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

11 IN THE APPEAL OF) APPEAL NO. OPA-PA-09-010
12)
13 ASC TRUST CORPORATION,) **APPELLANT'S COMMENTS ON**
14) **AGENCY REPORT**
15)
16 Appellant.)

17 Pursuant to §12104(c)(4) of the OPA's Rules of Procedure,
18 Appellant **ASC TRUST CORPORATION** ("ASC"), hereby submits the
19 following comments in response to the Agency Report, filed by
20 Appellee **GOVERNMENT OF GUAM RETIREMENT FUND** (the "Fund") on November
21 17, 2009.

22 **INTRODUCTION.**

23 In its Agency Statement, the Fund understandably chose not
24 to address the factual grounds of ASC's protest and this appeal.
25 Rather, the Fund stuck to its guns and asserted that ASC should
26 have filed its protest long ago and, because it did not, its
27 protest and appeal are time barred.

28 The position taken by the Fund mischaracterizes the grounds
for ASC's protest and appeal, makes unfounded and unsupportable
factual and legal assertions and advocates a policy position
which, if upheld by the Public Auditor, would bring further chaos

COPY

1 to the already problematic Government of Guam procurement protest
2 and appeal process.

3 **RELEVANT LEGAL STANDARD.**

4 The Fund correctly states that, under Guam's procurement
5 law, a protest "shall be submitted in writing within fourteen
6 (14) days after [an] aggrieved person **knows or should know of the**
7 **facts giving rise thereto.**" 5 GCA 5425(a); 2 GAR Div. 4, Chap.
8 9, §9101(c)(1) (protest must be filed "within 14 days after the
9 protestor **knows or should have known of the facts giving rise**
10 **thereto,**" emphasis added). This is not disputed.

11
12 The relevant inquiry, therefore, is what was the earliest
13 date ASC "knew or should have known" of the facts giving rise to
14 its protest and appeal.

15
16 **WHAT DID ASC KNOW, WHEN DID IT KNOW IT AND WHAT SHOULD IT HAVE DONE?**

17 As stated in its protest and notice of appeal, the facts on
18 which ASC bases its appeal relate to certain issues related to
19 the evaluation and scoring of its proposal. ASC only learned
20 these facts on October 6, 2009. The Fund continues to
21 mischaracterize the basis for ASC's protest and this appeal. The
22 Fund asserts that ASC is protesting on the basis that it was not
23 rated the best qualified offeror by the selection panel,
24 something ASC had long known. Unaware of the specific facts
25 related to the scoring of its proposal, ASC had no reason to
26 assume or believe it had been evaluated and scored unfairly.
27 However, on October 6, 2009, ASC learned that the reason it was
28

1 ranked second was that the scoring of its proposal and that of
2 GWRS had been arbitrarily skewed by the actions of one of the
3 members of the selection panel. That is the basis of its protest
4 and appeal, not the mere fact that ASC was not initially deemed
5 the best qualified offeror. Had the scoring not been arbitrarily
6 skewed, ASC would have no basis to protest.
7

8 The Fund continues to take the position that the 14-day
9 protest period started on one of four dates: May 7, 2007, May
10 11, 2007, July 6, 2007 or August 21, 2009. There is no factual
11 basis for any of this set of alternate claims.
12

13 On February 7, 2007, the Fund's evaluation panel convened
14 and the panel members scored each of the proponents based on the
15 evaluation criteria set forth in the RFP. GWRS was determined to
16 be the best qualified offeror to provide the required services.
17 ASC was ranked second. ASC was not informed of this fact, and it
18 was not provided with any information regarding the evaluation
19 process or the scoring.
20

21 On May 7, 2007, ASC was notified that it was "the next
22 qualified offeror." ASC was not told who was ranked higher (or
23 lower) than it, nor was ASC provided any information regarding
24 the evaluation process or the scoring. ASC had no reason or
25 basis to protest on that date.
26

27 On May 11, 2007, ASC was notified that GWRS had filed a
28 protest. From this, ASC could have inferred that GWRS had been

1 ranked higher than it. ASC still had no reason or basis to
2 protest.

3 On July 6, 2007, ASC was served with a copy of the Fund's
4 Agency Report in the prior procurement appeal. This report laid
5 out the basics of the evaluation process and informed that the
6 selection panel had met and evaluated the three offers using the
7 weighted scoring system. This revealed nothing as it described
8 precisely the process that was supposed to have happened
9 according to the RFP. Based on the July 6, 2007 Agency Report,
10 ASC learned that GWRS was ranked first. However, the Agency
11 Report did not set forth either the individual scores that each
12 of the members of panel has assigned or the total cumulative
13 scores earned by each of the proponents. ASC had no way to know
14 from this Agency Report why it earned a lower score or what its
15 scores were on the technical and pricing criteria.

16 Thus, as of July 6, 2007, all that ASC knew was that the
17 three proposals had been evaluated and that it had been ranked
18 second behind GWRS. At the time, ASC had no knowledge of any
19 facts that would have supported a protest of its ranking. ASC
20 was not (and legally could not have been) provided with any of
21 the technical or pricing details of the other offerors'
22 proposals. Any protest by ASC on this date would have been
23 without any factual basis; it would have been frivolous.

24 The Fund's position as set forth in its Agency Statement is
25 based on the false premise that, if ASC had filed a frivolous
26

1 protest, it could have obtained information as an "interested
2 party" under Section 9101(f) of the procurement regulations that
3 might have sustained its protest. However, it is simply not
4 correct that ASC could have obtained any relevant or material
5 information by such a ploy. As of July 6, 2007, no contract had
6 been awarded. Thus, no information regarding any of the
7 proposals could have been disclosed. (See discussion below.)

9 The contract was awarded by the Fund on August 21, 2009,
10 apparently after more than a year of negotiations with GWRs. As
11 of that date, ASC still had no information or knowledge regarding
12 the details of the GWRs proposal or the evaluation or scoring of
13 its own proposal. Soon after the notice of the award of the
14 contract, ASC filed its Sunshine Act request seeking information
15 that it could not have obtained any earlier. In response, the
16 Fund provided information regarding GWRs' proposal, but did not
17 include the evaluation scoring sheets related to ASC's proposal,
18 as the Fund asserted that these evaluation sheets revealed
19 information related to ASC's proposal, which the Fund was barred
20 from revealing. See September 29, 2009 letter from the Fund's
21 legal counsel, Ex. 7 to Notice of Appeal, pp. 1-2 ("The [Fund's]
22 position under the Freedom of Information Act is that the
23 evaluation sheets of offerors' proposals necessarily reflect
24 information contained in the proposals, and therefore, like
25 proposals, would fall under the umbrella of 'confidential
26 documents or other information expressly protected under the law'

1 protected from disclosure to members of the public under sections
2 [5 GCA] 10108(i) and 3114(i)". As the result, ASC still had no
3 way of knowing that its more favorable pricing proposal had been
4 given a lower rating than GWRS' higher pricing proposal by one of
5 the evaluators or that the lower rating it received on its
6 pricing proposal adversely affected its overall ranking. The
7 Fund refused to provide that vital information.

9 As set forth in its Notice of Appeal, only after ASC was
10 forced to file a writ petition did the Fund provide the requested
11 information on October 6, 2009, ostensibly because ASC asked for
12 it in its capacity as an offeror (not protestor) and not as a
13 member of the public.

15 Thus, only on October 6, 2009 did ASC learn that its lower
16 price proposal had been given a lower score than GWRS' higher
17 price proposal by one of the members of the Fund's selection
18 panel and that as the result of that lower score, and for no
19 other reason, it had not been deemed the best qualified offeror.

21 ASC's protest was filed within 14 days thereafter and was
22 thus timely.

23 **THE FUND'S POSITION WOULD ENCOURAGE, INDEED MANDATE, KNEE-JERK AND FRIVOLOUS
24 APPEALS.**

25 The position taken by the Fund in its Agency Statement in
26 this proceeding is that, ***based solely on the fact that it was not***
27 ***deemed the best qualified offeror,*** ASC should have filed a
28 protest, so that it could have requested information under the

1 rules governing procurement protests. Agency Statement, passim.
2 In other words, the Fund asserts, ASC should have filed a protest
3 even if it had no facts to support it, so it then could have gone
4 on a fishing expedition to determine if there were any such
5 facts.¹ The implication of the Fund's position is that any
6 proponent who is not deemed to be best qualified offeror must
7 routinely protest his ranking, no matter whether any facts are
8 known which support a protest, or else be deemed to have forever
9 waived or forfeited its rights to protest.
10

11 This is absurd. It turns the protest process on its head.
12 As the Fund itself noted, contracting officers "are presumed to
13 act in good faith." However, the position the Fund has asserted
14 necessarily would require that a proponent apply or follow
15 exactly the opposite presumption--if the proponent is not deemed
16 the best qualified or ranked higher than its competitors, then it
17 must be presume the contracting officers acted in bad faith.
18 According to the Fund, you must always protest and then try to
19 ferret out facts that will justify it. If you do not, then it
20 later will be too late.
21

22
23 Accepting the Fund's position would punish ASC for
24 presuming, as the law does, that each of the members of the
25 selection team acted fairly and rationally in evaluating its
26 proposal and those of the other proponents. Rather than assume
27

28 ¹ As the Public Auditor's Decision and Order in OPA-PA-09-07, discussed
infra, shows, any such fishing expedition would have come up empty.

1 that the game had been rigged, as the Fund's position would
2 require it to do, ASC assumed it lost the evaluation stage of the
3 game fair and square and GWRS won. It was only after it obtained
4 the evaluation scores and first learned that one of the members
5 had not played by the rules that ASC had a **factual** basis to
6 protest the award. ²

8 It goes without saying that the protest-first-ask-questions-
9 later position advocated by the Fund would encourage or invite
10 frivolous procurement protests and appeals. This would cause
11 even further delays and disruptions in the procurement process.
12 The procurement law seeks to discourage unfounded protests and
13 appeals, not promote them. 5 GCA 5425(h) (granting the Public
14 Auditor the power to assess costs against a protestant for a
15 frivolous protest).

17 The Fund's view must be rejected if the integrity of the
18 process is to be maintained.

19 **THE FUND'S PRESUMPTION OF BAD FAITH WOULD NOT HAVE WORKED.**

20 Even assuming, though, that ASC, with no factual basis to
21 support it, had protested its ranking within 14 days of May 7,
22

23 ² The facts in the case of *Laboratory Corporation of America Holdings v.*
24 *Rudolph*, 184 S.W.2d 68 (Ct.App.Ky. 2005) are instructive on this point. In
25 this case the unsuccessful bidder filed a bid protest after receiving
26 notification that it had not been selected. That protest was denied. **Two**
27 **months later**, the unsuccessful bidder received records it had requested under
28 an open records request. After reviewing the bid documents and the evaluators'
score sheets, it filed another protest based on the claim that the winning
bidder had failed to satisfy one of the bid requirements. This case was
resolved on the merits but it demonstrates there is a material difference
between protesting simply because you were ranked lower and protesting when it
is learned there are grounds supporting a protest.

1 May 11 or July 6, 2007, it would not have been able to learn the
2 facts, as asserted by the Fund. The Fund's position is based on
3 the argument that, if ASC had protested as soon as it first
4 learned that it was not deemed the best qualified offeror (May 7,
5 2007), it could have then requested information which would have
6 exposed the flawed evaluation process. In other words, ASC
7 "should have known" the true facts because it should have
8 protested earlier and requested the information. "Had ASC
9 [protested and] simply asked for the information as an interested
10 party, under Section 9191(f), the Fund would have provided it;
11 yet, ASC never asked until it improperly sought the information
12 as part of a FOIA request more than two years after it should
13 have filed its protest." Fund's Agency Statement, p. 10, in
14 original. This ludicrous argument is based on a false premise.

17 The Public Auditor very recently addressed this precise
18 issue. See Decision and Order Re Purchasing Agency's Motion for
19 Protective Order, dated November 16, 2009, in OPA Appeal No: OPA-
20 PA-09-007, *In the Appeal of Guam Education Financing Foundation,*
21 *Inc.* By that decision and order the Public Auditor granted the
22 purchasing agency's motion to seal the proposals of all the
23 offerors submitted in response to the RFP that was the subject of
24 the appeal. As a result, the information was not made available
25 for public inspection or disclosure, even to the parties to the
26 appeal. The Public Auditor stated in her order:
27
28

1 The Appellant argues that the information contained in
2 the proposals is what is at issue in their appeal and
3 that the Appellant's ability to defend its position is
4 significantly limited without access to such
5 information. [Footnote omitted.] Generally, a
6 procurement record and any person may inspect and copy
7 any portion of the procurement record. 5 GCA §5249 and
8 §5251, and 2 G.A.R., Div. 4, Chap. 3, §3129 and §3131.
9 However, there are several exceptions to this general
10 rule that are necessary to protect the integrity of the
11 procurement process. For requests for proposals, such
12 as the RFP in this matter, proposals shall not be opened
13 publicly nor disclosed to unauthorized persons. 2
14 G.A.R., Div. 4, Chap. 3, §3114(h)(1). A Registrar of
15 Proposals must be established containing the name of
16 each offeror, and this Registrar shall not be opened to
17 public inspection until after the award of the contract.
18 *Id.* Proposals of offerors not awarded the contract
19 shall not be opened to public inspection. *Id.* Further,
20 the Purchasing Agency is prohibited from disclosing any
21 information contained in any of the proposals until
22 after an award of the contract is made and only the
23 proposal of the offeror awarded the contract is opened
24 to public inspection unless otherwise required by the
25 contract. 2 G.A.R., Div. 4, Chap. 3 §3114(i)(2). Thus,
26 the Public Auditor finds that there can be no public
27 inspection of the proposals in this matters until after
28 an award has been made and only the proposal of the
offeror awarded the contract can be inspected by the
public.³

Thus, until the contract was awarded, the Fund could not lawfully have provided ASC with any information regarding GWRS' proposal, including its original pricing proposal, even if ASC

³ It is noteworthy that this was exactly the same legal position asserted by the Fund when it refused to provide ASC the evaluation sheets it had sought under the Sunshine Reform Act. September 29, 2009 letter from Carlsmith, Ex. 9 to Notice of Appeal. The Fund asserted that it was barred by the procurement law from producing the documents, so that they could not be provided to the "public" pursuant to a FOIA request. After being told by the Fund it needed only to ask for the evaluation sheets as an offeror, rather than a member of the public, ASC, for the sake of expediency, changed the hat it was wearing and requested the information as an "offeror," the documents were provided. The Public Auditor's ruling establishes that the distinction the Fund attempted to make (in the face of a writ petition) was utterly bogus. It seems clear that the Fund's about face was simply an attempt to save face.

1 had protested its lower ranking and "simply asked." The Fund
2 would have violated the law if it provided the information. A
3 frivolous protest would have accomplished nothing.

4 **SUMMARY.**

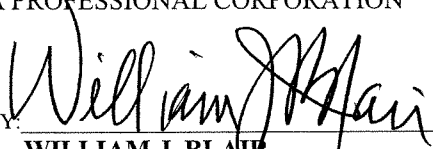
5 In the conclusion to its Agency Statement, the Fund asserts
6 that "all of the Fund's decisions and actions in this
7 solicitation are well documented, supported by factual evidence,
8 and are not controverted by evidence of specific malice, bias or
9 bad faith in the evaluation of the proposals received in response
10 to the RFP." This bald assertion is curious given that the Fund
11 assiduously avoids discussing any of the specific facts upon
12 which ASC's protest and this appeal were based. Instead, the
13 Fund continues to argue that ASC "knew or should have known" much
14 earlier that the evaluation process was flawed and skewed as the
15 result of the arbitrary and capricious action of one of the
16 members of the Fund's selection panel, a fact which was not
17 revealed until ASC obtained, after great effort, the individual
18 evaluation scoring sheets. The Fund completely ignores that
19 undeniable, objective evidence of bad faith.

20 The integrity of this procurement was compromised. There
21 can be no doubt of that fact. It is the duty of the Public
22 Auditor to protect the integrity of the process. The process did
23 not allow evidence of the compromising event to be revealed until
24 after the contract was awarded, but that is not the fault of ASC.

1 The award of the contract to GWRS should be set aside and
2 the Fund ordered either to negotiate with ASC or initiate a new
3 procurement. ASC should also be awarded its reasonable costs
4 incurred in connection with the RFP and protest.

5 **SUBMITTED** this 20th day of November, 2009.

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

10 BY: 
11 **WILLIAM J. BLAIR**
Appellant's Duly Authorized Representative

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14 REPORT RE ASC TRUST CORPORATION.DOC

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