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In the Appeal of ASC Trust, LLC - Consolidated Appeal OPA-PA-23-005 and 6 - Purchasing Agency Reply Memo ISO Motion to Dismiss

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Mr. Hernandez and Mr. Brennan,

Please find attached the Purchasing Agency's Reply Memorandum in Support of its Motion to Dismiss for filing in the above consolidated matter.

Kindly confirm receipt.

Thank you and regards,

Arsima

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[GGRF Dkt No. 23-005 and 23-006] GGRF Reply Memorandum.pdf

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Attorneys for
THE GOVERNMENT OF GUAM RETIREMENT FUND

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of

ASC TRUST, LLC,

Appellant

and

THE GOVERNMENT OF GUAM
RETIREMENT FUND,

Purchasing Agency.

Consolidated Appeal
Docket No. OPA-PA-23-005
Docket No. OPA-PA-23-006

**PURCHASING AGENCY’S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Purchasing Agency The Government of Guam Retirement Fund (“GGRF”), through its undersigned counsel, hereby files its Reply Memorandum In Support of its Motion to Dismiss Appellant ASC Trust, LLC’s (“ASC’s”) consolidated appeals (OPA-PA-23-005 dated September 20, 2023 and OPA-PA-23-006 filed on October 13, 2023). This Reply Memorandum (“Reply”) is submitted pursuant to the Public Auditor’s oral scheduling ruling at the 4:35 minute mark in the Audio File of the Pre-Hearing Conference held on October 27, 2023.

ASC’s own opposition to GGRF’s Motion to Dismiss supports why dismissal is appropriate until there can be a completed procurement record upon which the OPA can review

relevant facts, apply relevant law, and determine whether ASC's request to cancel the procurement is consistent with the letter and spirit of Guam's procurement laws.

GGRF's position as a purchasing agency is that the OPA should address ASC's allegations efficiently, after the procurement record is certified as complete. Dismissing ASC's consolidated appeal at this time will not deprive ASC of its opportunity to later challenge the procurement process with a completed procurement record, should a challenge be ASC's desired course of action following GGRF's contract award. An incomplete record hinders the OPA's review and GGRF's defense of its actions because procurement law prohibits the disclosure of information at this stage of the procurement process.

ASC concedes this point. For example, ASC states: "The Incomplete Record Deprives the OPA of the Ability to Review this Matter." *See* Section III. of ASC's Opposition to Motion to Dismiss dated December 4, 2023 ("Opposition") at p. 5. Further: "The lack of a complete record here is a valid and material basis of protest since GGRF's incomplete record fails to explain the erroneous notice of award issued to ASC on August 16, 2023, or the reasons why the procurement process was conducted in violation of law and the terms of the RFP[.]" *See* ASC's Opposition at p. 6.

Even assuming that ASC has identified viable violations of procurement law (which GGRF submits it has not), there are only two courses of action that the OPA can take with respect to this appeal. The first course of action is for the OPA to dismiss ASC's appeal until such time as the procurement record is complete, so that ASC's protest can be addressed based on all relevant facts applied to relevant law. The second course of action is for the OPA to determine if procurement law was violated, but the OPA's determination would be based on incomplete facts because GGRF cannot submit relevant facts without violating procurement laws

applicable to pre-award disclosures. The first course of action is clearly the most efficient and effective for the parties and for the OPA. A decision on the merits of a procurement violation should be based on a complete record.

The public record required by 5 GCA § 5249 cannot be certified by the responsible procurement officer because there is no agreement on all of the terms and conditions of a contract. Accordingly, the procurement record is not complete, and there is insufficient information available for public inspection under 5 GCA § 5250 that the OPA can review for ASC's appeal. Until a complete record is certified in writing by the responsible procurement officer, ASC's appeal would only be based on ASC's suppositions about what might have happened. Furthermore, until there is a signed contract between the Purchasing Agency and a contractor, there is no award of contract to protest or appeal from.

Because no contract has been awarded, ASC remains a viable contractor if GGRF cannot reach an agreement on all of the terms and conditions of a contract with ASC's competitor. If, however, GGRF discloses information not subject to public inspection under Guam's Freedom of Information law, then the disclosure may result in an advantage to potential contractors and a disadvantage to GGRF when negotiating a contract because GGRF's negotiating posture and position will have been revealed.

ASC contends that GGRF should submit an incomplete, non-certified procurement record to the OPA by designating portions of the record as "confidential" in accordance with 2 GARR §12106(c)(6).¹ See ASC's Opposition at p. 6. ASC's contention is untenable. The record will still be incomplete because no contract has been awarded. In addition, if GGRF confidentially submits portions of the procurement record to the OPA, and the OPA rules in GGRF's favor,

¹ 2 GARR § 12106(c)(6) does not exist. ASC may be referring to 2 GARR § 12104(c)(6).

how would ASC challenge the OPA's decision if the OPA cannot reveal the confidential information leading to the decision? 2 GARR § 12104(c)(6) is not meant to circumvent the completion of a procurement record and allow a premature protest of a contract award. Rather, the provision protects offerors choosing (for example) to identify trade secrets or other proprietary data contained in their proposals (*see* Section II.B of the RFP; GGRF PR000029). Such trade secrets and proprietary data are the types of confidential information contemplated by 2 GARR § 12104(c)(6). ASC's argument, therefore, fails.

ASC also requests a full evidentiary hearing so that ASC can get information about an evaluator's review and consideration of offeror's proposals and discussions with the selection panel. *See* ASC's Opposition at p. 7. ASC's position is again contrary to procurement law, as it seeks information surrounding the evaluations, the disclosure of which would put GGRF at a disadvantage during the remainder of the procurement process (and any future procurements if the process must be restarted).

ASC alleges a violation of the Open Government Law ("OGL") related to GGRF's extension of its contract with the contractor currently providing certain plan administrative services. ASC alleges that such OGL violation equates to a procurement violation. ASC's allegation of GGRF's unlawful extension appears to be premised on a belief that the current contract is for the same services sought in the underlying procurement. That is not so. The scope of services sought by GGRF in its RFP included cybersecurity services absent in the existing services contract with ASC's competitor. *See* RFP pp. 32 - 34, GGRF PR000058 – PR000060. In fact, cybersecurity services comprise 15 out of 100 evaluation points. *See* RFP p. 35, GGRF PR000061. Despite the obvious value of cybersecurity services to GGRF and its members, ASC alleges that GGRF had no incentive to complete the procurement (with important

additional services) and had a “conflict of interest” by seeking an unlawful extension. *See* ASC’s Opposition at p. 11. ASC’s allegations in this respect are clearly without merit. The RFP does not extend the current contract; the two relate to separate services.

Rather than waiting to appeal from an award of contract and a completed procurement record, ASC seeks to cancel the solicitation. ASC’s desired result is unsupported in both policy and practice, and its appeals should be denied.

CONCLUSION

ASC fails to identify 5 GCA § 5425(a) factors supporting a timely challenge to the method of source selection, solicitation, or award of a contract. Therefore, ASC’s consolidated appeal is not properly before the OPA, and GGRF respectfully requests it be dismissed.

DATED: December 11, 2023.

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