



Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;

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## In the Appeal of ASC Trust, LLC OPA-PA-23-005 - GGRF - GGRF Agency Report and Agency Statement

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**Arsima A. Muller** <amuller@carlsmith.com>

Thu, Oct 5, 2023 at 11:40 AM

To: Jerrick Hernandez &lt;jhernandez@guamopa.com&gt;, William B Brennan &lt;wbrennan@arriolafirm.com&gt;, "William B. Brennan Esq. (attorneys@arriolafirm.com)" &lt;attorneys@arriolafirm.com&gt;

Cc: "Joanne L. Grimes" &lt;jgrimes@carlsmith.com&gt;, "Diane E. DePortillo" &lt;ddeportillo@carlsmith.com&gt;, "Colleen E.K. Tam" &lt;ctam@carlsmith.com&gt;

Dear Mr. Hernandez and Mr. Brennan:

Please find attached Government of Guam Retirement Fund's Agency Report and Agency Statement in the above matter. Kindly confirm your receipt.

Thank you.

Arsima

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**2 attachments**



**2023-10-05 Agency Report.pdf**  
441K



**2023-10-05 Agency Statement; Exh 1.pdf**  
565K

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Attorneys for  
THE GOVERNMENT OF GUAM RETIREMENT FUND

BEFORE THE OFFICE OF PUBLIC AUDITOR  
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

**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 August 1, 2022, GGRF issued GGRF RFP-002-22, involving a procurement for professional services; specifically seeking a provider of Plan Administration Services related to the Defined Contribution Retirement System (401(a) Plan) and the 457 Deferred Compensation

Plan and Welfare Benefit Plan. ASC Trust, LLC (“ASC”) submitted its proposal on September 22, 2022. GGRF engaged in discussions with, and evaluations of, offerors. By letter dated August 16, 2023, GGRF informed ASC that GGRF had awarded the contract to Empower Retirement, LLC. *See Exhibit J* to ASC’s September 21, 2023 Notice of Appeal.

On August 25, 2023, ASC filed its first procurement protest, which GGRF denied on September 5, 2023. *See* GGRF Procurement Record GGRF PR000480 – PR000506; PR000508 – PR000511. In its denial, GGRF informed ASC that GGRF’s August 16, 2023 letter to ASC was incorrect, as it should have stated that GGRF is negotiating with the best qualified offeror based on the evaluation factors in the RFP. *See Exhibit F* to ASC’s September 21, 2023 Notice of Appeal. By letter dated September 7, 2023, GGRF informed ASC that GGRF’s August 16, 2023 was superseded, and that negotiations with the best qualified offeror would be stayed until pending resolution of the protest. *See Exhibit K* to ASC’s September 21, 2023 Notice of Appeal.

On September 14, 2023, ASC filed its second procurement protest with GGRF. *See Exhibit H* to ASC’s September 21, 2023 Notice of Appeal. On September 21, 2023, ASC’s notice of appeal (from its first procurement protest) was filed with the OPA herein. On September 29, 2023, GGRF denied ASC’s second procurement protest. *See Exhibit 1* attached hereto.

Related but not relevant to ASC’s protest herein, ASC also filed two FOIA requests, asking GGRF to disclose records related to the procurement. GGRF responded with disclosures of records that could be made available under Guam’s Sunshine Reform Act of 1999, but did not make available records that could not be publicly inspected while GGRF RFP-002-22 remained in pre-award status. GGRF’s Procurement Record (GGRF PR000001 – PR000511) therefore

consists of the records available for public inspection as produced in response to ASC's FOIA requests.

### **RESPONSE TO PROTEST**

The three grounds upon which ASC's protest is based are without merit.

1. **GGRF's Compliance with Guam's Open Government Law is Irrelevant to the OPA's Appeal Authority over GGRF RFP-002-22 under 5 G.C.A. § 5425(e).**

ASC alleges that GGRF failed to give public notice of regular meetings, and as such, the purported "action" taken at the February 10, 2023 and July 28, 2023 meetings should be void. GGRF disagrees.

The OPA is not tasked with determining violations of Guam's Open Government Law ("OGL"). Nonetheless, as it relates to this appeal, the GGRF Board took no action at its February 10, 2023 meeting involving the procurement for RFP GGRF-002-22. Nor was there an RFP-related action taken by the GGRF Board at its July 28, 2023 meeting, for which timely notice was posted that the GGRF Board would discuss RFP GGRF-002-22. *See also*, GGRF's September 5, 2023 denial of ASC's first procurement protest.

ASC also alleges that a contract with an incumbent was improperly extended, arguing that there is no provision in Guam law allowing a contract extension beyond the term in the existing contract. ASC, however, does not provide a citation to any Guam law that prohibits an extension beyond the term of a contract. In fact, GGRF's contract with the incumbent includes a contract provision providing for renewal, and in fact the incumbent's contract previously had been renewed pursuant to its own terms. ASC's desire to challenge the month-to-month extension of an existing contract with an incumbent is not a challenge to GGRF's method of source selection, solicitation, or award of contract for the procurement for GGRF RFP-002-22,

and is therefore outside the scope of the OPA's appeal authority under 5 G.C.A. § 5425(e).

**2. GGRF did not fail to give notice of the ranking of offerors to ASC.**

Without citation to any authorities, ASC contends that GGRF failed to give ASC notice of the ranking of offerors. Because negotiations for the services under GGRF RFP-002-22 have not yet resulted in an award of contract, the ranking of offerors could not and still cannot be made available for public inspection.

**3. GGRF's procurement record is not complete pending negotiation of contract; GGRF's August 16, 2023 notice to ASC of the award of contract was corrected in GGRF's September 7, 2023 letter to ASC, prior to ASC's September 21, 2023 appeal to the OPA.**

GGRF has not awarded a contract, has not completed negotiations with the best qualified offeror, and the procurement process is stayed pending resolution of ASC's protest. The result is that the procurement record is not complete and cannot be made available for public inspection.

Guam Law provides:

No procurement award shall be made unless the responsible procurement officer certifies in writing under penalty of perjury that he has maintained the record required by § 5249 of this Chapter and that it is complete and available for public inspection. The certificate is itself a part of the record.

5 G.C.A. § 5250. GGRF has not certified the procurement record because the procurement remains active (pending resolution of this protest). Moreover, GGRF has not awarded a contract for RFP GGRF-002-22. Upon the resolution of this protest, GGRF will continue active negotiations with the best-qualified offeror.

GGRF's denial of ASC's protest was proper, as the award of contract under GGRF RFP-002-22 had not been made at the time of ASC's protest. GGRF respectfully requests that ASC's

appeal be denied in its entirety and dismissed.

Respectfully submitted this 5th day of October, 2023.

CARLSMITH BALL LLP



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

**EXHIBITS**

1. Exhibit 1. September 29, 2023 GGRF's response to ASC's second protest.

**Lourdes A. Leon Guerrero**  
*Governor*

**Joshua F. Tenorio**  
*Lieutenant Governor*

**Paula M. Blas**  
*Director*



**Wilfred P. Leon Guerrero**  
*Chairman*  
**Antolina S. Leon Guerrero**  
*Vice-Chairman*  
**Katherine T.E. Taitano**  
*Secretary*  
**Artemio R.A. Hernandez**  
*Treasurer*  
**Thomas H. San Agustin**  
*Trustee*  
**David N. Sanford**  
*Trustee*  
**George A. Santos**  
*Trustee*

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## LETTER OF TRANSMITTAL

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**To:** Ms. Candy Okuhama  
President & CEO  
120 Father Dueñas Avenue  
Suite 110  
Hagåtña, Guam 96910

**Date:** September 29, 2023  
**Re:** RFP No. GGRF-002-22 (Second) Procurement  
Protest

Mailed

Hand Delivered

Fax

Picked Up

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THE FOLLOWING IS (ARE) TRANSMITTED HEREWITH:

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- Protest Response from Paula Blas dated September 29, 2023 (4 pages)
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*Victoria Sapinso* 

Print Name/ Sign

Date Received: 9/29/23

**Exhibit 1**





GOVERNMENT OF GUAM  
**RETIREMENT FUND**  
STABILITY · SECURITY · REWARDS

**Lourdes A. Leon Guerrero**  
Governor

**Joshua F. Tenorio**  
Lieutenant Governor

**Paula M. Blas**  
Director

Trustees:

**Wilfred P. Leon Guerrero, Ed.D.**  
Chairman

**Antolina S. Leon Guerrero**  
Vice Chair

**Katherine T.E. Taitano**  
Secretary  
Chair, Members and Benefits Committee

**Artemio R.A. Hernandez, Ph.D.**  
Treasurer  
Chair, Investment Committee

**Thomas H. San Agustin**  
Trustee

**David N. Sanford**  
Trustee

**George A. Santos**  
Trustee

September 29, 2023

Hand Delivery

Ms. Candy Okuhama  
President & CEO  
ASC Trust, LLC  
120 Father Dueñas Avenue  
Suite 110  
Hagåtña, Guam 96910

Re: RFP No. GGRF-002-22 (Second) Procurement Protest

Dear Ms. Okuhama,

This letter responds to Section III of your September 14, 2023 letter concerning ASC Trust, LLC's second protest of the procurement of services under RFP No. GGRF-002-22. GGRF's responses to your September 14, 2023 procurement protest are set forth below.

**1. GGRF violated the terms of the RFP by issuing a Notice of Award and then a Notice of Conditional Award.**

The GGRF denies ASC's protest on this point.

In Section III.1 of the September 14, 2023 protest letter, ASC claims that it is unable to determine whether Empower received a Notice of Award or Notice of Conditional Award. Because neither term is defined or required in RFP No. GGRF-002-22 or the Guam Procurement Law (5 G.C.A. Chap. 5), there is no violation of the RFP or the Procurement Law supporting ASC's protest on this point. Relevant sections of the Guam Procurement Law and Guam Procurement Rule and Regulations also do not support ASC's protest.

Section 5216 of the Guam Procurement Law describes the competitive selection procedures for services specified in § 5121 (authority to contract for certain service and approval of contracts). Section 5216(c)(public announcement and form of request for proposals) states: "Adequate notice of the need for such services shall be given by the purchasing agency through a Request for Proposals. The Request for Proposals shall describe the services required, list the type of information and data required of

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each offeror, and state the relative importance of particular qualifications.” 5 G.C.A. § 5216 (c). Nothing in this section supports ASC’s assertion of a violation because a Notice of Award was corrected by a Notice of Conditional Award. Section 5216(c) pertains to the requirement to publish a Notice of the RFP. ASC did not dispute the required Notice after it was issued, and ASC submitted a response to RFP No GGRF-002-22 arising from the GGRF’s notice.

Section 3114 of the Guam Procurement Rule and Regulations (2 G.A.R. Division 4) addresses negotiating and awarding of contracts, and does not require notice prior to the successful negotiation of compensation, contract requirements, and contract documents with the best qualified offeror (or subsequent qualified offerors, should negotiations fail with the best qualified offeror). See 2 G.A.R. § 3114(l). Guam Procurement Rule and Regulations do not require the GGRF to issue a notice of award of contract before it has completed negotiations for the required services at compensation determined in writing to be fair and reasonable.

ASC fails to provide a legal basis to sustain its protest for GGRF’s errors in issuing its letters. The GGRF’s position is explicitly stated in the July 28, 2023, Board Minutes that the GGRF has not awarded a contract for RFP No. GGRF-002-22. Nothing in the authorities cited in the Second Protest, 5 G.C.A. § 5216(c) or 2 G.A.R. §3114(l), is relevant to the alleged error in issuing the Notice of Award before the Notice of Conditional Award.

**2. GGRF violated the terms of its RFP by substituting an evaluator on its proposal evaluation committee, with a GGRF representative who was not present during the discussions with ASC, after the date of ASC’s presentation to the selection panel.**

The GGRF denies ASC’s protest on this point.

The GGRF did not violate any RFP, Guam law, or Guam regulation provision by substituting an evaluator. All evaluators conducted their evaluations with the same information.

The GGRF did not violate the terms of the RFP when it substituted an evaluator to review the proposals because no such requirement exists. The RFP did not identify the evaluators other than to state that “proposals submitted may be evaluated by a selection panel consisting of the following: Retirement Fund Management and Board of Trustees.” See Section VI. Evaluation and Selection Procedures (RFP GGRF-002-22).

ASC fails to provide a legal basis to sustain its protest regarding the evaluator change. Nowhere in the RFP discusses the substitution of an evaluator and the requirement to resolicit the RFP so that an evaluator can physically attend the presentations. Furthermore, neither Guam law nor its rules and regulations require GGRF to resolicit if the evaluators were absent during a presentation. In this case, the GGRF recorded all the presentations, and the absent evaluator was required to review the recorded version of all the presentations (including ASC’s) and allowed to ask additional questions.

Guam Procurement Law and Guam Procurement Rule and Regulations have no prohibitions concerning the substitution of an evaluator on the proposal evaluation committee.

**3. GGRF violated the Guam Open Government Law (OGL) in convening meetings which included two or more members of its Board of Directors that were not noticed and livestreamed in accordance with the Guam OGL.**

The GGRF denies ASC's protest on this point.

First, ASC's protest describes meetings that included two or more members of the Board of Directors that were not noticed and livestreamed under Guam's Open Government Law. However, without the identification of specific meetings that allegedly violated the OGL, the GGRF is unable to consider the merits of ASC's protest on this point.

Second, even assuming ASC's protest identifies the most recent meeting it attended, ASC's protest is untimely because the most recent meeting identified on the meeting log occurred on January 31, 2023. Guam law provides that "[a] protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the fact giving rise thereto." 5 G.C.A. § 5425 (a). Here, ASC knew as early as January 31, 2023 that two or more GGRF Trustees participated in meetings related to the RFP. ASC was well aware that the meetings were not open to the public because the meetings were part of the procurement process, allowing discussions. See 5 G.C.A. § 5216 (d) and 2 G.A.R. § 3114(i). Section 3114 (i)(2) specifically provides that "discussions shall not disclose any information derived from proposals submitted by other offerors, and the agency conducting the procurement shall not disclose any information contained in any proposals until after the award of the proposed contract has been made." 2 G.A.R. § 3114 (i)(2).

At no time during the January 31, 2023 presentation or fourteen (14) days from January 31, 2023, did ASC submit a written protest objecting to the two Trustees participating in the presentations. Thus, ASC's protest is untimely regarding its Open Government Law protest.

Third, the GGRF Board of Trustees did not convene a meeting as defined by Guam law, in connection with the method of source selection, solicitation, or award of the contract. Guam law defines a meeting as "the *convening of a governing body of a public agency for which a quorum is required* in order to make a decision or deliberate toward a decision on any matter." 5 G.C.A. 8104 (b). Guam law provides that "four (4) or more board members physically in attendance shall constitute a quorum for all meetings of the Board of Trustees." 4 G.C.A. § 8138.3.


At no time during the source selection or solicitation for RFP No. GGRF-002-22, did the GGRF Board of Trustees convene a meeting that required a quorum to make a decision or deliberate toward a decision on any matter related to RFP No. GGRF-002-22 because no Board decision or deliberation is needed until the selection panel successfully negotiates a contract with the best-qualified offeror. Here, as the July 28, 2023, GGRF Board minutes confirm, no contract has been negotiated. So, there would be no reason to convene the Board of Trustees for a meeting for which a quorum is required because no decision can be made at this time due to the automatic stay put in place due to ASC's First and Second protest to RFP No. GGRF-002-22.

**Automatic Stay**

The GGRF agrees since ASC's First Protest, an automatic stay remains in place, and the GGRF has ceased negotiations with the best-qualified offeror until the finality of both ASC's First and Second Protest to RFP GGRF-002-22.

For the reasons stated above, the GGRF denies ASC's Second Protest in its entirety. According to 5 G.C.A. § 5425(c), ASC may pursue administrative and judicial review of this decision under Chapter 5, Article 9 of Title 5 of the Guam Code Annotated, and Division 4, Chapter 9 of Title 2 of the Guam Administrative Rules and Regulations.

Sincerely,



PAULA M. BLAS