



OFFICE OF THE PUBLIC AUDITOR  
 Doris Flores Brooks, CPA, CGFM  
 Public Auditor

**PROCUREMENT APPEALS**

IN THE APPEAL OF )  
 ASC TRUST CORPORATION ) **Appeal No: OPA-PA-09-010**  
 APPELLANT. ) **DECISION**

**I. INTRODUCTION**

This is a Decision by the Public Auditor on a procurement appeal filed on October 29, 2009, by ASC TRUST CORPORATION, (hereafter “ASC”) regarding the Government of Guam Retirement Fund’s (hereafter “GGRF”) procurement of Investment Management and Plan Administration services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan, and Welfare Benefit Plan pursuant to RFP No. GGRF-028-06 (hereafter “RFP”) issued initially on September 28, 2006; and due to a prior appeal was stayed on June 22, 2007, and then resumed on April 14, 2008 after the issuance of the Public Auditor’s Decision on the prior appeal.

An informal scheduling conference for appeal OPA-PA-09-010 was held on November 30, 2009. A formal hearing on the merits was held on December 21, 2009, and a subsequent follow-up hearing was held on January 13, 2010. Presiding over the formal hearing on the merits was Hearing Officer Robert G.P. Cruz, Esq. Present from the Office of Public Accountability (hereafter “OPA”) were Public Auditor Doris Flores Brooks, CPA, CGFM and staff. Present and making arguments on behalf of their client, GGRF, were Maria Teresa Cenzone, Esq., and Elyze McDonald, Esq. of Carlsmith Ball, LLP. Present and making arguments on behalf of their client, ASC Corporation, was William Blair, Esq., of Blair, Sterling, Johnson, Martinez & Leon Guerrero, P.C. Also in attendance at the formal merits hearing were GGRF Director Paula M. Blas, ASC President David John, GGRF trustees Gerard A. Cruz and Katherine T. E. Taitano,

1 two of the three GGRF trustees who served on the RFP selection committee. Present at the  
2 January 13, 2010 hearing was GGRF Chairman and RFP selection committee member Joe T. San  
3 Agustin.

4 The Public Auditor holds that the Appellant ASC has not met its burden of proof that the  
5 procurement process was improperly executed. Accordingly, ASC's appeal is DENIED.

## 6 **II. BACKGROUND**

7 This case is the second appeal related to GGRF's procurement of investment management  
8 and plan administration services pursuant to RFP No. GGRF-028-06. In the first appeal, OPA-  
9 PA-07-006, filed on June 22, 2007, by Great West Retirement Services (hereafter "GWRS"), the  
10 Appellant sought to continue negotiations with GGRF, which had cut off negotiations after  
11 GWRS submitted its best and final offer on custodial arrangements and pricing data, which  
12 GGRF determined was not acceptable.

13 After the formal hearing on the merits for OPA-PA-07-006, held on January 21, 2008, the  
14 Public Auditor issued a Decision on March 13, 2008. In that Decision, the Public Auditor  
15 concurred with GWRS and determined that GGRF had arbitrarily and capriciously cut off  
16 negotiations and required that GGRF continue negotiations with GWRS. She further noted that  
17 no analysis had been provided by GGRF on why GWRS's fee proposal of .27% of valued assets  
18 was not fair and reasonable, while .25% of valued assets offered by ASC would be fair and  
19 reasonable.

20 The initial Decision in OPA-PA-07-006, issued on March 13, 2008, was subsequently  
21 amended on April 11, 2008 in response to a Motion to Amend the Decision filed by GGRF  
22 attorneys on March 20, 2008. GGRF received the Amended Decision on April 14, 2008.

23 From April 14, 2008 to August 21, 2009, GGRF continued the negotiations with GWRS as  
24 ordered by the Decision in OPA-PA-07-006. After 16 months of negotiations, GGRF accepted  
25 GWRS's best and final offer of an administrative fee of .24% of total plan assets and sent the  
26 Notification of Award to all offerors. On August 21, 2009, the contract between GGRF and  
27 GWRS was signed and this second appeal, OPA-PA-09-010 was filed by ASC on October 29,  
28 2009. ASC sought either that GGRF enter into negotiations with ASC or that a new RFP be  
issued for the services required.

1 **III. FINDINGS OF FACT**

- 2 1. GGRF issued the RFP on September 28, 2006.<sup>1</sup>
- 3 2. The RFP stated that for all proposals to be in compliance with the mandatory and
- 4 material requirements of this solicitation, they shall be evaluated based upon technical
- 5 merits and price. Technical merits and price will count for 60% and 40% of the score,
- 6 respectively.<sup>2</sup> The following factors and weights were used to evaluate each proposal:

7 **EVALUATION CRITERIA** **WEIGHT**<sup>3</sup>

8 *A) Technical Merits*

9 1. The plan for performing the required services. .15

10 2. Ability to administer the plan and benefits administration process in .15

11 a cost-effective manner.

12 3. Breadth and depth of experience, specialized training and industry .15

13 recognition of professional staff.

14 4. Ability to be responsive and accessible to the Retirement Fund and .10

15 to DCRS and Deferred Compensation plan participants.

16 5. Knowledge of legislative, operational and legal aspects of Guam .10

17 public pensions funds, as well as federal laws pertinent to the

18 investment management and plan administration of the DCRS and

19 Deferred Compensation plan.

20 6. Ability to improve participant satisfaction and benefits .10

21 administration services received from the Retirement Fund.

22 \_\_\_\_\_

23 <sup>1</sup> GGRF RFP Announcement, Excerpt from Pacific Daily News dated September 28,

24 2006, Procurement Record.

25 <sup>2</sup> RFP Section VI(C) Evaluation and Selection Procedures, Page 29, and

26 Evaluation Form, Procurement Record and oral testimony of GGRF Director Paula

27 Blas at the December 21, 2009 formal merits hearing.

28 <sup>3</sup> RFP Section VI(C) Evaluation and Section Procedures, Page 29, and Evaluation

Form, Procurement Record.

**EVALUATION CRITERIA**

**WEIGHT<sup>3</sup>**

7. Educational resources and ability to provide ongoing training. .10

8. Record of past performance of similar work. .10

9. Other factors. .05

**Total Technical Points Possible 1.00**

**Weight for Technical Merits .60**

*B) Price*

**10. Price Proposal .40**

3. Proposals were due on November 6, 2006, of which proposals were received from three offerors: GWRS, ASC, and Lincoln Financial Group/Bank of Hawaii (hereafter “Lincoln”).
4. Proposals were opened on December 7, 2006, in which GGRF Director and Administrative Assistant determined that all three offerors met the minimum qualifications.
5. Letters were sent to the three offerors on December 11, 2006, inviting the offerors to discuss their proposals in January 2007.
6. On February 7, 2007, the GGRF selection committee, consisting of three GGRF trustees, reviewed, evaluated, and scored the qualified offerors proposals relative to the specifications and evaluation criteria as outlined in RFP No. GGRF-028-06. The members of the selection committee were Joe T. San Agustin, Katherine T.E. Taitano, and Gerard A. Cruz. The selection committee members rated and scored each of the offeror’s presentations using a score sheet.
7. After evaluating the proposals’ technical merits, the price proposals were opened and the selection committee members evaluated the offerors’ price proposals using the same scoring sheet.
8. OPA’s *de novo* review of the selection committee’s completed score sheets determined that in their evaluation and rating of the offerors’ financial component of the RFP, committee member Taitano favored GWRS; committee member Cruz favored ASC; and committee member San Agustin gave GWRS and ASC equal scores for the price proposal, but gave a slight lead to GWRS for the technical proposal. In ranking the

1 qualified offerors, the selection committee assigned numeric values between 1 and 10 for  
2 each Evaluation Factor as outlined in Section VI. C. of RFP No. GGRF-028-06.

3 9. The completed weighted tabulations indicated that GWRS received 22.42 points, ASC  
4 received 21.64 points, and Lincoln received 18.76 points. The Public Auditor notes that  
5 the cumulative scores, themselves, do not indicate a significant variance between one  
6 offeror and another, because the difference between the top two offerors is less than one  
7 point.

8 10. The total scores gave GWRS the highest cumulative score causing GGRF to negotiate  
9 with GWRS first. ASC was ranked second and Lincoln's cumulative score was the  
10 lowest.

11 11. No discussion was held jointly by the selection committee about the tabulation of the  
12 numerical results and whether their voting reflected that the majority supported awarding  
13 the contract to GWRS. After the committee independently scored each proposal, the  
14 completed score sheets were compiled and tabulated by GGRF Director Paula Blas.<sup>4</sup> The  
15 committee's actions, scores, and rating were documented in GGRF's Memorandum of  
16 Evaluation and Negotiation dated September 7, 2009.

#### 17 IV. ANALYSIS

18 The Public Auditor has jurisdiction to hear this matter pursuant to 1 G.C.A. § 1909(k), 5  
19 G.C.A. § 5703, and 5 G.C.A. § 5706. This Decision is based upon the Procurement Record, all  
20 documents submitted by the parties, and all arguments and testimony given during the hearings.

##### 21 1. The Public Auditor has Subject Matter Jurisdiction.

22 GGRF argues that the ASC's appeal was untimely, GGRF properly denied its protest on the  
23 grounds of untimeliness, and ASC's appeal should be denied.<sup>5</sup>

24 ASC's protest was timely. GGRF raises the issue of whether ASC's protest was timely.  
25 Generally, a protest must be made in writing and filed with the Chief Procurement Officer, the  
26 Director of DPW, or the head of a purchasing agency within 14 days after a protestor either

27 <sup>4</sup> Testimony of GGRF Director Paula Blas at the December 21, 2009 formal merits  
28 hearing.

<sup>5</sup> Agency Statement submitted November 17, 2009.

1 knows or should have known of the facts giving rise thereto. 5 G.C.A. § 5425(a) and 2 G.A.R. §  
2 Div. 4, Chap. 9, § 9101(c) (1).

3 The Appellant ASC states that GGRF gave notice that negotiations with GWRS concluded  
4 and a contract was awarded effective August 21, 2009. On September 10, 2009 ASC submitted  
5 a request to GGRF to release the selection committee's individual scoring sheets of ASC's  
6 proposal; however, GGRF refused their request and did not provide the requested information.  
7 On September 21, 2009, ASC made a second attempt to obtain the requested information, and  
8 again GGRF denied their request. On October 5, 2009, ASC escalated their request by filing SP  
9 0193-09, a petition of mandamus in the Superior Court to obtain the requested information. On  
10 October 6, 2009, GGRF released the information to ASC. On October 15, 2009, nine days after  
11 receiving the requested information from GGRF, ASC filed its protest of GGRF's notice of  
12 award decision to GWRS. On October 26, 2009, GGRF denied ASC's protest on the grounds  
13 that it was untimely.

14 The Public Auditor determines that because ASC did not receive the information from  
15 GGRF, specifically the documents reflecting the evaluation scoring of ASC's proposal by the  
16 individual committee members, to determine whether it had a cause to file a protest until October  
17 6, 2009. The protest filed nine days later is timely as provided under 2 G.A.R., Div. 4, Chap. 9 §  
18 9101(c)(2), which states in part that "protestors may file a protest on any phase of the solicitation  
19 or award including, but not limited to, specifications preparation, bid solicitation, award, or  
20 disclosure of information marked confidential in the bid or offer."

21 ASC's appeal was timely. GGRF raises the issue of whether ASC's appeal was timely.  
22 Generally, an appeal of a protest decision must be made to the Public Auditor within 15 days  
23 after the protestant receives the purchasing agency's Decision on Protest. 5 G.C.A. § 5425(e)  
24 and 2 G.A.R., Div. 4, Chap. 12 § 12201(a). In addition, 2 G.A.R. Div. 4, Chap. 12 § 12103  
25 mandates that the Public Auditor's jurisdiction be utilized to perform a *de novo* review to  
26 promote the integrity of the process and the purposes of the Guam Procurement Law as outlined  
27 in 5 G.C.A. Chapter 5. ASC received GGRF's Decision on Protest on October 26, 2009 denying  
28 ASC's protest on the grounds that it was untimely. The Public Auditor finds that this appeal is  
timely because ASC submitted its appeal on October 29, 2009, which is just three days after  
GGRF's Decision on Protest.

The Public Auditor will now review ASC's specific allegations.

1           **2. ASC’s claim that the procurement process was improperly executed has no merit.**

2           ASC’s appeal alleges that the “procurement process was perverted by the arbitrary and  
3 capricious action of one member of the Fund’s selection panel. If the evaluation criteria set forth  
4 in the RFP had been fairly and rationally applied, ASC would have been rated the best qualified  
5 proponent, not GWRS.”<sup>6</sup> Specifically, ASC questions the rating of committee member Taitano  
6 of ASC’s pricing proposal, which ASC argues was done with no rational basis and suggests  
7 intentional and deliberate manipulation of the evaluation criteria, which caused GGRF to have to  
8 negotiate with GWRS rather than ASC once the final weighted scores were tabulated. ASC  
9 argues that if committee member Taitano rated ASC fairly, ASC would have received a higher  
10 score and GGRF would have been compelled to negotiate with ASC first. While it is true that  
11 the rating of ASC given by member Taitano did appear to favor GWRS, it is also true that  
12 committee member Cruz’s rating appeared to favor ASC.

13           The Public Auditor’s *de novo* review of the procurement record and the oral testimony given  
14 by committee member Taitano at the December 21, 2009 formal hearing indicate that there is no  
15 merit to ASC’s claim that committee member Taitano’s scoring actions were arbitrary,  
16 capricious, or contrary to law. In her oral testimony, committee member Taitano stated that her  
17 evaluation was performed to the best of her knowledge in accordance with the criteria set forth in  
18 the RFP. Specifically, she explained that in reviewing the services to be offered to the members,  
19 she:

20           Looked at the two [GWRS and ASC] and I still felt that I was happier with what  
21 was being proposed from Great West’s proposal... It isn’t that I wasn’t happy  
22 with the ASC proposal, but when it came down to looking at what services were to  
23 be provided and if I wasn’t as happy with that, then the cost didn’t merit a higher  
24 score to me because I took it as based on the value of what I thought I was getting  
25 under the evaluation.

26           Furthermore, committee member Taitano indicated that her understanding of the RFP process  
27 is that it is about the professional services first and anything cost-related has to be secondary  
28 because it is about how well the Third-Party Administrator can provide a better service, and she  
“felt that was going to be the one that we went to first.”

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<sup>6</sup> Notice of Appeal filed October 29, 2009.

1 Committee member Taitano also recognized that there was room for negotiations in any  
2 proposal process as far as price is concerned. When asked if she would rank ASC and GWRS  
3 essentially the same way if asked to perform the duty again, she stated she would stand by the  
4 actions she performed in this RFP evaluation.

5 When committee member Cruz was asked to explain his rationale in scoring the price  
6 proposals, he stated, "I thought all of them needed work. I liked Lincoln Financial Group/Bank  
7 of Hawaii and GWRS the least..." He explained that GWRS's and Lincoln's price proposals  
8 limited the universe of investable funds. He also stated that GWRS's Option 1 "was a watered  
9 down version of the status quo and I didn't like that. There were too many unknowns." He  
10 "thought there was going to be much less room to negotiate with the ASC proposal than the other  
11 two" and thought a lot more time would be required to negotiate with GWRS and Lincoln.

12 The oral testimonies of committee members Cruz on December 21, 2009 and San Agustin on  
13 January 13, 2010 further supported the understanding that price was negotiable. In committee  
14 member Cruz's testimony, he stated that price is an issue, but it is "not as important as the  
15 components that resulted in the dollar amount" and that the price indicated in the three proposals  
16 received were the "starting points for negotiation." Committee member San Agustin testified  
17 that he was concerned with the price of the proposals, but that there was "room for negotiations."

18 The Public Auditor determined, based on the testimony given by each of the three board  
19 members and Director Blas, that there was no collaboration or explanation to the committee by  
20 GGRF staff regarding the ratings to be given to the best or the worst of the offerors. Each  
21 committee member independently reviewed each offeror's technical proposal, and independently  
22 assigned scores to each proposal as they deemed appropriate. At the formal hearings on the  
23 merits, all three selection committee members affirmed and confirmed their individual rating of  
24 each qualified offeror's technical and price proposals. In addition, a review of the committee  
25 members' evaluation sheets confirmed that while Taitano's scoring heavily favored GWRS and  
26 Cruz's scoring strongly favored ASC, each proposals' technical merits was given the weight of  
27 60%, and price was given the weight of 40%, which are in accordance with the evaluation  
28 criteria set forth in the RFP.

The Public Auditor's review of the procurement record and the testimony obtained at the  
formal hearings indicate that there is no evidence to support ASC's claim that committee



1 member Taitano intentionally and deliberately manipulated the evaluation criteria to favor  
2 GWRS.

3 The Public Auditor noted that although in its Agency Statement dated November 17, 2009  
4 that it fulfilled the requirements of 2 G.A.R., Div. 4, Chap. 12 §§ 12104 and 12105, GGRF did  
5 not include the pricing analysis and information pertaining to negotiations between GWRS and  
6 GGRF as part of the Agency Record filed with OPA in this appeal on November 17, 2009, and  
7 that GGRF should have done so as provided under 2 G.A.R., Div. 4, Chap. 12 § 12104(c)(3).  
8 The procurement record pertaining to the negotiations between GWRS and GGRF for the time  
9 period from April 2008 to July 2009 was provided on December 7, 2009, subsequent to the  
10 Public Auditor's request made during the Scheduling Conference on November 30, 2009. The  
11 pricing analysis information was later provided by GGRF Director Paula Blas subsequent to the  
12 December 21, 2009 formal hearing after the Public Auditor informed her that the procurement  
13 record and agency report filed by GGRF with OPA was devoid of this information.

14 ASC's request that pursuant to 5 G.C.A. § 5452(a) and 5 G.C.A. § 5425(e), the award of the  
15 contract be set aside, the contract with GWRS be terminated, and that it be awarded its  
16 reasonable cost incurred in connection with the RFP and protest is rejected. There is no evidence  
17 that the selection committee acted arbitrarily or capriciously against ASC. Furthermore, there is  
18 no remedy appropriately applied and there is no requirement to resolicit.

## 19 V. CONCLUSION

20 Based on the above, the Public Auditor hereby determines the following:

- 21 1. Appellant ASC's Protest and Appeal were timely.
- 22 2. The Public Auditor reviewed GGRF's October 26, 2009 decision denying ASC's October  
23 15, 2009 Protest *de novo*.
- 24 3. ASC has not met its burden of proof that the procurement process was improperly  
25 executed. While the implementation of the evaluation process would benefit from  
26 guidance from the GGRF procurement staff on how to score, the process described  
27 during the two hearings generally followed the procurement law and regulations, and  
28 GGRF was not arbitrary and capricious in selecting GWRS to negotiate with before ASC,  
the unsuccessful, yet technically qualified offeror.

- 1 4. There is no evidence to support ASC's claim that committee member Taitano  
2 intentionally and deliberately manipulated the evaluation criteria to favor GWRS.  
3 5. GGRF fulfilled its duty under the procurement law and regulations and may now enter  
4 into a contract with GWRS to provide Investment Management and Plan Administration  
5 Services related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation  
6 Plan, and Welfare Benefit Plan.  
7 6. ASC's appeal is hereby DENIED.

8 This is a final administrative Decision. Parties are hereby informed of their right to appeal a  
9 Decision by the Public Auditor to the Superior Court of Guam, in accordance with Part D of  
10 Article 9 of 5 G.C.A. § 5702. 5 G.C.A. § 5481(a).

11 A copy of this Decision shall be provided to the parties and their respective attorneys in  
12 accordance with 5 G.C.A. § 5702 and shall be made available for review on the OPA website at  
13 [www.guamopa.org](http://www.guamopa.org).

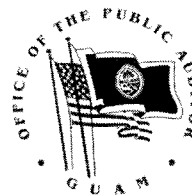
14 **Dated this 1<sup>st</sup> day of March, 2010**

15 

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17 **DORIS FLORES BROOKS, CPA, CGFM**  
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Mr. William J. Blair, Esq., Attorney for  
Appellant ASC Trust Corporation

**From:** Doris Flores Brooks, Public Auditor

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**Pages** 11 (Including cover)

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**CC:** 477-4375 (T. Cenzone)  
472-4290 (W. Blair)  
475-8922 (GGRF)

**Date:** Monday, March 1, 2010

**Phone:** 475-0390 x 219 (Anne Camacho);  
x 204 (Rodalyne Marquez)

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**Re:** Appeal No. OPA-PA-09-010: DECISION

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