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8 **GUAM**

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10 IN THE APPEAL OF) Appeal No. OPA-PA-07-006
11 GREAT-WEST RETIREMENT)
SERVICES,) **APPELLANT GREAT-WEST**
12) **RETIREMENT SERVICES' COMMENT**
13) **ON AGENCY REPORT**
Appellant.)
_____)

14 **COMES NOW**, Appellant GREAT-WEST RETIREMENT SERVICES (GWRS), by
15 and through its counsel of record, ANTHONY R. CAMACHO, ESQ., and, pursuant to 2 G.A.R.,
16 Div. 4, Chap. 12, §12104(c)(4), hereby submits it Comment to the Government of Guam
17 Retirement Fund's (GGRF) Agency Report which is as follows:

18
19 **GGRF'S PRICE ANALYSIS WAS ARBITRARY, CAPRICIOUS AND**
20 **VIOLATED GUAM PROCUREMENT REGULATIONS**

21 There is no merit to GGRF's arguments that it conducted a proper price analysis of
22 GWRS's cost and pricing data. The record below clearly shows: (1) GGRF failed to make any
23 finding that GWRS's cost or pricing data was overstated or otherwise defective because it was
24 inaccurate, incomplete, or non-current; and (2) GGRF arbitrarily and capriciously refused to
25 consider prices available on the open market or the prior price quotations and contract prices
26 charged by GWRS and limited its price analysis to a comparison of GWRS's cost and pricing
27 data and the price proposals submitted by the other offerors in violation of 2 G.A.R., Div. 4,
28 Chap. 3, §3118(g)(1), (2), and (4); and (3) GGRF failed to consider the terms and conditions in

4 GWRS' cost and pricing data which differed from the proposals of the other offerors in violation
5 of 2 G.A.R., Div. 4, Chap. 3, §3118(g)(5).

6 **GGRF failed to make any finding that GWRS's Cost or Pricing Data**
7 **was overstated or otherwise defective**

8 GGRF failed to make any finding that GWRS's Cost or Pricing Data was overstated or
9 otherwise defective due to inaccuracy, incompleteness, or non-currentness. GGRF's argument
10 that 2 G.A.R., Div. 4, Chap. 3, §3118(f) is not applicable because a contract has not been
11 awarded has no merit. Offeror's determined to be best qualified shall be required to submit cost
12 or pricing data to the head of the agency conducting the procurement at a time specified prior to
13 the commencement of negotiations in accordance with 2 G.A.R., Div. 4, Chap. 3, §3118. 2
14 G.A.R., Div. 4, Chap. 3, §3114(k). The provisions of 2 G.A.R., Div. 4, Chap. 3, §3118 include
15 procedures that must be followed whenever it is alleged that cost or pricing data has been
16 overstated. 2 G.A.R., Div. 4, Chap. 3, §3118(f)(1). The plain language of said regulation does
17 not limit its application to post award allegations of overstated cost or pricing data. Instead, said
18 regulation states it is applicable to defective cost or pricing data and adjustments of contract
19 price. Id. Here, the procurement was at the stage were the parties were supposed to be
20 negotiating and one of the elements of such negotiation is the contract price. See Section II,
21 Paragraph I, Request for Proposal (RFP) No. GGRF-028-06, Tab 1, Procurement Record, and 2
22 G.A.R., Div. 4, Chap. 3, §3118(l)(2)(C). GGRF admits that it believed GWRS's cost and pricing
23 data was overstated. See Page 7, Lines 7-11, Agency Report. However, it failed to make the
24 finding that GWRS's cost or pricing data was inaccurate, incomplete, or non-current as required
25 by 2 G.A.R., Div. 4, Chap. 3, §3118(f)(1). Instead, GGRF merely stated that it did not accept the
26 additional cost and pricing data GWRS provided to GGRF on March 12, 2007. See Letter by
27 Paula M. Blas dated March 18, 2007, Exhibit C, Notice of Appeal. Therefore, without said
28 finding, there is no evidence or record below that the cost or pricing data GWRS submitted with

4 its proposal and the additional cost or pricing data GWRS provided to GGRF on March 12, 2007
5 pursuant to GGRF's request, was overstated or otherwise defective.

6 **GGRF arbitrarily and capriciously refused to consider**
7 **prices available on the open market or the prior price quotations and**
8 **contract prices charged by GWRS and limited its price analysis**
9 **to a comparison of GWRS's cost and pricing data and the price**
10 **proposals submitted by the other offerors**

11 GGRF arbitrarily and capriciously refused to consider prices available on the open market
12 or the prior price quotations and contract prices charged by GWRS and limited its price analysis
13 to a comparison of GWRS's cost and pricing data and the price proposals submitted by the other
14 offerors. A price analysis is used to determine if a price is reasonable and acceptable and it
15 involves an evaluation of the prices for the same or similar items or services. 2 G.A.R., Div. 4,
16 Chap. 3, §3118(g). Further, price submissions of prospective offerors in the current
17 procurement, prior price quotations and contract prices charged by the offeror, and prices
18 available on the open market are all acceptable price analysis criteria. 2 G.A.R., Div. 4, Chap. 3,
19 §3118(g)(1), (2), and (4). Here, GGRF admitted that its price analysis was limited to a
20 comparison of GWRS' cost and pricing and the pricing quotes of the remaining offerors. Page 3,
21 Paragraph C(2), Procurement Protest Decision dated June 1, 2007, Exhibit G, Notice of Appeal.
22 Thus, GGRF's arbitrarily and capriciously refused to consider prices available on the open
23 market or the prior price quotations and contract prices charged by GWRS

24 In its Agency Report, GGRF now speciously argues that its price analysis included an
25 undisclosed in-house estimate of the open market price and the pricing quotes of the other
26 offerors. Page 4, Lines 9-21, of the Agency Report. However, as stated above, this argument is
27 not supported by the record below. Despite being price analysis criteria authorized by
28 Procurement Regulations as set forth above, GGRF admitted that GWRS's pricing, "is to be
"compared only against the relevant pool of proposals from other qualified offerors," and:
"contracts negotiated and awarded in other jurisdictions are relevant to GWRS's qualifications

4 and experience but cannot be the basis to establish that GWARS's best and final offer is fair and
5 reasonable." Id. Thus, GGRF arbitrarily and capriciously limited its price analysis to a
6 comparison of GWRS's cost and pricing data and the price proposals from the other offerors

7
8 **GGRF failed to consider the terms and conditions in GWRS' cost
9 and pricing data which differed from the proposals
of the other offerors**

10 GGRF failed to consider the terms and conditions in GWRS's cost and pricing data
11 which differed from the proposals of the other offerors. In conducting a price analysis that
12 includes price submissions of prospective offerors, and prices available on the open market, the
13 purchasing agency must give consideration to any differing terms and conditions. 2 G.A.R., Div.
14 4, Chap. 3, §3118(g)(5). Here, GGRF determined that the price proposals from the other offerors
15 had a price of 0.25% of the total assets as their fee and disclosed this amount to GGRF on or
16 about March 6, 2007. Letter from Paula M. Blas dated March 6, 2007, Exhibit A, Notice of
17 Appeal. GGRF's price analysis was limited to whether GWRS's cost or pricing data was higher
18 or lower than the 0.25% fee from the other offerors, and GGRF rejected GWRS's price of 0.27%
19 for the sole reason that it was higher than the 0.25% fee from the other offerors. Letter from
20 Paula M. Blas dated March 18, 2007, Exhibit C, Notice of Appeal. Thus, GGRF gave no
21 consideration to the terms and conditions in GWRS's cost and pricing data which differed from
22 the proposals of the other offerors in violation of 2 G.A.R., Div. 4, Chap. 3, §3118(g)(5).
23

24 **GGRF ARBITRARILY, CAPRICIOUSLY REFUSED TO NEGOTIATE**
25 **WITH GWRS, AND GGRF ADDED ADDITIONAL REQUIREMENTS TO THE RFP,**
26 **ILLEGALLY DISCLOSED INFORMATION FROM OTHER OFFERORS,**
27 **AND WITHHELD PUBLIC PROCUREMENT DATA IN VIOLATION**
28 **OF GUAM PROCUREMENT LAW AND REGULATIONS**

There is no merit to GGRF's arguments that it gave GWRS the opportunity to negotiate
and that GWRS was unresponsive. Instead, GGRF arbitrarily, capriciously and illegally: (1)

4 Refused to negotiate with GWRS; (2) Added additional requirements to the RFP; and (2)
5 Illegally disclosed information from the proposals of other offerors; and (3) Withheld public
6 procurement data.

7 **GGRF arbitrarily, capriciously and illegally**
8 **refused to negotiate with GWRS**

9 GGRF arbitrarily, capriciously and illegally refused to negotiate with GWRS. The RFP
10 required the GGRF to negotiate a contract with the best qualified offeror for the required services
11 at compensation determined in writing to be fair and reasonable. Section II, Paragraph I, Page 4
12 of 29, RFP, Tab 1, Procurement Record. The RFP required the offerors to submit cost or pricing
13 data and Fee Summary Services in a separate sealed envelope with their proposals. Id.,
14 Paragraph G, Page 4 of 29, and Paragraph 187, Page 25 of 29. The RFP stated that individual
15 proposals will be rejected if the proposed price is: "clearly unreasonable." The RFP specifically
16 stated that the proposals would be evaluated based upon technical merits and price, and that price
17 proposals will count for 40% of the evaluation and the technical merits will count for 60% of the
18 evaluation, and based on the combination of the scores assigned from the technical merit and
19 pricing, the GGRF will enter negotiations with the company with the highest combined score.
20 Section VI, Paragraph C, Page 29 of 29, RFP, Tab 1, Procurement Record. Here, GGRF applied
21 these RFP requirements correctly and determined that GWRS's price proposal was reasonable,
22 and that GWRS had the highest combined scores assigned from GWRS' technical merits and
23 GWRS's price proposal. Unfortunately, GGRF deviated from the RFP mandates in the
24 negotiation stage of the solicitation.

25 There is no merit to GGRF's claims that GWRS was non-responsive to their requests for
26 information. Despite providing the cost and pricing data and the Fee Summary Services
27 required by the RFP, which GGRF accepted, GWRS provided additional cost and pricing data
28 addressing each and every request by GGRF and the information provided GWRS adequately

4 justified the .33% fee in its original cost proposal. Letter from Gregory E. Seller dated March
5 12, 2007, Exhibit B, Notice of Appeal. GWRS provided their best and final offer as demanded
6 by GGRF which modified their already reasonable fee by reducing it to .27%. See letter by
7 Gregory M. Seller dated March 21, 2007, Exhibit D, Notice of Appeal. Further, GWRS also
8 provided additional information justifying its .27% fee in its Protest Letter. Protest Letter dated
9 May 9, 2007, Exhibit F, Notice of Appeal. In fact, the information provided by GWRS to GGRF
10 clearly shows that GWRS' original .33% fee and its .27% best and final offer fee are fair and
11 reasonable taking into account the estimated value of the required services, and the scope,
12 complexity, and nature of such services. Thus, GWRS was responsive, attempted a good faith
13 negotiation with GGRF, and at all time during this procurement offered a fee that was fair and
14 reasonable.

15 In contrast, GGRF refused to negotiate in good faith. GGRF's argument, made on Page 6
16 of its Agency Report, that "negotiations come in many varieties," has no merit. A negotiation
17 must include an exchange of information during which the offeror and the purchasing agency may
18 alter or otherwise change the conditions, terms, and price of the proposed contract. 2 G.A.R., Div.
19 4, Chap. 3, §3101(4). Also, such negotiation must be directed toward agreeing upon
20 compensation which is fair and reasonable taking into account the estimated value of the services,
21 and scope, complexity, and nature of the services. 2 G.A.R. Div. 4, Chap. 3, §3114(1)(2)© and
22 Section II, Paragraph I, Page 4 of 29, RFP, Tab 1, Procurement Record. GGRF did not negotiate
23 in good faith because it refused to exchange information with GWRS or accept GWRS's fair and
24 reasonable .33% original fee or GWRS's .27% best and final offer fee, and GGRF did not direct
25 the negotiations toward agreeing to fair and reasonable compensation because GGRF was
26 demanding that GWRS accept the unreasonable .25% fee from one of the other offerors. See
27 Letter by Paula M. Blas dated March 6, 2007, Letter by Paula M. Blas dated March 18, 2007, and
28 Letter by Debbie I. Ulloa dated April 27, 2007, Exhibits A, C, and E, respectively. Thus, GGRF

4 arbitrarily and capriciously refused to negotiate with GWRS in violation of the RFP requirements
5 and Guam Procurement Regulations.

6 **GGRF arbitrarily, capriciously, and illegally added**
7 **additional requirements to the RFP**

8 GGRF arbitrarily, capriciously, and illegally added additional requirements to the RFP
9 during the negotiation stage. Proposals shall be evaluated only on the basis of evaluation factors
10 stated in the RFP. 2 G.A.R., Div. 4, Chap. 3, §3114(f)(2). The RFP specifically stated that the
11 proposals would be evaluated based upon technical merits and price, and that price proposals will
12 count for 40% of the evaluation and the technical merits will count for 60% of the evaluation.
13 Section VI, Paragraph C, Page 29 of 29, RFP, Tab 1, Procurement Record. Agencies do not have
14 the discretion to announce in the solicitation that they will use one evaluation plan and then
15 follow another, once offerors are informed of the criteria against which their proposals will be
16 evaluated, the agency must adhere to those criteria or inform offerors of any significant changes
17 made in the evaluation scheme. *Latecoere International Inc. v. U.S. Department of the Navy*
18 *et.al.*, 19 F.3d 1342, 1359 (11th Cir. 1994). Further, in negotiated procurement, contracting
19 officials have broad discretion to determine the manner in which they will make use of technical
20 and cost evaluation results, however, it is improper to induce an offer representing the highest
21 quality and then reject it in favor of a materially inferior offer on the basis of a relatively
22 insignificant price difference. *Id.*

23 Here, during the negotiation stage of the solicitation, GGRF introduced a new evaluation
24 scheme in the negotiation phase wherein the price of the services could not exceed a fee of .25%
25 and GGRF increased the importance of GWRS's price proposal from 40% to 100%. Said .25%
26 fee requirement was not originally part of the RFP evaluation or negotiation requirements nor was
27 raising the importance of price proposals from 40% to 100%. Further, GGRF's imposition of
28 these new requirements will result in the award of this contract to a technically inferior but lower

4 priced offeror without any consideration of the differences in the proposals between the
5 technically superior higher priced offerors and the technically inferior lower priced offerors.
6 Finally, the price difference between GWRS's .27% fee and the GGRF's .25% fee is relatively
7 insignificant considering the overall cost of the services. Therefore, GGRF's new price and
8 evaluation requirements are arbitrary, capricious, and violate Guam Procurement Law and the
9 RFP's terms.

10 **GGRF illegally disclosed information from the proposals of other offerors**

11 GGRF admits that its .25% fee came from the proposals of the other offerors. Page 4,
12 Agency Report and Paragraph C(1) of Protest Decision dated June 1, 2007, Exhibit G, Notice of
13 Appeal. An agency shall not disclose any information contained in any proposals until after
14 award of the proposed contract has been made. 2 G.A.R. Div. 4, Chap. 3, §3114(i)(2). Here, the
15 .25% fee GGRF is demanding came from another offeror's proposal and it was disclosed to
16 GWRS during negotiation the negotiation. Such disclosure violated 2 G.A.R. Div. 4, Chap. 3,
17 §3114(i)(2).

18 **GGRF illegally withheld public procurement data**

19 GGRF argues that it placed the written record setting forth the reasons why it could not
20 agree on compensation with GWRS, which is required by 2 G.A.R. Div. 4, Chap. 3,
21 §3114(l)(4)(A), in Tab 10 of the procurement record. Page 6, Agency Report. However, Tab 10
22 of the procurement record states that said record is confidential and is not being released to the
23 public and GGRF argues that it such record is not required to be given to the offeror as it may
24 contain proprietary information. Page 6, Agency Report. The procurement record in this matter
25 is a public record. 5 G.C.A. §5251. Further, the written record stating the reasons GGRF could
26 not agree on compensation with GWRS is part of this public record and must be disclosed to
27 GWRS. 2 G.A.R. Div. 4, Chap. 3, §3114(l)(4)(A). If any portion of said record is in fact
28 proprietary, GGRF can redact said portion and release the remainder of said written record which

4 is a public record.

5 **CONCLUSION**

6 Based on the foregoing, GGRF's arguments that it conduct a proper price analysis and that
7 it negotiated in good faith and GWRS was unresponsive in negotiations have no merit and the
8 Office of the Public Auditor must grant GWRS's appeal.

9
10 **RESPECTFULLY SUBMITTED** this 16st day of July, 2007 by

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13
14 By: *Anthony R. Camacho*
15 ANTHONY R. CAMACHO, ESQ.
16 Attorney for Appellant Great-West Retirement Services
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