña, Guam.

CARLSMITH BALL LLP

Elyze J. McDonald

ELYZE J. MCDONALD
CAREY MCALISTER AUSTIN

Attorneys for Appellee
Government of Guam Retirement Fund

33

COPY

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

OFFICE OF THE PUBLIC AUDITOR
GUAM

GOVT OF GUAM
RETIREMENT FUND
RECEIVED
2007 JUL -6 PM 3:57
SM

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.)

On November 6, 2006, the RFP closed with a total of three (3) proposals submitted to GGRF. All submitted proposals met the deadline stated in the RFP. After reviewing the three (3) proposals, the Procurement Officer determined that all three (3) offerors met the qualifications and were eligible for further evaluation. On January 23, 2007, the selection panel of the GGRF conducted individual discussions with all offerors regarding their proposals.

At noon on February 7, 2007, the selection panel met to evaluate the offerors based on technical merits and price. Using a weighted scoring scheme, with a specific weight given to each evaluation factor, each member of the selection panel scored each offeror. Based on the scoring, Great-West was chosen as the best qualified offeror. The meeting of the selection panel concluded at 2:50 p.m.

GGRF notified Great-West that it was chosen as the best qualified offeror by letter dated March 6, 2007. The letter also requested that Great-West submit pricing data for negotiation, specifically including the following information:

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

Great-West responded by letter dated March 12, 2007 to GGRF's requests. This letter was deemed non-responsive as it did not sufficiently address any of the four (4) items requested by GGRF. The letter did not confirm an independent custodian licensed on Guam to provide trust services; it did not specifically address the fees for participant account balances under "Option 1" of its proposals; it simply re-stated its prior offer of fees at .27-.33%, basing such fees on assumptions that were not part of its original proposal; and it did not indicate remittance of re-

allowances and 12b-1 fee rebates to GGRF.

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

awarded if certified cost or pricing data is later found to be inaccurate, incomplete, or non-current. As the contract has never been awarded, this regulation does not apply.

The applicable regulation to price analysis is 2 G.A.R., Div. 4, Chap. 3, § 3118(g). When considering pricing, the agency should look at various factors, including but not limited to, the price submission of other bidders, prices in catalogue or price lists, prior quotes of the bidder, prices available on the open market and in-house estimates. 2 G.A.R., Div. 4, Chap. 3, § 3118(g). Great-West would like GGRF to ignore all of the pricing elements other than its own prior price quotes or contract prices.

Instead, GGRF conducted extensive research into the marketplace, using both in house resources and price lists from industry organizations of which it is a member. (See Tab #11 of the Procurement Record.) These price lists and in-house resources reflected the going-rate for the services sought on the open market. Furthermore, GGRF determined that transparency would be one of their primary goals under the new contract and having a clearly delineated fee structure is a major part of accomplishing this goal. Based upon the performance of GGRF's past investment, they determined it would no longer be necessary to charge fees to participant accounts. This too became part of the negotiation. Finally, GGRF considered the pricing quotes of the remaining bidders. As these bids remain proprietary and confidential, they cannot be disclosed to Great-West or the public at large at this time; however, they can be submitted to the Auditor for confidential, in camera review upon request.

Based on the price analysis factors, GGRF decided that Great-West's price quote was not fair and reasonable. Award of a contract under 5 GCA § 5216(e) and 2 G.A.R., Div. 4, Chap. 3, § 3114(k) requires two elements: (1) a determination that an offeror is the best qualified and (2) successful negotiation of a fair and reasonable compensation. If a successful negotiation does

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.

Furthermore, negotiations come in many varieties. Negotiation does not necessarily mean that a fair and reasonable price is somewhere in the middle of the initial quotes of each party. Negotiation also contemplates affording a qualified, but over-priced competitor the opportunity to make a more reasonable and competitive offer. Unfortunately, Great-West did not seize their opportunity to negotiate and apparently assumed that they would be awarded the contract because they were chosen as the initial best qualified offeror. While it is unfortunate that Great-West misjudged their position in these negotiations, Guam's procurement law clearly states that the award of the contract is based on successful negotiations. GGRF indicated the prior offer was unacceptable and requested a "best and final offer", Great-West made its final offer, which was basically unchanged from its previous unacceptable offer. Therefore, it risked the fact that it may be rejected and negotiations terminated as provided by law. This is, in fact, what happened.

c. GGRF's actions are supported by the facts and the record: GGRF's actions in terminating negotiations was not arbitrary or capricious, but based on research, the marketplace, and most importantly, the bids and pricing from the pool of other offerors. GGRF gave Great-West ample opportunity to negotiate. The fact that the negotiations were not successful does not indicate an arbitrary decision.

2 G.A.R., Div. 4, Chap. 3, (1)(4)(A) requires that upon deciding to terminate negotiations, the agency place a written record stating the reasons therefore in the file. It also requires the offeror to be notified of the termination within three days of such decision. The written record supporting GGRF's decision to terminate negotiations was placed in the file. (See Tab #10 of the Procurement Record.) Such statement is not required to be given to the offeror as it may contain proprietary information. The offeror only receives notice of the termination itself,

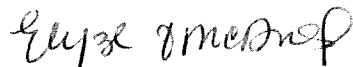
not the statement of supporting reasons. The decision to terminate negotiations was made on April 27, 2007 and a letter notifying Great-West of the termination was sent on that same day. Not only was notification sent within three days of the decision to terminate in accordance with the statutory requirement, 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 15th day of July, 2007, Hagåtña, Guam.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
CAREY MCALISTER AUSTIN

Attorneys for Appellee
GOVERNMENT OF GUAM RETIREMENT
FUND

EXHIBIT A

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



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		

Urgent For Review Please Comment 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.

34

1 **LAW OFFICE OF SOMERFLECK & CAMACHO**
Suite 500W, 5th Floor GCIC Building
2 414 West Soledad Ave.
Hagatna, Guam, 96913
3 Telephone: (671) 477-1389 Ext. 113
Fax: (671) 477-1077
4 E-Mail: arcesq@hotmail.com

5 **ATTORNEY FOR APPELLANT**
Great-West Retirement Services
6

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

JUL 16 2007

TIME: 2:55 PM
BY: Acamacho
FILE No. OPA-PA 07-006

7 **OFFICE OF THE PUBLIC AUDITOR**
8 **GUAM**

9
10 IN THE APPEAL OF)

11 GREAT-WEST RETIREMENT)
SERVICES,)

12)
13 Appellant.)
14

Appeal No. OPA-PA-07-006

**APPELLANT GREAT-WEST
RETIREMENT SERVICES' COMMENT
ON AGENCY REPORT**

GOVT OF GUAM
RETIREMENT FUND
2007 JUL 26 PM 2:58
8m

15 **COMES NOW**, Appellant GREAT-WEST RETIREMENT SERVICES (GWRS), by
16 and through its counsel of record, ANTHONY R. CAMACHO, ESQ., and, pursuant to 2 G.A.R.,
17 Div. 4, Chap. 12, §12104(c)(4), hereby submits its Comment to the Government of Guam
18 Retirement Fund's (GGRF) Agency Report which is as follows:

19 **GGRF'S PRICE ANALYSIS WAS ARBITRARY, CAPRICIOUS AND**
20 **VIOLATED GUAM PROCUREMENT REGULATIONS**

21 There is no merit to GGRF's arguments that it conducted a proper price analysis of
22 GWRS's cost and pricing data. The record below clearly shows: (1) GGRF failed to make any
23 finding that GWRS's cost or pricing data was overstated or otherwise defective because it was
24 inaccurate, incomplete, or non-current; and (2) GGRF arbitrarily and capriciously refused to
25 consider prices available on the open market or the prior price quotations and contract prices
26 charged by GWRS and limited its price analysis to a comparison of GWRS's cost and pricing
27 data and the price proposals submitted by the other offerors in violation of 2 G.A.R., Div. 4,
28 Chap. 3, §3118(g)(1), (2), and (4); and (3) GGRF failed to consider the terms and conditions in

RECEIVED

CARLSMITH BALL

DATE: 07-16-07 TIME: 4:22 PM

COPY

4 GWRS' cost and pricing data which differed from the proposals of the other offerors in violation
5 of 2 G.A.R., Div. 4, Chap. 3, §3118(g)(5).

6 **GGRF failed to make any finding that GWRS's Cost or Pricing Data**
7 **was overstated or otherwise defective**

8 GGRF failed to make any finding that GWRS's Cost or Pricing Data was overstated or
9 otherwise defective due to inaccuracy, incompleteness, or non-currentness. GGRF's argument
10 that 2 G.A.R., Div. 4, Chap. 3, §3118(f) is not applicable because a contract has not been
11 awarded has no merit. Offeror's determined to be best qualified shall be required to submit cost
12 or pricing data to the head of the agency conducting the procurement at a time specified prior to
13 the commencement of negotiations in accordance with 2 G.A.R., Div. 4, Chap. 3, §3118. 2
14 G.A.R., Div. 4, Chap. 3, §3114(k). The provisions of 2 G.A.R., Div. 4, Chap. 3, §3118 include
15 procedures that must be followed whenever it is alleged that cost or pricing data has been
16 overstated. 2 G.A.R., Div. 4, Chap. 3, §3118(f)(1). The plain language of said regulation does
17 not limit its application to post award allegations of overstated cost or pricing data. Instead, said
18 regulation states it is applicable to defective cost or pricing data and adjustments of contract
19 price. Id. Here, the procurement was at the stage where the parties were supposed to be
20 negotiating and one of the elements of such negotiation is the contract price. See Section II,
21 Paragraph I, Request for Proposal (RFP) No. GGRF-028-06, Tab 1, Procurement Record, and 2
22 G.A.R., Div. 4, Chap. 3, §3118(l)(2)(C). GGRF admits that it believed GWRS's cost and pricing
23 data was overstated. See Page 7, Lines 7-11, Agency Report. However, it failed to make the
24 finding that GWRS's cost or pricing data was inaccurate, incomplete, or non-current as required
25 by 2 G.A.R., Div. 4, Chap. 3, §3118(f)(1). Instead, GGRF merely stated that it did not accept the
26 additional cost and pricing data GWRS provided to GGRF on March 12, 2007. See Letter by
27 Paula M. Blas dated March 18, 2007, Exhibit C, Notice of Appeal. Therefore, without said
28 finding, there is no evidence or record below that the cost or pricing data GWRS submitted with

4 its proposal and the additional cost or pricing data GWRS provided to GGRF on March 12, 2007
5 pursuant to GGRF's request, was overstated or otherwise defective.

6 **GGRF arbitrarily and capriciously refused to consider**
7 **prices available on the open market or the prior price quotations and**
8 **contract prices charged by GWRS and limited its price analysis**
9 **to a comparison of GWRS's cost and pricing data and the price**
10 **proposals submitted by the other offerors**

11 GGRF arbitrarily and capriciously refused to consider prices available on the open market
12 or the prior price quotations and contract prices charged by GWRS and limited its price analysis
13 to a comparison of GWRS's cost and pricing data and the price proposals submitted by the other
14 offerors. A price analysis is used to determine if a price is reasonable and acceptable and it
15 involves an evaluation of the prices for the same or similar items or services. 2 G.A.R., Div. 4,
16 Chap. 3, §3118(g). Further, price submissions of prospective offerors in the current
17 procurement, prior price quotations and contract prices charged by the offeror, and prices
18 available on the open market are all acceptable price analysis criteria. 2 G.A.R., Div. 4, Chap. 3,
19 §3118(g)(1), (2), and (4). Here, GGRF admitted that its price analysis was limited to a
20 comparison of GWRS' cost and pricing and the pricing quotes of the remaining offerors. Page 3,
21 Paragraph C(2), Procurement Protest Decision dated June 1, 2007, Exhibit G, Notice of Appeal.
22 Thus, GGRF's arbitrarily and capriciously refused to consider prices available on the open
23 market or the prior price quotations and contract prices charged by GWRS

24 In its Agency Report, GGRF now speciously argues that its price analysis included an
25 undisclosed in-house estimate of the open market price and the pricing quotes of the other
26 offerors. Page 4, Lines 9-21, of the Agency Report. However, as stated above, this argument is
27 not supported by the record below. Despite being price analysis criteria authorized by
28 Procurement Regulations as set forth above, GGRF admitted that GWRS's pricing, "is to be
compared only against the relevant pool of proposals from other qualified offerors," and:
"contracts negotiated and awarded in other jurisdictions are relevant to GWRS's qualifications

4 and experience but cannot be the basis to establish that GWARS's best and final offer is fair and
5 reasonable." Id. Thus, GGRF arbitrarily and capriciously limited its price analysis to a
6 comparison of GWRS's cost and pricing data and the price proposals from the other offerors

7
8 **GGRF failed to consider the terms and conditions in GWRS' cost
9 and pricing data which differed from the proposals
of the other offerors**

10 GGRF failed to consider the terms and conditions in GWRS's cost and pricing data
11 which differed from the proposals of the other offerors. In conducting a price analysis that
12 includes price submissions of prospective offerors, and prices available on the open market, the
13 purchasing agency must give consideration to any differing terms and conditions. 2 G.A.R., Div.
14 4, Chap. 3, §3118(g)(5). Here, GGRF determined that the price proposals from the other offerors
15 had a price of 0.25% of the total assets as their fee and disclosed this amount to GGRF on or
16 about March 6, 2007. Letter from Paula M. Blas dated March 6, 2007, Exhibit A, Notice of
17 Appeal. GGRF's price analysis was limited to whether GWRS's cost or pricing data was higher
18 or lower than the 0.25% fee from the other offerors, and GGRF rejected GWRS's price of 0.27%
19 for the sole reason that it was higher than the 0.25% fee from the other offerors. Letter from
20 Paula M. Blas dated March 18, 2007, Exhibit C, Notice of Appeal. Thus, GGRF gave no
21 consideration to the terms and conditions in GWRS's cost and pricing data which differed from
22 the proposals of the other offerors in violation of 2 G.A.R., Div. 4, Chap. 3, §3118(g)(5).
23

24 **GGRF ARBITRARILY, CAPRICIOUSLY REFUSED TO NEGOTIATE**
25 **WITH GWRS, AND GGRF ADDED ADDITIONAL REQUIREMENTS TO THE RFP,**
26 **ILLEGALLY DISCLOSED INFORMATION FROM OTHER OFFERORS,**
AND WITHHELD PUBLIC PROCUREMENT DATA IN VIOLATION
OF GUAM PROCUREMENT LAW AND REGULATIONS

27 There is no merit to GGRF's arguments that it gave GWRS the opportunity to negotiate
28 and that GWRS was unresponsive. Instead, GGRF arbitrarily, capriciously and illegally: (1)

4 Refused to negotiate with GWRS; (2) Added additional requirements to the RFP; and (2)
5 Illegally disclosed information from the proposals of other offerors; and (3) Withheld public
6 procurement data.

7 **GGRF arbitrarily, capriciously and illegally**
8 **refused to negotiate with GWRS**

9 GGRF arbitrarily, capriciously and illegally refused to negotiate with GWRS. The RFP
10 required the GGRF to negotiate a contract with the best qualified offeror for the required services
11 at compensation determined in writing to be fair and reasonable. Section II, Paragraph I, Page 4
12 of 29, RFP, Tab 1, Procurement Record. The RFP required the offerors to submit cost or pricing
13 data and Fee Summary Services in a separate sealed envelope with their proposals. Id.,
14 Paragraph G, Page 4 of 29, and Paragraph 187, Page 25 of 29. The RFP stated that individual
15 proposals will be rejected if the proposed price is: "clearly unreasonable." The RFP specifically
16 stated that the proposals would be evaluated based upon technical merits and price, and that price
17 proposals will count for 40% of the evaluation and the technical merits will count for 60% of the
18 evaluation, and based on the combination of the scores assigned from the technical merit and
19 pricing, the GGRF will enter negotiations with the company with the highest combined score.
20 Section VI, Paragraph C, Page 29 of 29, RFP, Tab 1, Procurement Record. Here, GGRF applied
21 these RFP requirements correctly and determined that GWRS's price proposal was reasonable,
22 and that GWRS had the highest combined scores assigned from GWRS' technical merits and
23 GWRS's price proposal. Unfortunately, GGRF deviated from the RFP mandates in the
24 negotiation stage of the solicitation.

25 There is no merit to GGRF's claims that GWRS was non-responsive to their requests for
26 information. Despite providing the cost and pricing data and the Fee Summary Services
27 required by the RFP, which GGRF accepted, GWRS provided additional cost and pricing data
28 addressing each and every request by GGRF and the information provided GWRS adequately

4 justified the .33% fee in its original cost proposal. Letter from Gregory E. Seller dated March
5 12, 2007, Exhibit B, Notice of Appeal. GWRS provided their best and final offer as demanded
6 by GGRF which modified their already reasonable fee by reducing it to .27%. See letter by
7 Gregory M. Seller dated March 21, 2007, Exhibit D, Notice of Appeal. Further, GWRS also
8 provided additional information justifying its .27% fee in its Protest Letter. Protest Letter dated
9 May 9, 2007, Exhibit F, Notice of Appeal. In fact, the information provided by GWRS to GGRF
10 clearly shows that GWRS' original .33% fee and its .27% best and final offer fee are fair and
11 reasonable taking into account the estimated value of the required services, and the scope,
12 complexity, and nature of such services. Thus, GWRS was responsive, attempted a good faith
13 negotiation with GGRF, and at all time during this procurement offered a fee that was fair and
14 reasonable.

15 In contrast, GGRF refused to negotiate in good faith. GGRF's argument, made on Page 6
16 of its Agency Report, that "negotiations come in many varieties," has no merit. A negotiation
17 must include an exchange of information during which the offeror and the purchasing agency may
18 alter or otherwise change the conditions, terms, and price of the proposed contract. 2 G.A.R., Div.
19 4, Chap. 3, §3101(4). Also, such negotiation must be directed toward agreeing upon
20 compensation which is fair and reasonable taking into account the estimated value of the services,
21 and scope, complexity, and nature of the services. 2 G.A.R. Div. 4, Chap. 3, §3114(1)(2)© and
22 Section II, Paragraph I, Page 4 of 29, RFP, Tab 1, Procurement Record. GGRF did not negotiate
23 in good faith because it refused to exchange information with GWRS or accept GWRS's fair and
24 reasonable .33% original fee or GWRS's .27% best and final offer fee, and GGRF did not direct
25 the negotiations toward agreeing to fair and reasonable compensation because GGRF was
26 demanding that GWRS accept the unreasonable .25% fee from one of the other offerors. See
27 Letter by Paula M. Blas dated March 6, 2007, Letter by Paula M. Blas dated March 18, 2007, and
28 Letter by Debbie I. Ulloa dated April 27, 2007, Exhibits A, C, and E, respectively. Thus, GGRF

4 arbitrarily and capriciously refused to negotiate with GWRS in violation of the RFP requirements
5 and Guam Procurement Regulations.

6 **GGRF arbitrarily, capriciously, and illegally added**
7 **additional requirements to the RFP**

8 GGRF arbitrarily, capriciously, and illegally added additional requirements to the RFP
9 during the negotiation stage. Proposals shall be evaluated only on the basis of evaluation factors
10 stated in the RFP. 2 G.A.R., Div. 4, Chap. 3, §3114(f)(2). The RFP specifically stated that the
11 proposals would be evaluated based upon technical merits and price, and that price proposals will
12 count for 40% of the evaluation and the technical merits will count for 60% of the evaluation.
13 Section VI, Paragraph C, Page 29 of 29, RFP, Tab 1, Procurement Record. Agencies do not have
14 the discretion to announce in the solicitation that they will use one evaluation plan and then
15 follow another, once offerors are informed of the criteria against which their proposals will be
16 evaluated, the agency must adhere to those criteria or inform offerors of any significant changes
17 made in the evaluation scheme. *Latecoere International Inc. v. U.S. Department of the Navy*
18 *et.al.*, 19 F.3d 1342, 1359 (11th Cir. 1994). Further, in negotiated procurement, contracting
19 officials have broad discretion to determine the manner in which they will make use of technical
20 and cost evaluation results, however, it is improper to induce an offer representing the highest
21 quality and then reject it in favor of a materially inferior offer on the basis of a relatively
22 insignificant price difference. *Id.*

23 Here, during the negotiation stage of the solicitation, GGRF introduced a new evaluation
24 scheme in the negotiation phase wherein the price of the services could not exceed a fee of .25%
25 and GGRF increased the importance of GWRS's price proposal from 40% to 100%. Said .25%
26 fee requirement was not originally part of the RFP evaluation or negotiation requirements nor was
27 raising the importance of price proposals from 40% to 100%. Further, GGRF's imposition of
28 these new requirements will result in the award of this contract to a technically inferior but lower

4 priced offeror without any consideration of the differences in the proposals between the
5 technically superior higher priced offerors and the technically inferior lower priced offerors.
6 Finally, the price difference between GWRS's .27% fee and the GGRF's .25% fee is relatively
7 insignificant considering the overall cost of the services. Therefore, GGRF's new price and
8 evaluation requirements are arbitrary, capricious, and violate Guam Procurement Law and the
9 RFP's terms.

10 **GGRF illegally disclosed information from the proposals of other offerors**

11 GGRF admits that its .25% fee came from the proposals of the other offerors. Page 4,
12 Agency Report and Paragraph C(1) of Protest Decision dated June 1, 2007, Exhibit G, Notice of
13 Appeal. An agency shall not disclose any information contained in any proposals until after
14 award of the proposed contract has been made. 2 G.A.R. Div. 4, Chap. 3, §3114(i)(2). Here, the
15 .25% fee GGRF is demanding came from another offeror's proposal and it was disclosed to
16 GWRS during negotiation the negotiation. Such disclosure violated 2 G.A.R. Div. 4, Chap. 3,
17 §3114(i)(2).

18 **GGRF illegally withheld public procurement data**

19 GGRF argues that it placed the written record setting forth the reasons why it could not
20 agree on compensation with GWRS, which is required by 2 G.A.R. Div. 4, Chap. 3,
21 §3114(l)(4)(A), in Tab 10 of the procurement record. Page 6, Agency Report. However, Tab 10
22 of the procurement record states that said record is confidential and is not being released to the
23 public and GGRF argues that it such record is not required to be given to the offeror as it may
24 contain proprietary information. Page 6, Agency Report. The procurement record in this matter
25 is a public record. 5 G.C.A. §5251. Further, the written record stating the reasons GGRF could
26 not agree on compensation with GWRS is part of this public record and must be disclosed to
27 GWRS. 2 G.A.R. Div. 4, Chap. 3, §3114(l)(4)(A). If any portion of said record is in fact
28 proprietary, GGRF can redact said portion and release the remainder of said written record which

4 is a public record.

5 **CONCLUSION**

6 Based on the foregoing, GGRF's arguments that it conduct a proper price analysis and that
7 it negotiated in good faith and GWRS was unresponsive in negotiations have no merit and the
8 Office of the Public Auditor must grant GWRS's appeal.

9
10 **RESPECTFULLY SUBMITTED** this 16st day of July, 2007 by

11
12
13
14 By:


15 _____
16 ANTHONY R. CAMACHO, ESQ.
17 Attorney for Appellant Great-West Retirement Services
18
19
20
21
22
23
24
25
26
27
28

35

GOVT. OF GUAM
RETIREMENT FUND

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

2007 JUL 23 PM 3:13

RECEIVED

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT DIVISION

JUL 23 2007

TIME: 2:15 pm
BY: [Signature]
FILE NO. OPA-PA-07-006

Attorneys for Appellee
Government 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

**APPELLEE GOVERNMENT OF
GUAM RETIREMENT FUND'S
REBUTTAL TO APPELLANT'S
COMMENT ON AGENCY REPORT**

Appellee the Government of Guam Retirement Fund ("GGRF"), by and through its undersigned counsel and pursuant to 2 G.A.R. Div. 4, Chap. 12 § 12104(c)(4), hereby submits its Rebuttal to Appellant's Comment on Agency Report filed on July 16, 2007.

GGRF PROPERLY CONDUCTED PRE-AWARD PRICE ANALYSES

Appellant Great-West Retirement Service ("GWRS") contends that 2 G.A.R. Div. 4, Chap. 3, § 3118(f) applies to negotiations because it is not limited to post award determinations. This contention is incorrect, as it is clear that this regulation both by its plain language and when read in conjunction with 2 G.A.R. Div. 4, Chap. 3 § 3118(d) that it is meant to apply only *post-award*. To arrive at a pool of three qualified offerors from which to begin negotiations, GGRF considered prices available on the open market, prior price quotations, contract prices charged by GWRS, and price proposals of the other offerors. 2 G.A.R. Div. 4, Chap. 3 § 3118(d)(3) calls for

COPY

certification of pricing to be made after an agreement on price is reached. (Emphasis added). 2 G.A.R. Div. 4, Chap. 3 § 3118(f)(1) states, "if certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or non-current as of the date stated in the certificate . . ." (Emphasis added). Since the pricing is not certified until after a price is agreed upon by the parties, it cannot be determined to be overstated, inaccurate, or non-current until an agreed upon price is reached and certified.

While submission of pricing or cost data occurs prior to negotiation, the offeror must keep this information current throughout negotiations and the parties must mutually agree upon a price before certification. See 2 G.A.R. Div. 4, Chap. 3 § 3118(d). This is evidenced by the fact that GWRS's proposal contained a certificate of cost pricing dated May 14, 2004, which is unlikely to be current in 2007. See Supp. Procurement R. Tab #21.

Thus, GGRF was not required to make a finding that the price proposal was inaccurate, incomplete, or non-current because no price had been mutually agreed upon or certified. Such a finding is necessary only where a contract has been awarded and subsequently needs adjustment.

GGRF PROPERLY DETERMINED THAT GWRS'S BEST AND FINAL OFFER WAS NOT FAIR AND REASONABLE UNDER THE CIRCUMSTANCES

As stated in its Agency Report, GGRF considered many factors in determining that GWRS's "best and final offer" was not fair and reasonable. These factors included listings from other similar contracts in the industry serviced by providers who were not offerors to the RFP, in-house determinations of actual governmental needs, comparison to packages submitted by other actual offerors, and GWRS's past pricing in other jurisdictions.

While it is true that GGRF compared GWRS's pricing against the relevant pool of proposals as stated in GGRF's Procurement Protest Decision, GWRS attempts to read the statement in isolation. In fact, the statement was made in response to GWRS's initial protest that

gave no basis for price comparison other than its past contract pricing in other jurisdictions and its claim (based upon its own survey) that it is the largest provider of defined contribution services to state governments. *See Procurement R. #13 (protest letter dated May 9, 2007)*. The protest letter attempted to state that because GWRS was chosen as the plan provider in Montana, a state with similar participant numbers to that of Guam, the price proposed to GGRF must have been "fair and reasonable."

GWRS fails to acknowledge that the Procurement Protest Decision addresses this very one dimensional argument put forth by GWRS in its protest. GGRF states in the Procurement Decision (Procurement R. #16 at 3, ¶ C(1)) that GWRS's success "must be weighed not in isolation, but against the value (price) given the scope and complexity of services to be provided." While prices obtained by similar plans in other jurisdictions, whether serviced by GWRS or another provider, are relevant and were considered, they are merely one portion of the analysis and comparison. Indeed, 2 G.A.R. Div. 4, Chap. 3 § 3118(i) clearly states:

Evaluation of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent territorial price and cost estimates.

There are many factors that affect negotiations and pricing: the goals of a particular jurisdiction, the relative stability of a fund, past growth, projected growth, transparency and the like. All of these factors have some effect on the pricing of a contract and how a fee should be structured. Therefore, GWRS oversimplifies the determination process of what is fair and reasonable by assuming that what was acceptable in one jurisdiction should be acceptable here. The procurement process itself is designed to encourage fair competition among providers so that the Government of Guam can get the most value for its dollar. If the only criteria used to judge value is what the same provider charges in another jurisdiction, the procurement process

would be stripped of its basic purpose.

GGRF properly exercised its procurement authority in determining that given the nature, scope and complexity of the services needed under the RFP, the pricing proposal submitted in GWRS's best and final offer was not fair and not reasonable. As governmental fiduciaries tasked with spending monies held in trust, GGRF properly determined that negotiations should be halted so that the process could commence with the next qualified offeror to secure desired services at the best value.

**GGRF CONSIDERED ALL OF THE TERMS AND CONDITIONS OF GWRS'S
PROPOSAL, NOT JUST PRICING**

GWRS makes a blatantly false allegation that GGRF disclosed in its March 6, 2007 letter to GWRS that other offerors had a fee of .25% of total assets. The truth is that this letter simply asked GWRS to price its fee at 0.25% of total assets. There is no indication in the letter or elsewhere that this fee request was based on another offeror's proposal. GWRS simply assumes that because the fee requested is different than their proposal that GGRF simply plucked the fee from another offeror's proposal and gave no consideration to other pricing factors, terms, or conditions. Furthermore, it claims that in GGRF's letter of March 18, 2007 "GGRF rejected GWRS's price of 0.27% for the sole reason that it was higher than 0.25% fee from the other offerors." (See Appellant's Comment on Agency Report, p. 4.) Again, this claim is wholly without support as the letter referenced simply rejects the cost pricing submitted by GWRS and requests its best and final offer. There is no mention of fees or other offerors.

GGRF considered the pricing submitted by GWRS and the various terms and conditions presented with its pricing options. GWRS's terms and conditions created contingencies to the pricing that were unacceptable to GGRF. Moreover, and as stated in the Agency Report, GWRS was non-responsive to most of GGRF's requests. Contrary to GWRS's allegations and

assumptions, all pricing terms and conditions were carefully considered in GGRF's final determination.

NEGOTIATIONS WERE SIMPLY NOT SUCCESSFUL

GWRS states "GGRF did not negotiate in good faith because it refused to . . . accept GWRS's fair and reasonable 0.33% original fee or GWRS's 0.27% best and final offer fee . . ." (See Appellant's Comment on Agency Report, p. 6.) GWRS continues to assert that because it was chosen as the best qualified offeror, GGRF was constrained to accept its offer. This is simply not the case. GWRS has yet to provide any evidence of the fairness and reasonableness of its proposed fee outside of its own past contract pricing. Further, the RFP in several places, and specifically in the "Evaluation Factors" section on page 29 of 29 states that while negotiations will be entered with the company given the highest initial evaluation score, "[i]f these negotiations do not result in a successful contract, then the GGRF will enter into negotiations with the next ranked company."

Unlike a sealed bid procurement where the lowest bidder is awarded the contract, this services contract is not awarded unless negotiations are successful. The determination of the best qualified offeror from the initial proposals is a starting point for negotiations that, if successful, will lead to the award of the contract. Here, negotiations simply were not successful. GGRF determined that GWRS's "best and final" offer was non-responsive and not fair and reasonable. GWRS's desire to reopen the negotiations so that it can haggle over pricing demonstrates that it did not submit its "best and final" offer; accordingly GWRS should not be granted a second bite at the apple.

NO MINIMUM PRICING NOR NEW EVALUATION CRITERIA WERE ADDED TO THE RFP

GWRS alleges that GGRF illegally changed the RFP by making the price proposal 100%

"marginal," it would not have been eligible for the contract award. *Id.* Here, there is no evidence of intentional manipulation by GGRF of any sort.

Furthermore, when determining what constitutes arbitrary and capricious in the procurement context, courts have taken a narrow view and give great deference to the government agency so as not to simply substitute the court's judgment. *Patriot Contract Services v. U.S.*, 388 F. Supp. 2d 1010 (N.D.Cal. 2005). The courts recognize the heavy burden on protestors to demonstrate by clear and convincing evidence that there was no rational basis for the agency's decision or that there was a clear and prejudicial violation of procurement laws or regulations. *Id.* at 1019. Where any rational basis exists for an agency's decision, the court should stay its hand. *Id.* GWRS cannot prove any violation of law by GGRF, nor can it prove any prejudice, as it was given every opportunity to respond to GGRF's requests, but simply chose not to.

GGRF HAS LAWFULLY DEALT WITH CONFIDENTIAL INFORMATION

GWRS complains on one hand that GGRF illegally disclosed information regarding an offeror on one hand and illegally withheld information on the other. GWRS makes another blatant mischaracterization of GGRF's "disclosures" in the Agency Report on page 4 and paragraph (C)(1) of the Protest Decision dated June 1, 2007. These documents merely state that GGRF considered the price quotes of other bidders as it is instructed to do under 2 G.A.R. Div. 4, Chap. 3, § 3118(i). Nowhere in either of these documents does GGRF disclose anything about any of the other offers.

Furthermore, GGRF has been extremely careful to protect the proprietary nature of all offerors during this appeal by submitting proprietary or confidential documents to the auditor for in camera review. Although GWRS cites 2 G.A.R. Div. 4, Chap. 3, § 3118(e)(4)(A) to support

that the written record regarding termination is part of the public record, in fact this regulation makes no reference to the written record being part of the public record. It only requires a written record to be made in the agency's files and for notification of termination to be given to the offeror.

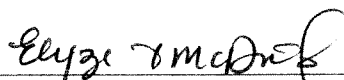
Additionally, while the procurement record is generally a public record open for review and copying, 2 G.A.R. Div. 4, Chap. 3, § 12104(c)(6) states that if any portion thereof is considered to contain confidential information, the same may be withheld by affixing a statement to this effect on the front page of the document and noting the same wherever such document or information appears. The Public Auditor shall make available any information that is not confidential in nature to interested parties pursuant to 2 G.A.R. Div. 4, Chap. 3, § 12106, which also allows for submission of confidential information in the format presented by GGRF in this case.

CONCLUSION

GGRF has diligently complied with all procurement rules and regulations regarding the bidding process and the confidentiality of information submitted by bidders. GGRF's determination to terminate negotiations was completely informed, based on substantial review of various pertinent factors and was done in good faith. Their decision was sound and should be upheld.

SUBMITTED this 23^d day of July, 2007, Hagåtña, Guam.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
CAREY M. AUSTIN

Attorneys for Appellee
GOVERNMENT OF GUAM RETIREMENT
FUND

36

GOVT. OF GUAM
RETIREMENT FUND

CARLSMITH BALL LLP

2007 JUL 23 PM 3:13

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

RECEIVED

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT SECTION

JUL 23 2007

TIME: 2:20pm
BY: [Signature]
FILE No. OPA-PA 07-006

Attorneys for Appellee
Government of Guam Retirement Fund

OFFICE OF THE PUBLIC AUDITOR

GUAM

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

CIVIL CASE NO. OPA-PA-07-006

**NOTICE OF FILING UNDER SEAL -
NOTICE OF FILING OF
SUPPLEMENTAL PROCUREMENT
RECORD AND CONFIDENTIAL
PORTIONS OF PROCUREMENT
RECORD**

The PRIVATE VERSION of the Notice of Filing of Supplemental Procurement Record
and Confidential Portions of Procurement Record are being filed under seal.

DATED: Hagåtña, Guam, July 23, 2007.

CARLSMITH BALL LLP

Elyze McDonald

ELYZE J. MCDONALD
Attorneys for Appellee
Government of Guam Retirement Fund

COPY

GOV. OF GUAM
RETIREMENT FUND

CARLSMITH BALL LLP

2007 JUL 23 PM 3:13

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

RECEIVED

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT

JUL 23 2007

TIME: 2:15 pm
BY: [Signature]
FILE NO. OPA-PA 07-006

Attorneys for Appellee
Government of Guam Retirement Fund

OFFICE OF THE PUBLIC AUDITOR

GUAM

CIVIL CASE NO. OPA-PA-07-006

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

**NOTICE OF FILING OF
SUPPLEMENTAL PROCUREMENT
RECORD AND CONFIDENTIAL
PORTIONS OF PROCUREMENT
RECORD**

Appellee Government of Guam Retirement Fund ("GGRF"), by and through undersigned counsel, hereby files with the Office of Public Auditor a supplement to the complete copy of the procurement record relevant to the above-captioned appeal in the form prescribed by 2 GAR 12104(c)(3).

Appellee has furthermore submitted this portion of the record which is confidential and/or proprietary under seal.

CHRONOLOGY OF EVENTS

TAB

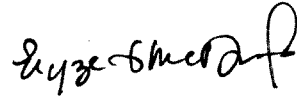
November 2006 *Cost Proposal for: Sections 401(A), 457, and Welfare
Benefit Plan Investment Management and Administration
Services*

21

COPY

DATED: Hagåtña, Guam, July 23, 2007.

CARLSMITH BALL LLP



ELYZE J. MCDONALD
Attorneys for Appellee
Government of Guam Retirement Fund

37

1 **LAW OFFICES OF SOMERFLECK & CAMACHO**
Suite 500W, 5th Floor GCIC Building
2 414 West Soledad Ave.
Hagatna, Guam, 96913
3 Telephone: (671) 477-1389
Fax: (671) 477-1077
4 E-Mail: arcesq@hotmail.com

5 **ATTORNEYS FOR APPELLANT**
Great-West Retirement Services
6

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT APPEALS

AUG 13 2007
TIME: 1045 am
BY: [Signature]
FILE No. OPA-PA 07-006

7
8 **OFFICE OF THE PUBLIC AUDITOR**
9 **GUAM**

10 IN THE APPEAL OF) Appeal No. OPA-PA-07-006
11 GREAT-WEST RETIREMENT)
SERVICES,) **APPELLANT GREAT-WEST**
12) **RETIREMENT SERVICES' MOTION**
13) **TO LIFT SEAL AND COMPEL**
Appellant.) **PRODUCTION OF DOCUMENTS**

14 **COMES NOW**, Appellant GREAT-WEST RETIREMENT SERVICES (GWRS), by
15 and through its counsel of record, ANTHONY R. CAMACHO, ESQ., and hereby GIVES
16 NOTICE that on _____, at _____, or as soon
17 thereafter as GWRS' Counsel may be heard, GWRS shall move the Office of the Public Auditor
18 (OPA), pursuant to 2 G.A.R. Div. 4, Chap. 12, §12109(c), to lift the seal and release to GWRS
19 public documents filed under seal by the Government of Guam Retirement Fund (GGRF). Said
20 motion is based on the following Memorandum of Points and Authorities in Support of GWRS'
21 Motion to Lift Seal and Release Public Documents, and any oral arguments, testimony, or
22 evidence presented at the hearing in this matter.

23 **RESPECTFULLY SUBMITTED** this 13th day of August, 2007:
24

25
26 **Original Signed by**
ANTHONY R. CAMACHO

27 By: _____
28 ANTHONY R. CAMACHO, ESQ.
Attorney for Appellant Great-West Retirement Services

RECEIVED
CARLSMITH BALL
DATE: 08-13-07 TIME: 4:13 PM

COPY

4
5 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
6 **OF GWRS' MOTION TO LIFT SEAL AND RELEASE PUBLIC DOCUMENTS**

7 **BACKGROUND**

8 On June 29, 2007 GGRF filed a copy of the Procurement Record for RFP No. GGRF-
9 028-06 (RFP). GGRF also separated and submitted separately and under seal portions of the
10 record which they argued were confidential and/proprietary. The portions of the RFP GGRF
11 filed under seal included the: (1) Termination of Negotiations Memorandum; (2) Comparative of
12 Third Party Administrator Fees; (3) Response received from ASC providing price proposal; (4)
13 Letter received from ASC requesting for update on status of RFP; (5) Letter received from ASC
14 submitting their best and final offer for required services.

15
16 **DISCUSSION**

17 GWRS hereby objects to GGRF filing the (1) Termination of Negotiations
18 Memorandum; (2) Comparative of Third Party Administrator Fees; (3) Response received from
19 ASC providing price proposal; (4) Letter received from ASC requesting for update on status of
20 RFP; (5) Letter received from ASC submitting their best and final offer for required services
21 under seal as "confidential and/or proprietary." GWRS hereby moves the OPA to lift the seal
22 and release said public documents for GWRS review. The OPA has the authority to require
23 parties to produce for examination relevant documents under their control. 2 G.A.R. Div. 4,
24 Chap. 12, §12109(c). Here, the aforementioned documents are disclosable public records
25 pursuant to Guam Procurement Law and Regulations and Guam's Freedom of Information Act.
26 Further, these documents are relevant to these proceeding because they are part of the RFP
27 record and GWRS' review of these documents is necessary for GWRS to fully develop its
28 arguments concerning GGRF's numerous statutory violations and procedural irregularities in

4 terminating negotiations with GWRS.

5 **Guam Procurement Law and Regulations**
6 **mandate public disclosure of the documents.**

7 Guam Procurement Law and Regulations mandate public disclosure of the documents.
8 Each procurement officer shall maintain a complete record of each procurement and such record
9 is a public record and, subject to rules promulgated by the Public Auditor, any person may
10 inspect and copy any portion of the record. 5 G.C.A. §5249 and §5251 and 2 G.A.R. Div. 4,
11 Chap. 3, §3129 and §3131. In the context of a procurement appeal, the rules promulgated by the
12 public auditor require the head of a purchasing agency to submit to the OPA, a complete copy of
13 the procurement record relevant to the appeal within five (5) working days after receiving notice
14 of an appeal and if the Agency considers that the procurement file contains material which
15 should be withheld pursuant to law or regulation, they must affix a statement advising this to the
16 front page of the document . 2 G.A.R. Div. 4, Chap. 12, §12104(c)(3) and (6). Here, GGRF
17 withheld the aforementioned documents from GWRS and stating that they were confidential
18 and/or proprietary without citing any law or regulation which justifies withholding the
19 documents from public disclosure. Further, a review of the procurement laws and regulations
20 concerning the public disclosure of procurement records show that there is no justification for
21 GGRF's filing the documents under seal and claiming that they are "confidential or proprietary."

22 Guam's Procurement Law and Regulations do not prohibit the public disclosure of the
23 documents. In the context of a competitive selections procedures for professional services,
24 which is the solicitation method used here, only the Register of Proposals and the proposals of
25 the offerors are not to be publically disclosed at this time. 2 G.A.R., Div. 4, Chap. 3,
26 §3114(h)(1). Here, none of the documents are the Register of Proposals or the proposals of the
27 offerors. Thus, all the documents are public records that may be inspected and copied by any
28 person pursuant to 5 G.C.A. §5249 and §525, and 2 G.A.R. Div. 4, Chap. 3, §3129 and §3131

4 (both Statutes and Regulations cited above) because they are part of the procurement file for the
5 RFP.

6 Further, the documents submitted by ASC are disclosable public records. Negotiations
7 arising from a request for proposal and communications between government employees and any
8 member of the public which is in any way related to the procurement are public records that any
9 person may inspect and copy. 5 G.C.A. §5249(b) and (c) and §5251 and 2 G.A.R. Div. 4,
10 Chap. 3, §3129(2) and (3) and §3131. Here the response received from ASC providing its price
11 proposal, the letter received from ASC requesting for update on status of RFP, and the letter
12 received from ASC submitting their best and final offer for required services are disclosable
13 public documents because they are negotiations between GGRF and ASC arising from the RFP
14 and a communications between GGRF and ASC related to the procurement. Thus, pursuant to
15 Guam Procurement Law and Regulations, the documents are public records that anyone may
16 inspect and copy.

17 **Guam's Freedom of Information Act Mandates Public Disclosure of the Documents**

18 Guam's Freedom of Information Act Mandates Public Disclosure of the Documents.
19 Every person has the right to inspect and take a copy of any public document on Guam, *except* as
20 otherwise expressly prohibited in law, and *except* as provided in § 10108 of this Chapter
21 [Guam's Freedom of Information Act]. 5 G.C.A. §10103(a). The language of this statute
22 guarantees very broad access to public documents. *George P. Macris, M.D. vs. Guam Memorial*
23 *Hospital Authority*, CV1799-01, Line 10, Page 3 (Superior Court of Guam, October 11, 2002
24 Decision and Order). Members of the public have the right of access to all documents unless
25 they belong to a category of documents that are specifically identified as exempted from
26 production. *Id.*, at Line 14. The Court finds that the legislative scheme favors broad and timely
27 access to records and disfavors denials and agencies that wish to deny access to records may do
28 so only if they identify with specificity the statutory basis for the denial, and they must do so at

4 the time they refuse to produce the records and this requirement has the practical effect of forcing
5 the agencies to acknowledge that the withheld records exist and to disclose, to some extent, the
6 general nature of these records, and this legislative policy of broad access convinces the court
7 that the limitations on the right of inspection are to be construed narrowly. *Id.*, Line 16, Page 4.
8 Here, the documents are public documents and, as stated above, there is no law prohibiting there
9 disclosure. Therefore, the broad public access guarantees of the Guam's Freedom of Information
10 Act apply and the documents should be released for inspection and copying.

11 Further, GGRF cannot argue that the documents cannot be released because portions of
12 them may contain material that is exempt from disclosure pursuant to law. If the records being
13 requested partially contain information exempted from disclosure by this Guam's Freedom of
14 Information Act or by another law, the agency shall redact the exempt information only and
15 release the nonexempt information in the records, citing the exemptions in law that require the
16 information to be redacted. 5 G.C.A. §10103(d). Thus, if the documents contain any material
17 that is exempt for disclosure pursuant to law, then GGRF must redact such material and release
18 the portions of the documents that are not exempt from disclosure and cite the law exempting the
19 material from disclosure.

20 **The Release of the Documents is Required to Provide a Full and Fair**
21 **Determination of a Procurement Protest Appeal**

22 The release of the documents is necessary for GWRS to fully develop its arguments
23 concerning GGRF's numerous statutory violations and their refusal to negotiate in good faith
24 with GWRS. As stated above, GGRF has absolutely no statutory justification for filing the
25 documents under seal and denying GWRS access to them. In order for a full and fair
26 determination of a procurement protest appeal, the protestor must have access to the procurement
27 file and be afforded the opportunity to review the file so that it can fully develop its arguments
28 with regard to bidding irregularities or statutory violations. *Goodwill Industries Guam, Inc. vs.*

4 *Guam Mass Transit*, Special Proceedings Case No. SP82-00, Page 5 (Superior Court of Guam,
5 March 20, 2000 Decision and Order). Here, by wrongfully filing the documents under seal,
6 GGRF seeks to deny GWRS a full and fair determination of its protest appeal. Thus, the OPA
7 must lift the seal and allow GWRS to inspect and copy the documents or compel their production
8 from GGRF to ensure that GWRS has a full and fair determination of its protest appeal.

9
10 **CONCLUSION**

11 Based on the foregoing, the OPA must grant this motion and lift the seal and allow
12 GWRS to inspect and copy the documents or compel their production from GGRF.

13
14 **RESPECTFULLY SUBMITTED** this 13th day of August, 2007 by:

15
16
17
18 **Original Signed by**
19 **ANTHONY R. CAMACHO**

20 _____
21 ANTHONY R. CAMACHO, ESQ.
22 Attorney for Appellant Great-West Retirement Services
23
24
25
26
27
28