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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
OPPOSITION TO APPELLANT'S
MOTION TO LIFT SEAL AND
COMPEL PRODUCTION OF
DOCUMENTS AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Appellee, the Government of Guam Retirement Fund ("GGRF"), by and through its undersigned counsel hereby submits its Opposition to Appellant's Motion to Lift Seal and Compel Production of Documents filed on August 13, 2007. Said Opposition is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

APPELLANT HAS NOT CITED PROPER AUTHORITY TO BRING ITS MOTION TO LIFT SEAL OR COMPEL PRODUCTION OF DOCUMENTS AS REQUESTED

Appellant Great-West Retirement Service ("GWRS") brings its Motion to Lift Seal and Compel Production of Documents pursuant to 2 G.A.R. Div. 4, Chap. 12 § 12109(c). While 2

G.A.R. Div. 4, Chap. 12 § 12109(c) does give the Public Auditor the ability to compel production of documents for examination, this provision is applicable only if documents have not been submitted for examination. The Appellee, Government of Guam Retirement Fund ("GGRF") has already produced all proper documents for examination by the Public Auditor in accordance with law, only seeking that confidential documents which are not yet part of the public record be reviewed in camera and not disclosed to GWRS or the public at large. This was done properly by notation on the front page of the Procurement Record and in accordance with 2 G.A.R. Div. 4, Chap. 12 § 12106.

The Public Auditor may release such documents where an interested party requests such release in writing, *except* as to documents submitted as containing confidential or proprietary information. *Id.* The only procedure provided in a procurement appeal before the Public Auditor for compelling the production of documents is to make a request in writing in accordance with 2 G.A.R. Div. 4, Chap. 12 § 12106 cited above; and this request remains subject to the agency's request to maintain confidentiality. Therefore, GWRS's motion is not a proper filing or a proper request under the procurement regulations.

EVEN IF THE PUBLIC AUDITOR MAY ENTERTAIN GWRS'S MOTION, SUCH MOTION SHOULD NOT BE GRANTED DUE TO THE CONFIDENTIAL INFORMATION CONTAINED IN THE DOCUMENTS.

A. GUAM'S PROCUREMENT LAWS AND REGULATIONS MANDATE NONDISCLOSURE OF THE REQUESTED DOCUMENTS AS THEY ARE NOT PART OF THE PUBLIC RECORD.

GWRS complains on one hand that GGRF illegally disclosed information about it, but now seeks disclosure of confidential information pertaining to other offerors. 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. It is by law GGRF's duty to maintain such confidentiality and thereby protect the integrity of the procurement

process. 2 G.A.R. Div. 4, Chap. 3, § 3114. Although GWRS cites 5 GCA § 5249 and § 5251 to support their argument that the procurement record is part of the public record, it fails to mention that 5 GCA §5252 makes it clear that the public record is subject to necessary protection of the bidding process and the protection of the confidentiality of trade secrets. 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. GGRF followed the law exactly in submitting the procurement record, including the confidential portions thereof.

The fact is that the confidential material sought by GWRS will not become part of the public record unless and until the project has been awarded to ASC or the final awardee. 2 G.A.R. Div 4, Chap. 3, § 3114 governs the receipt and handling of proposals. 2 G.A.R. Div. 4, Chap. 3, § 3114(h)(l) states that the Register of Proposals becomes part of the public record only after the award of the contract and that the proposals of offerors who are not awarded the contract shall not be opened to public inspection. At this point no award has been made and the negotiations that have occurred between GGRF and GWRS and ASC contain proposals that GGRF is by law not at liberty to disclose.

Furthermore, 2 G.A.R. Div. 4, Chap. 3 § 3114(i)(2) requires that discussions with one offeror not be disclosed to another offeror and "the agency conducting the procurement shall not disclose any information contained in any proposals until after award of the proposed contract has been made. (Emphasis added.) At this point, disclosure of other offerors' proposals, even in the context of negotiation, could jeopardize the integrity of the procurement process. Just as

negotiations failed with GWRS, they could likewise fail with other qualified offerors. Revealing negotiations with other offerors before an award is made would give other offerors an unfair advantage in negotiations, to the detriment of GGRF, and is specifically prohibited by law. Likewise, disclosing GGRF's research regarding comparative third party fees also would compromise the process. Thus, to enable GGRF to obtain the best pricing for the services sought, it is critical for GGRF to maintain the confidentiality of all proposals, including those proposals made during negotiations, as well as the information and basis upon which GGRF bases its own negotiations such as the comparisons of other third party administrator fees. No award has been made and no proposals or information contained in any proposal from any offeror can be released as part of the public record until award is made. The nondisclosure of offeror information is so closely guarded that even after an award is made the release of certain information can be accomplished only with the prior written consent of the offeror. See 2 G.A.R. Div. 4, Chap. 3, § 3116(b).

B. THE DOCUMENTS REQUESTED ARE EXPRESSLY PROTECTED BY LAW AND THEREBY EXEMPT FROM GUAM'S FREEDOM OF INFORMATION ACT.

Appellant correctly states that Guam's Freedom of Information Act ("FOIA") allows for inspection by the public of public documents, *except* as otherwise expressly prohibited in law and *except* as provided in § 10108 of FOIA. Appellant's argument fails in its application because the documents requested are exempt from FOIA for two reasons: (1) they are not public documents; and (2) they are expressly protected by law.

First, as already discussed in detail above, the documents sought by Appellant are not yet part of the public record and so cannot be public documents. Should negotiations fail, some of these documents may never become part of the public record because proposals of offerors not awarded the contract are not open to public inspection. 2 G.A.R. Div. 4, Chap. 3, § 3114(h)(l).

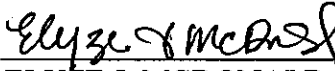
Second, as also discussed above, 2 G.A.R., Div. 4, Chap. 3, § 3114(i)(2) expressly prohibits the disclosures of any information pertaining to any proposal until after an award is made. This information is also expressly protected from disclosure by law under the mandate that government agencies properly handle proposals and information relayed to them in the procurement process so as to protect the integrity of the process. Although FOIA does have a broad application and seeks to make proper public documents accessible, it also contemplates exemption when a document is confidential because of either its content or because of timing and the process surrounding it. This can be seen in the express provision of exceptions to the FOIA disclosure provided in 5 GCA § 10103 and § 10108(i).

CONCLUSION

GGRF has diligently complied with all procurement rules and regulations regarding the bidding process and the confidentiality of information submitted by bidders. GGRF also has abided by the procurement appeal procedures by providing these confidential documents to the Public Auditor for in camera review. The Public Auditor should assist GGRF in maintaining the integrity of the procurement process by maintaining the confidentiality of these documents and denying Appellants' Motion to Lift Seal and Compel Documents.

SUBMITTED this 17th day of August, 2007, Hagåtña, Guam.

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