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OFFICE OF THE PUBLIC AUDITOR

GOVERNMENT OF GUAM
RETIREMENT FUND
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To: Ms. Paula M. Blas, Director
Government of Guam Retirement Fund
Mr. William J. Blair, Esq., Attorney for
Appellant ASC Trust Corporation
From: Doris Flores Brooks, Public Auditor

Agency: **Pages:** 2 (Including cover)

CC: **Date:** Thursday, Oct. 29, 2009

Fax: 475-8922 (GGRF); 472-4250 (W. Blair) **Phone:** 475-0390 x 219 (Anne Camacho); x
204 (Rodalyn Marquez); x 210 (Lourdes
Perez)

Re: OPA-PA-09-010: Notice of Appeal

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Appellant's Duly Authorized Representative

OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

8 IN THE APPEAL OF) APPEAL NO. OPA-PA-09-____
9)
10 ASC TRUST CORPORATION,) NOTICE OF APPEAL
11)
12 Appellant.)

12 APPELLANT INFORMATION

13 Name: ASC Trust Corporation
14 Mailing Address: c/o Blair Sterling Johnson
15 Martinez & Leon Guerrero, P.C.
16 1008 DNA Building
17 238 Archbishop F.C. Flores Street
18 Hagåtña, Guam 96910
19 Daytime Contact No.: c/o William J. Blair, Esq.
20 (671) 477-7857

19 APPEAL INFORMATION

- 20 A) Purchasing Agency: Government of Guam Retirement Fund (the
21 "Fund")
- 22 B) Identification Number of Procurement: RFP No. GGRF-028-06
- 23 C) Decision being appealed was made on October 26, 2009 by the
24 Director of the Fund.
- 25 D) Appeal is made from Decision on Protest of Award. Copies of
26 the notice of protest and the Fund's decision are attached
27 as Exhibits 1 and 2.
- 28 E) Names of Competing Offerors: Great-West Retirement Services
Lincoln Financial Group/Bank
of Hawaii

COPY

1
2 **DECLARATION RE COURT ACTION**

3 The undersigned party does hereby confirm that to the best
4 of its knowledge, no case or action concerning the subject of
5 this Appeal has been commenced in court. All parties are
6 required to and the undersigned party agrees to notice the Office
7 of Public Accountability within 24 hours if court action
8 commences regarding this Appeal or the underlying procurement
9 action.

10
11 **STATEMENT OF GROUNDS FOR APPEAL**

12 ASC appeals the denial of its protest of the Fund's award to
13 Great-West Retirement Services ("GWRS") of the contract (the
14 "Contract") to provide certain investment management and
15 administrative services pursuant to RFP No. GGRF-028-06.¹

16 Notice of the award of the Contract was sent to ASC on
17 August 21, 2009. Based on information obtained from the Fund on
18 October 6, 2009, ASC protested the award of the Contract on
19 October 15, 2009. See Ex. 1. ASC's protest was denied on
20 October 26, 2009, by Paula M. Blas, the Fund's Director on the
21 grounds that it was untimely. See Ex. 2.

22
23 **BACKGROUND FACTS**

24 The RFP. On September 28, 2006, the Fund issued its RFP for
25 investment management and plan administration services for its
26

27 ¹ This procurement was the subject of a prior appeal to the OPA by GWRS,
28 Docket No. OPA-PA-07-006. It is requested, pursuant to 2 GAR, Div. 4, section
12108(h), that judicial notice be taken of all filings in that docket.

1 401(a) defined contribution plan, it 457 deferred compensation
2 plan and its welfare benefit plan.² Three companies responded
3 with proposals—ASC, GWRS, and Lincoln Financial Group/Bank of
4 Hawaii. *Id.*

5
6 The RFP documents set forth the evaluation criteria that
7 were to be used in evaluating proposals and the relative weight
8 those criteria would be given. According to the RFP, the price
9 to be charged for the services to be rendered was one of the
10 factors to be evaluated, and it was assigned a weight of 40% of
11 the total evaluation score. Under the applicable procurement
12 regulations, the evaluation factors stated in the RFP were the
13 only permissible basis for evaluating the proposals. 2 GAR,
14 Division 4, section 3114(f)(2). Specifically, the RFP stated:
15

16 Based on the [technical] factors above, the proposals
17 will be initially evaluated. Then the price proposals
18 will be opened and the price proposals will be
19 incorporated into the evaluation effort. The price
20 proposal will count for 40% of this evaluation and the
21 technical merits will count for 60% of this evaluation.
22 Based on the combination of the scores assigned from the
23 technical merit and pricing, the GGRF will enter into
24 negotiations with the company with the highest combined
25 score. If these negotiations do not result in a
26 successful contract, then the GGRF will enter into
27 negotiations with the next highest ranked company.³

28 ASC's and GWRS' Price Proposals. ASC and GWRS submitted
proposals in November 2006. As required by the RFP, the pricing
proposals were submitted separately. GWRS offered two pricing

² See September 7, 2009 Memorandum of Evaluation and Negotiation (the "Evaluation Memo"), attached hereto as Ex. 3.

³ RFP, Section VI.C.10., p. 29, Ex. 4 attached hereto.

1 options. See Ex. 5, attached hereto. Under GWRS option one, the
2 fees were:

3 \$48 per participant per year (pro-rated quarterly, plus:
4 GWRS' actual costs for local staff and communication
5 services,⁴ plus a fixed a fixed fee of \$34,000 per year
6 Revenue sharing of 100% of all 12(b)(1) fees paid by
7 mutual fund companies per annum, plus .25% on average
8 fund balances per year

9 In comparison, ASC's pricing proposal was an annual
10 participant administrative fee of \$16 (payable \$4 quarterly), a
11 custodial/trustee fee of 2.5 basis points (0.025%) per quarter
12 (0.10% annually) and a financial investment advisory services fee
13 of 2.5 basis points (0.025%) per quarter (0.10% annually). Like
14 GWRS, ASC proposed revenue sharing of 100% of all 12(b)(1) fees.
15 See ASC pricing proposal, Ex. 6 attached hereto.

16 Thus, ASC's pricing proposal called for an annual
17 administrative fee of \$16 a year per participant, plus fees equal
18 to 0.20% of trust balances annually. Based on an estimated
19 numbers of participants of 8,700 and the Fund asset balances of
20 \$133,000,000, this resulted in an estimated annualized base
21 administrative fee of \$405,250 ($8,700 \times \$16 + \$133,000,000 \times$
22 0.002). See, ASC Pricing Analysis, Ex. 6, p. XV-9. Using the
23 same assumptions, GWRS' pricing proposal under option one was
24

25 _____
26 ⁴ The proposal does not provide any estimate of these costs, but in its
27 March 21, 2007 letter to the Fund, which communicated GWRS' best and final
28 offer, GWRS represented that its local "field service cost" was \$334,000. See,
Exhibit D to GWRS' Notice of Appeal in Docket No. OPA-PA-07-006. Subtracting
the "fixed fee" of \$34,000 in the pricing proposal, this suggests GWRS' assumed
local staff and administrative costs, which under its original pricing proposal
would have been paid by the Fund, were about \$300,000 a year.

1 \$751,600 (8,700 x \$48 + \$300,000 + \$34,000). Under GWRS' option
2 two its fee would have been \$438,900 ($\$133,000,000 \times 0.0033$).⁵

3 ASC's pricing proposal was thus less than either of GWRS'
4 proposals.

5
6 The Evaluation Process. The Fund appointed a three-person
7 selection panel, whose members met on February 7, 2007, evaluated
8 the three proposals and rated them. Evaluation Memo., p. 2.⁶
9 Based on the scores given by the three members of the panel,
10 GWRS, with a total score of 22.42, was deemed the best qualified
11 offeror to provide the required services. ASC, with a total
12 score of 21.64, was ranked second. *Id.*

13
14 Negotiations. The Fund commenced negotiations with GWRS.
15 *Id.* The course and outcome of those negotiations were the
16 subjects of GWRS' prior procurement appeal. To briefly
17 summarize, the Fund asked GWRS to accept a lower price than that
18 which it had proposed. The basis asserted by the Fund for
19 seeking a lower cost proposal from GWRS was that the cost
20 proposals of ASC and the third proponent were lower than that of
21 GWRS. Agency Report filed by the Fund on July 6, 2007, in Docket
22 No. OPA-PA-07-006.⁷ When GWRS refused to lower its price, the
23

24
25 ⁵ Under option two, the investment options of Fund participants would
have been limited to mutual funds linked to GWRS.

26 ⁶ The Evaluation Memo was provided to ASC on September 15, 2009, in
27 response to ASC's second attempt under the Sunshine Reform Act to obtain
information from the Fund regarding the evaluation process.

28 ⁷ In its Agency Report, the Fund asserted that GWRS was a "qualified, but
over-priced competitor" and claimed that the Fund's determination that GWRS'
reduced price offer was not fair and reasonable was not arbitrary and

1 Fund terminated negotiations with it on the basis that its best
2 and final offer was not "fair and reasonable." The Fund then
3 commenced negotiations with ASC as the next qualified firm.
4 Evaluation Memo., pp. 2-3.

5
6 GWRs protested the determination that its price proposal was
7 not fair and reasonable and, after the Fund denied that protest,
8 appealed to the OPA on June 22, 2007. Evaluation Memo., p. 3.

9 The Public Auditor issued a decision sustaining GWRs' appeal
10 on March 12, 2008, later amending it on April 11, 2008. The Fund
11 was ordered to continue negotiating with GWRs. Negotiations
12 regarding GWRs' fees resumed on April 2, 2008 and its reduced fee
13 offer was accepted by the Fund's negotiation panel on August 1,
14 2008. The Fund then commenced contract negotiations with GWRs on
15 August 28, 2008. Evaluation Memo, pp. 3-4.

17 A week short of one year later, the Fund signed the Contract
18 with GWRs, with an effective date of August 21, 2009. That same
19 day ASC and the other offeror were given notice of the award of
20 the Contract. *Id.*, p. 4.

21 ASC's Efforts to Obtain Information Regarding the Evaluation
22 Process. Following the notice of award, ASC filed a request for
23 documents under the Sunshine Reform Act of 1999, Guam's freedom
24 of information act. The Fund provided some documents, but
25 refused to provide documents reflecting the evaluation scoring of
26

27
28 capricious when that offer was compared to "the bids and pricing from the pool
of other offerors." Agency Report, p. 6.

1 ASC's proposal by the individual selection panel members,
2 claiming such information was exempted from production under the
3 Sunshine Act.

4 ASC tried again. On September 10, 2009, ASC retained
5 counsel to make a renewed Sunshine Act request, specifically
6 asking for the evaluation sheets for ASC's own proposal. In
7 response, the Fund asserted that it was "barred" by the
8 procurement law from producing the requested evaluation sheets,
9 because ASC had not been awarded the Contract. See September 15,
10 2009 letter from Paula Blas, Ex. 7, attached hereto. The Fund
11 did, however, provide the Evaluation Memo.⁸

12
13 ASC tried one more time. Dissatisfied with the September
14 15, 2009 response of Fund to its request for documents related to
15 the evaluation of its own proposal, ASC made a final demand for
16 the requested evaluation sheets. See September 21, 2009 letter
17 to Paula Blas, Ex. 8 attached hereto. In response, the Fund
18 again stonewalled ASC. See September 29, 2009 letter from Elyze
19 McDonald, the Fund's attorney, Ex. 9 attached hereto, reasserting
20 that the requested information regarding the evaluation of ASC's
21 own proposal was "confidential" and that the Fund was expressly
22 prohibited from disclosing it. It was further asserted that
23 ASC's status as one of the offerors made no difference.
24
25

26
27
28 ⁸ Ms. Blas' September 15, 2009 letter represented that the Evaluation
Memo, which is dated September 7, 2009, was "finalized" after ASC's FOIA
request was received.

1 ASC was thus forced to go to court to get the information.
2 On October 5, 2009, ASC filed a petition for writ of mandamus
3 from the Superior Court of Guam to obtain the requested
4 information. See, Petition for Writ of Mandate Under Sunshine
5 Reform Act of 1999, Superior Court of Guam Special Proceeding
6 Case No. SP 0193-09, Ex. 10, attached hereto.
7

8 The day after ASC filed its writ petition, October 6, 2009,
9 the Fund's attorney provided the requested documents to ASC,
10 ostensibly not under the Sunshine Act, but in light of its
11 capacity as an offeror. See October 6, 2009 letter from Ms.
12 McDonald, Ex. 11, attached hereto.⁹
13

14 ASC First Learns the Truth—its Proposal was Not Fairly
15 Evaluated. Despite the fact that ASC's proposed pricing was
16 lower than either of those initially proposed by GWRS, one of the
17 three members of the Fund's selection panel gave ASC a lower
18 evaluation score for its pricing proposal. Specifically, this
19 member of the panel gave ASC a numerical rating of 5 for its
20 lower price proposal and gave GWRS a numerical rating of 9 for
21 its higher ones.¹⁰ There was no rational basis for these ratings.
22 Giving ASC a lower rating for a lower, more favorable price was
23

24 ⁹ The Fund's about face is inexplicable, in view of the fact that it
25 expressly relied on provisions in the procurement law as the grounds for
26 claiming it could not provide to ASC the information it had requested under the
Sunshine Act. Indeed, the Fund had previously claimed ASC's status as an
offeror made no difference. Compare Ex. 9 with Ex. 11.

27 ¹⁰ See summary evaluation sheets for ASC and summary of results attached
28 to Exhibit 10. It is unknown which of GWRS' higher pricing proposals earned
the 9 rating on this member's scorecard.

1 necessarily arbitrary and capricious. Indeed, it suggests
2 intentional and deliberate manipulation of the evaluation
3 criteria to favor GWRS (or disfavor ASC), to the detriment of the
4 Fund and its members.¹¹ It goes without saying that a lower price
5 for providing the required services should have resulted in a
6 higher rating on this criterion.
7

8 The irrational score by the one member of the selection
9 panel skewed the result of the evaluation process. The total
10 combined score given to ASC by the three members of the panel was
11 21.64. See evaluation sheets attached to Exhibit 9. The total
12 combined score for GWRS was 22.42. Based solely on the 0.78
13 point difference between the two combined scores, GWRS was deemed
14 the best qualified to provide the required services and the Fund
15 entered into negotiations with it, which negotiations eventually
16 led to the award of the Contract.
17

18 The 5 rating given to ASC on its price proposal by the one
19 panel member resulted in a score of 2.00 on the price criterion
20 (5 x .40). The 9 rating given to GWRS by the same evaluator on
21 its higher price resulted in a score of 3.60 (9 x .40). The
22 resulting impact on the difference between ASC's total combined
23 evaluation score and that of GWRS was thus 1.60 (3.60 - 2.00),
24

25 ¹¹ ASC believes the scores given to it by the same evaluator on the
26 technical criteria also demonstrate a bias either in favor of GWRS or against
27 ASC, but that was not a basis for its protest or this appeal. ASC focuses
28 solely on the objective criterion of price, under the only possible rational
assumption that a lower price proposal would be given a higher rating score
than a higher price proposal.

1 which was more than twice the 0.78 difference between ASC's and
2 GWRS' combined scores. The scoring by this one evaluator thus
3 changed the result. If the evaluator had fairly and rationally
4 applied the price evaluation criterion, ASC would have been given
5 a higher score than GWRS for its price proposals, not a lower
6 one. ASC would have then been determined to be best qualified to
7 provide the required services, not GWRS, and the Fund would have
8 negotiated first with ASC, not GWRS.
9

10 ARGUMENT

11 After working through the obduracy of the Fund to obtain the
12 pieces of the puzzle that showed that the evaluation process was
13 unfair and biased, ASC filed its protest. That protest was
14 summarily denied, not on the merits, but on the grounds that it
15 was time barred.
16

17 The Fund claims that ASC was "extremely dilatory" in filing
18 its protest. It says the protest should have been filed no later
19 than 14 days after May 7, 2007, May 11, 2007, July 6, 2007 or, at
20 the latest, September 4, 2009. Ex. 2. Let us examine each of
21 those dates.
22

23 May 7, 2007. On May 7, 2007, the Fund sent ASC a letter
24 advising that it was not rated or evaluated to be the best
25 qualified offer. According to the Fund, ASC could have then
26 requested its evaluation sheets, and protested its ratings.

27 This is sophistry. First, it presupposes that the Fund
28 lawfully could have and voluntarily would have provided ASC with

1 not only its own evaluation sheets prior to the award of a
2 contract, but also those of GWRS. Given the lengths to which the
3 Fund has gone to avoid having to provide this information, it is
4 patently unreasonable to assume that ASC would have been provided
5 the information, if only ASC had thought to ask. Second, the raw
6 scores would have meant nothing unless ASC was also provided with
7 GWRS' pricing proposals, which the Fund clearly was not permitted
8 by law to make available at that time. ASC would have had no
9 basis to know that the scoring had been slanted to favor GWRS on
10 the pricing criteria.
11

12 Finally, it is beyond ridiculous when one considers that on
13 May 7, 2007, the Fund had terminated negotiations with GWRS and
14 was negotiating with ASC. What exactly would have been ASC's
15 grounds for a protest at that time?
16

17 May 11, 2007. The next date the Fund says triggered the 14
18 day protest period was May 11, 2007. That was the day the Fund
19 issued a "Stay of Procurement" and suspended its negotiations
20 with ASC in light of the protest by GWRS. See Evaluation Memo,
21 p. 3. According to the Fund, ASC should have learned that GWRS
22 had been initially rated higher than it. That was no secret.
23 ASC had no reason at the time to question why its total
24 evaluation score was less than GWRS. Price was not the only
25 evaluation criterion, and ASC had no knowledge that its price
26 proposal was less than that of GWRS. The Fund could not have
27 provided ASC with any information related to GWRS' proposal at
28

1 that time. Moreover, as of May 11, 2007, the Fund had already
2 terminated negotiations with GWRs, and its negotiations with ASC
3 were stayed only as the result of GWRs' appeal. Again, what
4 exactly would ASC have protested?

5 July 6, 2007. On this date, the Fund filed its Agency
6 Report in the GWRs procurement appeal, wherein the Fund appeared
7 to concede or admit that GWRs' price proposal was higher than
8 either of the other two proponents. So what? That fact,
9 standing alone, did not mean or even suggest that the scoring on
10 ASC' pricing proposal by one panel member had been arbitrary and
11 capricious, if not worse. Rather, ASC rightfully could only have
12 assumed that GWRs had been rated much higher than it on the
13 technical evaluation criteria which accounted for 60% of the
14 total score, and that GWRs' higher technical scores offset any
15 competitive advantage ASC' lower cost proposal might have given
16 it. ASC had no reason at that time to believe the integrity of
17 the procurement process had been compromised, as has now been
18 established was the case.

19 Moreover, as of July 6, 2007, no contract had been awarded
20 to GWRs. GWRs' appeal had not yet been sustained. The Fund had
21 not yet been ordered to resume negotiations with GWRs. The Fund
22 had been negotiating with ASC, not GWRs. If the Fund's position
23 in the appeal had been upheld, then the Fund would have resumed
24 negotiations with ASC, not GWRs. What was there to protest at
25 this point in time?

1 August 21, 2009. Lastly, the Fund asserts that the 14 day
2 protest period commenced, "at the latest," on August 21, 2009,
3 the date ASC was advised the Contract had been awarded to GWRS.
4 The Fund claims that ASC knew it had been lower-rated than GWRS
5 as far back as 2007, so it should have protested. More
6 correctly, the Fund seems to be saying that ASC should have asked
7 for the evaluation sheets at this time so it could have learned
8 the true facts and then filed a timely protest, all within 14
9 days.

11 The Fund's position entirely misses or deliberately avoids
12 the point of ASC's protest. ASC did not protest simply because
13 it was initially ranked lower than GWRS, as the Fund's denial of
14 its protest seems to assume. Of course ASC knew this fact.
15 Rather, ASC's protest is based on *why it was rated lower*, the
16 truth about which was not learned until October 6, 2009. The
17 evaluation criterion related to price was objective and the
18 weight assigned to the criterion was fixed by the RFP. Even if
19 ASC's price proposal was lower, however, that would not have
20 necessarily meant that its total score, when the other criteria
21 were considered, should have been higher than GWRS. Only when
22 you have the actual scores is the skewing and its effect on the
23 total scores made apparent. It was those very scores which the
24 Fund vigorously fought against having to disclose. ASC did not
25 get those scores until October 6, 2009, after it had been forced
26 to file a writ proceeding in the Superior Court.

1 The procurement process was perverted by the arbitrary and
2 capricious action of one member of the Fund's selection panel.
3 If the evaluation criteria set forth in the RFP had been fairly
4 and rationally applied, ASC would have been rated the best
5 qualified proponent, not GWRS. The Fund would have first
6 negotiated with ASC, not GWRS, and, given that ASC had originally
7 made a lower price proposal than GWRS, it is fair to assume there
8 was a reasonable likelihood that ASC would have successfully
9 negotiated a contract with the Fund—all back in 2007.

11 The Fund attempts to avoid dealing with the merits of ASC's
12 protest by claiming that ASC should have protested sooner.
13 However, once the Contract was finally awarded in August, ASC
14 promptly sought to obtain from the Fund information relating to
15 the evaluation process, information that the Fund could not
16 lawfully have provided any earlier. The Fund stonewalled ASC in
17 its efforts, thus denying to it the information needed to
18 determine if there were any grounds to protest. Finally, in the
19 face of ASC's writ petition, the Fund provided the information on
20 October 6, 2009. That is the date ASC first gained knowledge of
21 the facts on which its protest was based and the date the 14 day
22 protest period commenced. ASC's protest was thus timely, the
23 Fund's desire to avoid facing it notwithstanding.

26 **REQUESTED RULING**

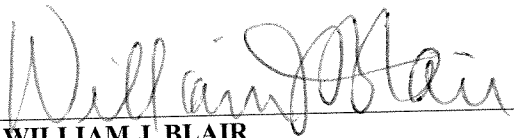
27 The Contract has improperly been awarded to GWRS. ASC has
28 no reason to believe that GWRS itself has acted improperly.

1 Thus, the remedies available under the procurement law are
2 limited. Pursuant to 5 GCA 5452(a), the award of the Contract
3 should be set aside and the Contract terminated. The Fund should
4 be ordered to then enter into negotiations with ASC or else issue
5 a new RFP for the services needed by it.

6
7 In addition, pursuant to 5 GCA 5452(e), ASC should be
8 awarded its reasonable costs incurred in connection with the RFP
9 and protest. ASC should have been determined the best qualified
10 offeror and there is a reasonable likelihood that it would have
11 been awarded the Contract but for arbitrary and capricious
12 scoring of ASC's proposal in direct contravention of the
13 evaluation criteria set forth in the RFP.

14
15 **SUBMITTED** this 24th day of October, 2009.

16 **BLAIR STERLING JOHNSON**
17 **MARTINEZ & LEON GUERRERO**
18 **A PROFESSIONAL CORPORATION**

19 BY: 
20 **WILLIAM J. BLAIR**
21 *Appellant's Duly Authorized Representative*

22 **ENCLOSURES:**

- 23 EXHIBIT 1: NOTICE OF PROTEST
- 24 EXHIBIT 2: DECISION ON PROTEST
- 25 EXHIBIT 3: SEPTEMBER 7, 2009 MEMORANDUM OF EVALUATION AND NEGOTIATION
- 26 EXHIBIT 4: RFP EXCERPT RE VALUATION CRITERIA
- 27 EXHIBIT 5: GWRS NOVEMBER 2006 COST PROPOSAL
- 28 EXHIBIT 6: ASC NOVEMBER 2006 COST PROPOSAL
- EXHIBIT 7: SEPTEMBER 15, 2009 LETTER FROM PAULA BLAS
- EXHIBIT 8: SEPTEMBER 21, 2009 LETTER TO PAULA BLAS
- EXHIBIT 9: SEPTEMBER 29, 2009 LETTER FROM ELYZE MCDONALD, THE FUND'S ATTORNEY
- EXHIBIT 10: PETITION FOR WRIT OF MANDATE UNDER SUNSHINE REFORM ACT OF 1999
- EXHIBIT 11: OCTOBER 6, 2009 LETTER FROM MS. MCDONALD

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