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

11 IN THE APPEAL OF) APPEAL NO. OPA-PA-09-010
12 ASC TRUST CORPORATION,)
13 Appellant.) **HEARING BRIEF OF APPELLANT**
14) **ASC TRUST CORPORATION**

15 Appellant **ASC TRUST CORPORATION** ("ASC") hereby respectfully
16 submits the following:

17 **INTRODUCTION**

18 In its filings in this docket Appellee Government of Guam
19 Retirement Fund ("Fund") continually misstates (or, perhaps,
20 still miscomprehends) the basis for ASC's protest and appeal and
21 the facts giving rise to that protest. The Fund misstates the
22 circumstances relating to ASC's learning of those facts. At the
23 hearing of this matter, ASC will debunk the Fund's plainly wrong
24 and distorted versions of the relevant events and set the record
25 straight.

26 **FACTS GIVING RISE TO ASC'S PROTEST AND APPEAL**

27 ASC will establish the following facts at the hearing:
28

COPY

1 The RFP in this procurement stated, in plain and simple
2 terms, how proposals would be initially evaluated. Proposals
3 were to be evaluated based on "technical merits **and price.**" RFP,
4 p. 29 (emphasis supplied). Ten evaluation criteria and the value
5 assigned to each were set forth in the RFP. The nine technical
6 criteria were to be scored first. Only then were the price
7 proposals to be opened.
8

9 The price proposal will count for 40% of this evaluation and
10 the technical merits will count for 60% of this evaluation.
11 Based on the combination of the scores assigned from the
12 technical merit and pricing, the GGRF will enter into
13 negotiations with the company with the highest combined
14 score.

15 Id.

16 ASC submitted a proposal, as did Great-West Retirement
17 Services ("GWRS") and one other company. A selection panel
18 comprised of three members of the Fund's board of trustees
19 evaluated the proposals and scored them.

20 ASC submitted a price proposal that was lower and more
21 favorable to the Fund than either of the price proposal options
22 submitted by GWRS. Nonetheless, one member of the selection
23 panel gave GWRS a score of 9 out of 10 for its higher price
24 proposals and gave ASC a score of 5 out of 10 for its lower price
25 one.

26 As the direct result of the scoring of the two price
27 proposals by this one evaluator, GWRS' combined score was higher
28

1 than ASC's combined score, and GWRS was deemed the best qualified
2 offeror.

3 If ASC had received a higher score than GWRS for its lower
4 price proposal (or even the same score) from this one evaluator,
5 ASC, not GWRS, would have had the highest combined score and been
6 deemed the best qualified offeror.
7

8 If ASC had been deemed the best qualified offeror, the Fund
9 would have first negotiated with it, and there would have been a
10 substantial likelihood that ASC would have been awarded the
11 contract.

12 **LEGAL ARGUMENTS**

13 The members of the Fund's selection panel were obliged to
14 evaluate the proposals based on the evaluation criteria set forth
15 in the RFP and no other. 5 GCA 5216(e). Any failure to follow
16 the stated evaluation criteria was a breach of the terms of the
17 RFP and a violation of the Guam procurement law.

18 Where price was specifically assigned a weighted value of
19 40% of the evaluation score by the RFP, it was unreasonable and
20 irrational to give a higher evaluation score to a higher, less
21 favorable price proposal than to a lower, more favorable price
22 proposal.
23

24 Irrational or unreasonable scoring of proposals is arbitrary
25 and capricious.
26

27 Contrary to the last minute assertions of the Fund, this
28 procurement was not a negotiated procurement akin to procurements

1 made and allowable under federal law.¹ However, even under
2 federal law, evaluations of proposals must be reasonable and
3 consistent with the stated evaluation criteria.

4 Assigning a higher evaluation score to a price proposal that
5 was less favorable to the Fund was not reasonable or consistent
6 with the evaluation criteria stated in the Fund's RFP.²
7

8 **TIMELINESS OF PROTEST**

9 ASC learned the facts giving rise to its protest on October
10 6, 2009.

11 The Fund's position that the Agency Report in the earlier
12 GWRS appeal revealed the details of GWRS' initial price proposals
13 is plainly wrong, as the evidence will clearly show.

14 Information related to GWRS' price proposals could not have
15 been made public or provided to ASC prior to the award of the
16 contract, which occurred on August 21, 2009.
17

18
19
20
21

¹ The Guam procurement law was long ago amended to eliminate the competitive
22 sealed proposals mode of procurement. *Fleet Services, Inc. v. Dept of
Administration*, 2006 Guam 6, at *15

23 ² The federal cases cited by the Fund in its eleventh hour Agency Rebuttal to
24 Appellant's Supplemental Comments on Agency Report ("Supp. Rebuttal") are all
25 factually and legally inapposite or easily distinguishable. See, e.g., *Matter
of United Telecontrol Electronics, Inc.*, 1989 WL 241333 (Comp.Gen. 1989), at
26 *9, cited by the Fund at Supp. Rebuttal, pp. 12-13 ("Here, the RFP specifically
27 stated that technical factors would be considered significantly more important
28 than price.") ("Even though the Navy credited UTE with the maximum possible
score for its lower price, Allied-Signal's [best and final offer] received the
highest combined score when the weighted price and technical scores were
combined.") ASC was not given the maximum possible score for its lower price
proposal or anything close to it; to the contrary, it was irrationally punished
by the one evaluator, and the effect was to alter the total combined results.

1 Information related to the scoring of ASC's price proposal
2 would have been meaningless without access to the GWRS price
3 proposals.

4 Information related to GWRS' price proposals would have been
5 meaningless without access to ASC's scoring evaluation sheets.

6
7 Immediately following the notice of the award of the
8 contract to GWRS, ASC diligently pursued obtaining the
9 information that provided the facts giving rise to its protest.
10 Any delay in the obtaining of the information was the result of
11 the contradictory and shifting legal positions being asserted by
12 the Fund, not the consequence of any dilatory actions of ASC.

13
14 ASC filed its protest within 14 days of learning the facts
15 giving rise to its protest.

16 **THE MERITS OF ASC'S PROTEST ARE PROPERLY BEFORE THE OPA**

17 Based on its reading of the OPA's recent Decision in *Appeal*
18 *of Guam Community Improvement Foundation, Inc.*, the Fund asserts
19 that the merits of ASC's protest are not properly before the OPA
20 in this appeal. Fund's Supp. Rebuttal, pp. 6-7. The Fund
21 asserts that because it took the baseless position that ASC's
22 protest was untimely and failed to make any decision on the
23 merits of the protest, there is nothing for the OPA to consider.
24 The Fund claims that the OPA lacks "jurisdiction" to consider the
25 merits.
26

27 The Fund misreads the OPA's decision in *Appeal of GCIF*. In
28 the language quoted by the Fund, but overlooked by it, the OPA

1 noted that the issues of whether the challenged lease or lease
2 back agreements violated the subject RFP requirements or whether
3 one of the parties was properly licensed had not been addressed
4 in the agency's protest decisions or GCIF's protest. Supp.
5 Rebuttal, p. 6. In other words, in that matter the issues were
6 neither raised by GCIF in its protest nor addressed by the agency
7 in its decision.
8

9 In this instance, on the other hand, the basis for ASC's
10 protest was raised quite specifically by it in its notice of
11 protest. The fact that the Fund opted to ignore or evade the
12 merits of ASC's protest in its decision does not and cannot
13 deprive or relieve the OPA of its power and obligation to review
14 *de novo* in this appeal the matters raised by ASC in its protest .
15

16 **CONCLUSION**

17 The evidence will uncontrovertibly show that ASC's proposal
18 was unreasonably and irrationally scored by one of the evaluators
19 and that, as a result, ASC was unfairly and unlawfully deprived
20 of being determined to be the best qualified offeror in this
21 procurement and, in all likelihood, being awarded the subject
22 contract.
23

24 **RESPECTFULLY SUBMITTED** this 14th day of December, 2009.

25 **BLAIR STERLING JOHNSON**
26 **MARTINEZ & LEON GUERRERO**
27 A PROFESSIONAL CORPORATION

28 BY William J. Blair
WILLIAM J. BLAIR
Appellant's Duly Authorized Representative