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**OFFICE OF THE PUBLIC AUDITOR**  
**PROCUREMENT APPEALS**

DEC 02 2009

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FILE No. OPA-PA 09-010

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 SUPPLEMENTAL**  
14 ) **COMMENTS ON AGENCY REPORT**  
15 )  
16 Appellant. )  
17 )

18 Appellant **ASC TRUST CORPORATION** ("ASC") hereby submits the  
19 following supplemental comments in response to the Agency Report,  
20 filed by Appellee Government of Guam Retirement Fund (the "Fund")  
21 on November 17, 2009.

22 In its Agency Statement, the Fund repeated the position  
23 asserted by it in its denial of ASC's protest that ASC's protest  
24 was untimely as it knew or should have known as of May 7, 2007,  
25 May 11, 2007, July 6, 2007 or August 21, 2009 that it had not  
26 been found by the Fund's selection committee to be the best  
27 qualified to provide the services required by the Fund. As set  
28 forth in ASC's Comments on Agency Report, filed November 20,  
2009, that was not the basis for ASC's protest or this appeal.  
Rather, ASC's protest arises from the fact that one of the  
members of the selection committee gave ASC a lower rating on the

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1 pricing criterion when the selection committee evaluated ASC's  
2 and GWRS' initial pricing proposals, even though ASC's pricing  
3 proposal offered a lower cost than GWRS. Inasmuch as the pricing  
4 criterion counted for 40% of the total evaluation score, this one  
5 member's rating on the pricing criterion skewed the total results  
6 in favor of GWRS. Simply stated, it is ASC's position that  
7 giving a lower evaluation score to a pricing proposal that was  
8 objectively more favorable to the Fund and its members was  
9 irrational and thus, as a matter of law, necessarily arbitrary  
10 and capricious. If its proposal had been fairly and rationally  
11 scored, ASC would have had the highest combined score, not GWRS.<sup>1</sup>

12  
13  
14 With regard to the factual issue relevant to the timeliness  
15 of its protest, while ASC may have known early on it had not been  
16 ranked first or best qualified, it never knew why until October  
17 6, 2009, when it obtained the evaluation sheets. That is when it  
18 first learned the facts upon which its protest was based.

19 In her November 27, 2009 Decision in Appeal No.: OPA-PA-09-  
20 005, the Public Auditor disposed of an argument similar to that  
21 made by the Fund that the protest that was the subject of that  
22 appeal was untimely. In that Decision, the Public Auditor ruled,  
23

24 Here, although GCIF knew or should have known that IBC  
25 was selected as the best qualified offeror on or about  
26 March 5, 2009, it did not know the facts giving rise to  
its protest until July 31, 2009, when it heard media

27 <sup>1</sup> The RFP provided that "[B]ased on the combination of the scores assigned for  
28 the technical merit and pricing, the GGRE will enter into negotiations with the  
company with the highest combined score." RFP, Section VI.C.10, p. 29  
(Procurement Record, Tab 1).

1 reports that the GEDA and IBC were seeking bond funds  
2 for the project in the United States.

3 Decision, supra, at p. 9 (footnote omitted).

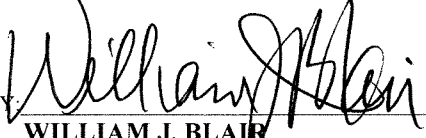
4 The Public Auditor's recent ruling thus makes it clear that  
5 knowledge of the fact that an offeror has not been selected or  
6 deemed the best qualified does not trigger the 14-day protest  
7 period, as the Fund asserts, but rather when the disappointed  
8 offeror learns or should have learned facts giving rise to a  
9 protest. The facts giving rise to ASC's protest were first  
10 revealed on October 6, 2009, when it obtained the evaluation  
11 sheets.  
12

13 Contrary to the position asserted by the Fund in its  
14 Rebuttal to ASC's Comments on the Fund's Agency Report, ASC could  
15 not have obtained these documents any earlier. The evaluation  
16 sheets were filed by the Fund in the GWRS appeal as "confidential  
17 and/or proprietary." See Procurement Record, Tab 41. In the  
18 GWRS appeal, the Fund successfully opposed GWRS' motion to  
19 various documents the Fund had filed under seal. Hearing Officer  
20 Robert Cruz determined a motion to lift the seal and require  
21 production was "an inappropriate motion during negotiations."  
22 Findings and Recommendations of Hearing Officer in OPA-PA-07-006,  
23 p. 4 (Procurement Record, Tab 43). This finding was adopted by  
24 the Public Auditor. Decision in OPA-PA-07-006, p. 2 (Procurement  
25 Record, Tab 44). Any attempt by ASC to request GWRS' pricing  
26  
27  
28

1 proposal or the evaluation sheets prior to the award of the  
2 contract would have similarly been "inappropriate."

3 SUBMITTED this 2nd day of December, 2009.

4  
5 **BLAIR STERLING JOHNSON**  
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7 A PROFESSIONAL CORPORATION

8 BY:   
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