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In the Appeal of ASC Trust, LLC OPA-PA-23-005

Arsima A. Muller <amuller@carlsmith.com>

Thu, Oct 19, 2023 at 1:31 PM

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Mr. Hernandez and Mr. Brennan,

Please see the attached Purchasing Agency Response to Appellant's Comments on Agency Report in the above matter. Kindly confirm receipt.

Thank you and regards,

Arsima

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**Purchasing Agency Response to Comments on Agency Report OPA-PA-23-005.pdf**

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Attorneys for
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-23-005

**PURCHASING AGENCY RESPONSE
TO APPELLANT’S COMMENTS ON
AGENCY REPORT**

**PURCHASING AGENCY RESPONSE TO
APPELLANT’S COMMENTS ON AGENCY REPORT**

Purchasing Agency the Government of Guam Retirement Fund (“GGRF”), by and through its attorneys, Carlsmith Ball LLP, hereby submits its Purchasing Agency Response to Appellant ASC Trust, LLC’s Comments On Agency Report filed herein on October 16, 2023.

1. Introduction.

The appeal filed by ASC Trust, LLC (“ASC”) concerns certain pre-award events that

ASC believes to be relevant to the Purchasing Agency's commencement of negotiations with a competing offeror for an award of contract for professional services. ASC apparently believes that ASC should have been selected as the best qualified offeror in the underlying procurement, yet ASC's protest and appeal herein do not address the merits of GGRF's selection of a competitor as the best qualified offeror to commence contract negotiations. Instead, ASC raises allegations of violations irrelevant to the underlying selection of a competitor in the hopes that the procurement will be re-started. That is not a proper remedy for ASC's protest.

Negotiations had ceased upon ASC's first protest, which was denied by GGRF and is pending appeal herein. If the negotiations ultimately resume with the best qualified offeror, it is possible that the parties (GGRF and the best qualified offeror) may not reach agreement on all of the terms of a contract, in which case negotiations with the next best qualified offeror, ASC, would commence. Or, if the parties do reach agreement on all of the terms of a contract, then ASC may choose to protest the Purchasing Agency's award of contract, and if the protest is denied, then ASC may appeal that denial to the OPA. Instead, ASC has chosen to engage in a pre-award protest and appeal, with the goal of restarting the procurement process. GGRF opposes ASC's premature agency protest and premature OPA appeal because the specious grounds on which ASC appeals do not support a restart of the procurement process.

2. GGRF's Alleged Non-Compliance with Guam's Open Government Law Does not Warrant a Restart of the Procurement Process.

ASC alleges that two separate violations of Guam's Open Government Law ("OGL") requires a restart of the underlying procurement. GGRF disagrees. A restart is unnecessary and unsupported under the circumstances, pre-award.

First, ASC repeats its argument that the GGRF's extension of an existing contract at its

February 10, 2023 board meeting was not noticed, and because the underlying contract involved similar services that ASC desired to perform under RFP No. GGRF-002-22, the entire procurement process should be re-started. Even if the services to be performed for GGRF are arguably similar, that would not confer authority to the OPA to review ASC's OGL allegation completely unrelated to the underlying procurement. Moreover, ASC offers no support for its allegation that there is no lawful basis to extend the underlying contract (Comments on Agency Report at p. 2). The lawful basis is in the underlying contract itself, which has been renewed more than once since inception. ASC's disagreement with the extension of the contract with an incumbent service provider does not relate to the "method of source selection, solicitation, or the award of a contract" that is the basis for a protest under 5 G.C.A. § 5425(a).

Second, ASC alleges, incorrectly, that the public was not notified of a GGRF Board action taken at its July 28, 2023 meeting, and therefore, that "action" should be void. First, the "action" involved an agenda item (noticed on July 20, and 26, 2023 in the Guam Daily Post) involving the RFP No. GGRF-002-22 procurement process and approval was merely to continue "to complete the necessary administrative requirements to complete the RFP process after being informed by the RFP Selection Panel's report that a best qualified offeror had been selected for contract negotiations." (See GGRF PR000477-PR000478). ASC and the public were aware that the RFP No. GGRF-002-22 was to be a topic of discussion at the July 28, 2023 GGRF Board meeting. The GGRF Board's "action" was not to approve an award of contract; it was to approve the continuation of the procurement process at the recommendation of the RFP Selection Panel. The remedy sought by ASC to restart the procurement process is unnecessary and would not address the substance of ASC's underlying disagreement that it was not selected

as the best qualified offeror.

3. Publication of Pre-Award Ranking of Offerors Will Not Promote the Purposes of Guam's Procurement Code.

ASC's protest stayed the procurement process, which was at the stage of negotiating the terms and conditions of a contract with the best qualified offeror. If negotiations fail, GGRF would then negotiate with the next best qualified offeror. If ranking of offerors and their proposals were disclosed prior to an award of contract, then all offerors in line for negotiations for award of contract would have an unfair advantage in knowing the positions of their competitors. This cannot be in the best interests of Guam. Publication of ranking is available post-award, not pre-award, and ASC's appeal should be denied on this point. The OAG checklist cited by ASC as authority for disclosure is misplaced; the checklist is not a statutory or regulatory requirement, it is merely a checklist to be used by the OAG (or SAAG) prior to the certification of the procurement record, which as described below, remains incomplete.

4. The GGRF Procurement Record is Necessarily Incomplete Pending Award of Contract.

No Award of Contract has been made. GGRF and the best qualified offeror have not reached agreement on the terms of a contract. Until such time as an award of contract has been made, the procurement record cannot be certified as complete and the procurement record cannot be disclosed. ASC's protest and appeal are premature. GGRF did not rescind the notice of award, it corrected an incorrect notice of award because contract negotiations were in progress.

5. Conclusion.

ASC's appeal should be denied. None of the grounds raised by ASC require a re-start of the procurement process. Denial of ASC's appeal will have no impact on ASC's ability to protest the ultimate award of contract, which may be addressed in a relevant protest at the

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GGRF AGENCY RESPONSE

appropriate time.

RESPECTFULLY SUBMITTED THIS 19TH DAY OF OCTOBER, 2023

CARLSMITH BALL LLP

A handwritten signature in black ink, appearing to read 'Joanne L. Grimes', written over a horizontal line.

JOANNE L. GRIMES
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Attorneys for
THE GOVERNMENT OF GUAM
RETIREMENT FUND