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Great-West Retirement Services

RECEIVED
OFFICE OF THE PUBLIC AUDITOR
PROCUREMENT AFFAIRS

AUG 13 2007

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

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

9
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:

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

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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.

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

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21 ANTHONY R. CAMACHO, ESQ.
22 Attorney for Appellant Great-West Retirement Services
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