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In the Appeal of ASC Trust, LLC OPA-PA-25-007- Agency Report and Agency Statement

Trina Angoco <tangoco@camachocalvo.law>

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Dear Mr. Hernandez and Attorney Brennan,

Attached, please find the following for filing:

- Agency Report; and
- Agency Statement.

Thank you,

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2 attachments



Agency Report.pdf

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Agency Statement.pdf

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THE GOVERNMENT OF GUAM RETIREMENT FUND

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL
TERRITORY OF GUAM

In the Appeal of

ASC TRUST, LLC,

Appellant

and

THE GOVERNMENT OF GUAM
RETIREMENT FUND

Purchasing Agency

Docket No. OPA-PA-25-007

AGENCY STATEMENT

AGENCY STATEMENT

Purchasing Agency, the Government of Guam Retirement Fund (“GGRF”), by and through its undersigned attorneys, hereby submits its Agency Statement, pursuant to 2 GAR Div. 4 § 12105, as part of its Agency Report concurrently filed herein.

RELEVANT BACKGROUND

On March 17, 2025, GGRF issued RFP No. GGRF-002-25, involving a procurement for professional services, specifically seeking a provider of Plan Administration Services related to the Defined Contribution Retirement System (401(a) Plan), 457(b) Deferred Compensation Plan and Welfare Benefit Plan (the “RFP”). *See* GGRF PR000156 – PR000225; GGRF PR000231 – PR000241. GGRF published Responses to Questions dated April 10, 2025. *See* GGRF PR000243 – PR000246. On April 16, 2025, ASC protested the procurement in its (first) protest letter dated April 16, 2025. *See* GGRF PR000248 – PR000252. On April 23, 2025, GGRF issued a Notice to All Prospective Offerors that a Stay of Procurement has been issued. *See* GGRF PR000257. GGRF issued Amendment No. 2 on April 23, 2025. *See* GGRF PR000259 – PR000260. ASC protested the procurement in its second protest letter dated April 25, 2025. *See* GGRF PR000262 – PR000264. GGRF issued a Notice to All Prospective Offerors that a Stay of Procurement was issued. *See* GGRF PR000269. GGRF issued Amendment No. 3 on April 28, 2025. *See* GGRF PR000271 – PR000272. GGRF denied ASC’s first protest by letter dated April 23, 2025. *See* GGRF Procurement Record GGRF PR000254 – PR000255. ASC’s notice of appeal from GGRF’s denial of its April 16, 2025, protest was filed with the OPA on May 1, 2025, in OPA-PA-25-007.

RESPONSE TO PROTEST

I. ASC’s Grounds for Protest Lacked Merit and was Properly Denied.

On appeal, ASC contends that GGRF failed to comply with 5 GCA § 5008, which provides, in pertinent part:

§ 5008. Policy in Favor of Local Procurement.

All procurement of supplies and services shall be made
from among businesses licensed to do business on Guam and that

maintain an office or other facility on Guam, whenever a business that is willing to be a contractor is:

* * *

(d) A service business actually in business, doing a substantial portion of its business on Guam and hiring at least 95% U.S. Citizens, lawfully admitted permanent residents or nationals of the United States, or persons who are lawfully admitted to the United States to work, based on their citizenship in any of the nations previously comprising the Trust Territory of the Pacific Islands.

Procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam that is one of the above-designated businesses entitled to preference.

5 GCA § 5008. Notably, ASC's protest was based on alleged violations of statute (5 GCA § 5008), and not on any alleged violations of the RFP. ASC's protest appears to be based on its unsubstantiated position that ASC is a Section 5008(d) business that is willing to be a contractor, and therefore GGRF must screen and appropriately weigh proposals from offerors who do not have a Guam business license and maintain an office or other facility on Guam (and conversely, weigh more favorably the proposals from Section 5008(d) businesses. Assuming, for purposes of argument, that ASC indeed meets the requirements of 5 GCA § 5008(d), there still is no support for ASC's protest, as discussed below.

A. **Section 5008 "Local" Status Applies to Contractors, Not Offerors, and Need Not Be Assessed During Evaluations of Qualifications Under a Competitive Selection Process.**

GGRF properly denied ASC's allegation that GGRF failed to comply with 5 GCA § 5008 because GGRF's disclosed evaluation scoring did not include a "local preference" requirement

for offerors of professional services. GGRF's position is that for purposes of submitting an offer to provide professional services to GGRF as Purchasing Agency under Section 5216 (and under 2 GAR § 3114), an offeror is not required to first prove that it has a license to do business and maintain an office or other facility on Guam – those requirements are to be met before contracting, as so stated in RFP No. GGRF-002-25 at Section V.B.4 (GGRF PR000170 (“Upon award of the contract but before the commencement of services, if later, the successful firm must be duly licensed to conduct business in the Territory of Guam.”) and implicitly in 5 GCA § 5004.¹ ASC contends that GGRF failed to comply with 5 GCA § 5008 because of GGRF's Response to Question 15, which states:

Response to Question 15: Minimum qualifications are addressed in Section V.B. and Evaluation Factors are addressed in Section VI.C. of the RFP. The evaluation criteria do not include any geographic preference or scoring advantage based on the offeror's location. Therefore, no additional documentation related to Guam-based status is required for evaluation purposes.”

See GGRF PR000246.

Requiring licensing and an office on Guam to be eligible to submit a proposal for professional services would significantly reduce the pool of potential professional service offerors, to the detriment of the Purchasing Agency, and would be contrary to the purposes and policies of Guam's Procurement Code. *See, e.g.*, 5 GCA § 5001(b) (“The underlying purposes of this Chapter [5] are: . . . (6) to foster effective broad-based competition within the free enterprise system[.]”) The underlying purposes and policies can be met by conducting 5 GCA § 5008 eligibility after evaluations have resulted in selection and ranking of qualified offerors, such as during negotiations on terms of contract including pricing, and certainly before contracts are executed.

¹ 5 GCA § 5004(a) states: “General Application. This Chapter applies only to contracts. . . .” (emphasis added.)

B. Qualification-Based Selection of Professional Service Providers Precedes Negotiations on Price and Other Contract Terms.

The services procured under RFP No. GGRF-002-25 for plan administration and recordkeeping, which are professional services governed by 5 GCA § 5216 and the implementing rules under 2 GAR § 3114. These provisions require the Purchasing Agency to evaluate and rank offerors based solely on qualifications, and to then negotiate with the most qualified firm first. If negotiations fail, the Purchasing Agency may then proceed to negotiations with the next most qualified offeror.

Reading Section 5008 to require awarding a contract to a lower-ranked § 5008 firm based solely on price would directly conflict with the structured competitive selection process mandated under Section 5216. For example, if three firms are ranked higher than a § 5008 firm based on professional qualifications, then Section 5008 could not reasonably operate without invalidating the statutory and regulatory ranking procedure. As such, 5 GCA § 5216 and 2 GAR § 3114 must control for the competitive selection process for professional services.

II. GGRF has Exclusive Authority to Approve and Execute All Contracts for the Procurement of Professional Services Associated with the Operation of the Fund.

Notwithstanding any other provision of law, the Board of Trustees of the Government of Guam Retirement Fund shall have exclusive authority to approve and execute all contracts for the procurement of professional services associated with the operation of the Fund.

5 GCA § 5121(e). Accordingly, GGRF has the authority to determine whether a potential contractor meets the requirements of 5 GCA § 5008 before a contract is approved and executed. The determination of Section 5008 eligibility is not required at the evaluation stage in a competitive selection process, as ASC suggests. GGRF did not include such a requirement at the evaluation stage in the RFP, and it was not required to do so under 5 GCA § 5008. During the pre-contract phase of the procurement, no potential contractor has been identified that cannot

meet Section 5008's requirements; therefore, no violation of Section 5008 has occurred.

III. ASC's Protest Was Untimely Under 5 GCA § 5425(a).

The communications log reveals that ASC had been reviewing the solicitation for a potential violation of Section 5008, as ASC submitted its written question on March 31, 2025, asking, "Will Guam-based offerors receive any preference in evaluation scoring?" (GGRF PR00279). ASC's written question confirms that ASC had noticed the alleged omission in the RFP's evaluation criteria and suspected it was intentional.

Under Guam procurement law, timeliness is not merely procedural—it is jurisdictional. 5 GCA § 5425(a) imposes a timeliness requirement: "The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto."

GGRF acknowledges that ASC's protest was submitted on April 16, 2025, prior to the proposal deadline of April 24, 2025. However, ASC's protest was not submitted within fourteen (14) days after ASC knew or should have known of the facts giving rise to the alleged solicitation defect.

A. ASC's Protest Involves an Alleged Solicitation Defect

ASC challenges GGRF's failure to apply a local preference under 5 GCA § 5008 in its evaluation criteria. But this alleged defect was apparent from the face of the RFP, which ASC received on March 17, 2025, and which contains no reference to 5 GCA § 5008 or any geographic scoring advantage in Section VI (Evaluation Criteria). This was not a hidden or technical error. The evaluation scheme was presented clearly. If ASC believed that the RFP was defective for failing to include local preference scoring, it was required to protest within fourteen (14) days after ASC knew or should have known of the facts giving rise to the alleged

solicitation defect, consistent with 5 GCA § 5425(a). As the Guam Supreme Court explained in *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20: “Section 5425(a) speaks not in terms of what is being protested but in terms of knowledge of the facts giving rise to a protest.” (¶ 87) “How a protest is framed by the aggrieved bidder—including whether they frame the protest as a challenge to the solicitation, the evaluation, or the award—does not dictate when the time period to file a protest begins to run.” (¶ 86) Thus, the test is not when ASC alleged that a violation occurred, but when ASC knew or should have known the factual basis of its claim. That occurred on March 17, 2025, the day the RFP was issued.

B. ASC’s Protest is Time-Barred and Cannot be Salvaged

In *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Auth., Guam*, 2020 Guam 20, the Court held: “Section 5425(a) speaks not in terms of what is being protested but in terms of knowledge of the facts giving rise to a protest.” Further, “A protest filed more than 14 days after the disappointed offeror or bidder had notice of the grounds for the protest is barred as untimely.” (2020 Guam 20 ¶ 87).

In this case, ASC contends that it became aware of GGRF’s non-compliance with Section 5008 on April 10, 2025, the date on which GGRF issued its response to written questions, including the question: “Will Guam-based offerors receive any preference in evaluation scoring?” which was answered: “The evaluation criteria do not include any geographic preference or scoring advantage based on the offeror’s location.”

Yet GGRF’s April 10th response did not reveal any new facts—it confirmed what was already evident in the RFP: that no § 5008 preference would be applied in evaluation scoring. The Guam Supreme Court has rejected similar attempts to reset the clock based on later clarifications: “[A] protest filed more than 14 days after the disappointed offeror or bidder had

notice of the grounds for the protest is barred as untimely. This is true even if no contract has yet been awarded [...] and even if the protestant did not subjectively understand or appreciate the ground for protest.” (*DFS Guam*, 2020 Guam 20 ¶ 87).

In short, April 10 was not the trigger date under 5 GCA § 5425(a). At best, it only confirmed what ASC had already known since March 31—or perhaps earlier, on March 17. Therefore, under the 14-day standard, ASC was not entitled to wait until April 16 to submit its protest.

IV. Conclusion

GGRF properly denied ASC’s first protest because 5 GCA § 5008 does not apply to the evaluations of potential professional service providers under the structured procurement process in 5 GCA § 5216 and 2 GAR § 3114. ASC’s protest was based on an alleged defect apparent in the solicitation and was therefore required to be filed within 14 days of either March 17 or March 31, 2025. ASC cannot meet its burden of showing that it submitted its protest in a timely manner.

Authority. Pursuant to 5 GCA § 5425(e) a protestor may Appeal a decision under 5 GCA § 5425(c) relative to the protest of a method of selection, a solicitation, and award of a contract, or a decision under 5 GCA § 5425(h) regarding entitlement to costs, within fifteen (15) days of receipt by protestor of the decision. The Public Auditor shall determine whether a decision on the protest of method of selection, solicitation or award of a contract, or entitlement to costs is in accordance with the statutes, regulations, and the terms and conditions of the solicitation.

2 GAR § 12112 (Appeal to Public Auditor Relative to Method, Solicitation, or Award).

GGRF respectfully requests that the Office of Public Accountability affirm the Purchasing Agency’s denial of ASC’s protest or dismiss the appeal for lack of jurisdiction.

Respectfully submitted this 15th day of May, 2025.

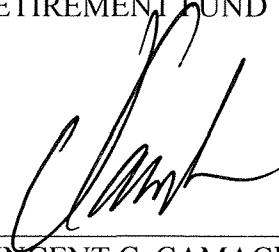
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