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OFFICE OF PUBLIC ACCOUNTABILITY - GUAM

IN THE APPEAL OF

ASC TRUST CORPORATION,

Appellant.

APPEAL NO. OPA-PA-09-010

**GOVERNMENT OF GUAM
RETIREMENT FUND'S HEARING
BRIEF**

Appellee Procuring Agency Government of Guam Retirement Fund ("GGRF") hereby respectfully submits its brief discussing the issues properly before the Office of Public Accountability ("OPA") in the above-captioned appeal by ASC Trust Corporation ("ASC") of RFP No. GGRF-028-06 (the "Solicitation").¹

ISSUES ON APPEAL

1. **Did ASC file a timely protest of the Solicitation?**

¹ During the Status and Scheduling Conference on November 30, 2009, the Hearing Officer allowed for the filing of hearing briefs in the matter but did not set a filing date; however, the Scheduling Order issued on December 3, 2009, appeared to amend the order and set a filing date "at the Parties' discretion" of December 14, 2009, which change was inadvertently missed by undersigned counsel. The instant brief was authorized to be filed by today's date by Anne Camacho of the OPA with the original to be filed and served on October 15, 2009.

2. **If ASC filed a timely protest of the Solicitation, was the ranking of ASC by one of the evaluators "arbitrary and capricious"?**

DISCUSSION

I. INTRODUCTION

The threshold question before the OPA is whether ASC's protest was timely filed. The indisputable fact is that ASC did not file its protest within the time set forth in the Procurement Laws, which is fourteen (14) days after such aggrieved person knows or should know of the facts giving rise to the protest.² The unavoidable consequence for untimely filing of a protest under the Procurement Laws is that the agency may not consider them. 2 G.A.R., Div. 4, § 9101(c)(1). Based on the procurement law, therefore, the OPA has no jurisdiction over the instant appeal.

What is particularly egregious about ASC's decision to wait to appeal the Solicitation is the fact that it knew or should have known about the basis of its appeal years ago, yet ASC lay in wait for almost three years -- during the protest by Great West Retirement Services, Inc. ("GWRS"), while the negotiations continued between GWRS and GGRF for over a year, and months after GWRS had been awarded the contract -- before awaking to file its untimely protest with GGRF. As the Guam Supreme Court has declared, "The laws assist those who are vigilant, not those who sleep over their rights." *Pacific Rock Corporation v. Dept. of Educ.*, 2000 Guam 19, p. *7 (Guam 2000).

Alternatively, if the OPA determines that the protest was timely -- which it was not under the Procurement Law and interpretive cases cited to by GGRF in numerous filings on the record on appeal -- the OPA still does not have jurisdiction over the issue of whether the evaluation was "arbitrary and capricious" because GGRF's denial of the protest did not address this issue. At best (for ASC), if the protest is determined to have been made timely, then the only proper

² 5 G.C.A. § 5425(a).

remedy is to remand to GGRF for a determination on the protest of the evaluations.

Even if ASC can overcome the untimeliness of its protest and the OPA remanded the protest to GGRF for a determination of whether the evaluation was "arbitrary and capricious," the record already before the OPA clearly establishes that GGRF "did its job" and evaluated the proposals as required under the Solicitation. The OPA has already ruled in *In the Appeal of Guam Community Improvement Foundation, Inc.*, OPA Appeal No. OPA-PA-09-005 (Aug. 26, 2009)(the "*GCIF Appeal*") that, even in the instance where evaluators are provided "little or no guidance" by the procuring agency and are given only a short amount of time in which to evaluate proposals, it would affirm the evaluation committee's selection of "best qualified offeror" if the agency followed the selection criteria set forth in the solicitation.

GGRF submits that the questions before the OPA are matters of law only and that an evidentiary hearing on the merits is unnecessary because (1) the protest was untimely as evidenced by the Procurement Record and (2) the evidence coupled with this Office's decision in the *GCIF Appeal* firmly establish that the GGRF Evaluation Committee "did its job."

II. ISSUES BEFORE THE OPA.

A. **The Procurement Laws Mandate Dismissal of ASC's Untimely Protest Based on Facts on the Record.**

The Procurement Record and the documents already on file with the OPA establish that ASC "knew or should have known" of the facts giving rise to its right to protest, at the very latest on *July 6, 2007*, when it's counsel was served with a copy of the Agency Report filed in GWRS's appeal (*In re. Great-West Retirement Services*, Appeal No. OPA-07-006 (7/6/2007)). Procurement Tab No. 33; *Exhibit 2* to Agency Statement filed herein (11/12/09).

In all of ASC's filings in the instant protest and appeal, it complains that it did not have

access to the evaluation sheets (which ASC inaccurately paints as the proverbial "smoking gun") and creates an impressive smoke screen by blaming first the Fund for failing to provide the evaluation sheets:

[O]nly after ASC was forced to file a writ petition did the Fund provide the requested information on October 6, 2009, ostensibly because ASC asked for it in its capacity as an offeror (not protestor) and not as a member of the public.³

and then blaming *this* Office's previous rulings for giving it pause to request the information from the Fund in a *proper* manner:

In the GWRS appeal, the Fund successfully opposed GWRS' motion to various documents the Fund had filed under seal. Hearing Officer Robert Cruz determined a motion to lift the seal and require production was an 'inappropriate motion during negotiations.' Findings and Recommendations of Hearing Officer in OPA-PA-07-006, p. 4 (Procurement Record, Tab 43). This finding was adopted by the Public Auditor. Decision in OPA-PA-07-006, p. 2 (Procurement Record, Tab 44). ***Any attempt by ASC to request GWRS' pricing proposal or the evaluation sheets prior to the award of the contract would have similarly been "inappropriate."***⁴

ASC's failure to obtain the evaluation sheets is no one's but its own, but more importantly, its failure to file a protest within 14 days from July 6, 2007 -- when it knew that it was ranked lower than a higher priced offeror -- smacks of an intentional delay under the circumstances, given that the Fund was attempting to cease negotiations with GWRS. Indeed, ASC's discussion of what happened in GWRS's appeal relating to the disclosure of the document production is irrelevant because Hearing Officer Robert Cruz only ruled that disclosure to GWRS -- the negotiating party -- of pricing information "during negotiations" was inappropriate. The point lost on ASC appears to be that -- notwithstanding the fact that the disclosure of certain documents was not made to GWRS -- GWRS *still* filed a timely protest of its solicitation...and prevailed.

³ *Appellant's Comments on Agency Report* at p. 6 (11/20/09).

⁴ *Appellant's Supplemental Comments on Agency Report* at p. 3-4 (12/2/09)(Emphasis added).

The Guam Supreme Court has ruled against a dilatory claimant in an analogous case interpreting the statute of limitations for a claim for the breach of a contract awarded pursuant to the Guam Procurement Act. In *Pacific Rock Corporation v. Dept. of Education*, 2000 Guam 19 (Guam 2000), the Guam Supreme Court vacated a judgment in favor of a claimant who had brought an action on a contract awarded under the Guam Procurement Law beyond the statute of limitations set forth in the Guam Procurement Law,⁵ finding that the Superior Court lacked jurisdiction to decide the case. In this regard, the Court reasoned as follows:

Since PRC did not timely file its action at the Superior Court, its claim was time-barred. Thus, PRC failed to satisfy the jurisdictional prerequisite to maintaining its procurement contract suit against DOE. Consequently the trial court was without jurisdiction over PRC's claim. The trial court erred by not dismissing PRC's suit.

For claimants, unaware of the brevity of the period within which to bring actions arising from procurement contracts, and for agencies, facing the possibility of profuse litigation, our holding today may entail grave consequences. *However, through this opinion we clarify and interpret the policies intended by the Legislature in promulgating the Procurement Laws. Further, while the result today brings about an unfortunate consequence to PRC, the company waited an inordinate length of time to bring its action. The laws assist those who are vigilant, not those who sleep over their rights.* Because Pacific Rock Corporation failed to timely bring its action in this case, the trial court was without jurisdiction to pass on the merits. Accordingly, the judgment of the trial court is VACATED and the matter is REMANDED to the trial court for proceedings consistent with this opinion.

Pacific Rock Corp., 2000 Guam 19 at p. *7 (Emphasis added).

The evidence already on the record establish that ASC did not pursue a timely protest of the Solicitation and while an evidentiary hearing is not necessary to make this determination, the Fund intends to establish the untimeliness of ASC's protest.

B. Claims that Evaluation was Arbitrary and Capricious Is Not Before OPA.

The OPA has already ruled on the question of whether it has authority to hear an appeal

⁵ Citation to Title 5, Guam Code Annotated, Section 5481(1996); GSA Procurement Reg. §9-402(3)(1984)("Any action commenced under Section 6978(c) of this Chapter shall be commenced within (6) six months of the date the claim arose or within six months of the date the claimant knew or should have known, that a claim existed against the parties.")

that is not based on an affirmative decision of the agency. In *Appeal of GCIF*, OPA-PA-09-005 (November 29, 2009), the OPA found that, because "there is simply no decision concerning the issue of whether the lease or leaseback agreements violated the RFP requirements or whether the CaPFA was properly licensed for the Public Auditor to review ... the Public Auditor finds that she does not have the jurisdiction to hear these issues because they are not properly before her." *Id.* at p. 11. The Procurement Record at Tab No. 63, which is the Fund's Response to ASC's protest clearly establishes that the Fund's denial of the protest was based solely on the fact that it was filed untimely. Consequently, *In Appeal of GCIF* establishes precedent for rejection of the appeal and confirms the Legislature's policy behind requiring the timely filing of procurement protests as set forth in the Guam Supreme Court case of *Rock Products Corp.*, discussed *supra*.

C. The Record Establishes that the Evaluation Committee "Did Its Job" Under the Standard Set Forth in *Appeal of GCIF*.

ASC has the burden of establishing that the evaluators' evaluation was "arbitrary and capricious."⁶ However, the Procurement Record at Tab No. 7, the Summary Evaluation Sheet for RFP No. GGRF-028-06, establishes unequivocally that the standard set forth in *Appeal of GCIF* has been met and, indeed, exceeded in this instance. The evidence already on record with the OPA establishes the following: using a weighted scoring system, with a specific weight given to each evaluation factor, each member of the selection panel scored each offeror and its proposal. Based on the scoring, GWRS was chosen as the best qualified offeror with an average total score of 22.42. ASC and Lincoln received scores of 21.64 and 18.76, respectively. ASC complains, however, that a single evaluator's score on the pricing portion of the evaluation "skewed the results in favor of GWRS" and "that giving a lower evaluation score to a pricing

⁶ *Matter of Microtonics, Inc.*, 1988 WL 2277188 at p.3 (Comp. Gen. 1988). See discussion Agency Rebuttal to Appellant's Comments on Agency Report at pp. 6-8 (11/30/09).

proposal that was *objectively* more favorable to the Fund and its members was irrational and thus, as a matter of law, necessarily arbitrary and capricious.”⁷ ASC provides no citation for the concept that as a matter of law in an RFP for professional services (not for goods under a sealed bidding process), lower pricing automatically requires a higher evaluation score. In fact, the purpose of a negotiated procurement involving professional services is to assess price in relation to value. The RFP contemplated that the pricing “will be incorporated into the evaluation effort” and that pricing would be weighted less than the technical evaluation. The RFP does not require the evaluators to rank the price proposals according to numerical order, as ASC contends should have occurred.

Indeed, in considering the offers, the RFP allows the evaluator to rank offerors’ price proposals relative to the value of the services, experience and overall technical merits of the offerors or according to any other methodology, as permitted in the RFP. As discussed in the Agency Rebuttal, with regard to the evaluator who rated ASC lower in pricing than GWRS, this evaluator’s score sheets included written comments about ASC’s pricing (“concerns w/ methodology”) and about GWRS’ pricing (“got one price ↑ but good disclosure opt. 2 – NO”). (Tab #7 of the Procurement Record (“P.R.”) filed with the OPA on November 9, 2009). Offerors who receive similar scores for different pricing proposals may have received similar scores for example, simply because their respective price-to-value may have been considered to be comparable. There is ample support for the Fund’s position that the evaluation was consistent with the process set forth in the RFP and ASC has not provided any kind of evidence to the contrary to meet its burden of proof.

III. CONCLUSION


The Procurement Record and numerous filings with the OPA already establish

⁷ ASC’s Supplemental Comments to Agency Report, p. 2.

unequivocally that ASC did not file a timely protest of the Solicitation. However, if the OPA should allow the appeal to proceed, it is clear that the evidence will establish that the Fund "did its job" as required under the RFP. Consequently, the Fund submits the appeal of ASC should be denied.

DATED: Hagåtña, Guam, December 14, 2009.

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From: Maria Teresa B. Cenzone [mcenzon@carlsmith.com]
Sent: Monday, December 14, 2009 10:04 PM
To: Anne Camacho
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Subject: Hearing Brief in Appeal of ASC Trust Corporation

Importance: High



GGRF Hearing Brief
(GGRF-ASC)....

<<GGRF Hearing Brief (GGRF-ASC).pdf>> Dear Anne:

Thank you for the opportunity to file the attached Hearing Brief today. The original will be filed first thing in the morning and served upon ASC's attorney.

Should you have any questions please do not hesitate to contact me at 488-3071.

Regards,
Maria Cenzone

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commitment to deliver her brief via
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