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PROCUREMENT MATRIALS

JUL 23 2007

TIME: 2:15pm  
BY: [Signature]  
FILE No. GPA-PA 07-006

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GUAM

IN THE APPEAL OF  
GREAT-WEST RETIREMENT SERVICES,  
Appellant.

DOCKET NO. OPA-PA-07-006

APPELLEE GOVERNMENT OF  
GUAM RETIREMENT FUND'S  
REBUTTAL TO APPELLANT'S  
COMMENT ON AGENCY REPORT

Appellee the Government of Guam Retirement Fund ("GGRF"), by and through its undersigned counsel and pursuant to 2 G.A.R. Div. 4, Chap. 12 § 12104(c)(4), hereby submits its Rebuttal to Appellant's Comment on Agency Report filed on July 16, 2007.

**GGRF PROPERLY CONDUCTED PRE-AWARD PRICE ANALYSES**

Appellant Great-West Retirement Service ("GWRS") contends that 2 G.A.R. Div. 4, Chap. 3, § 3118(f) applies to negotiations because it is not limited to post award determinations. This contention is incorrect, as it is clear that this regulation both by its plain language and when read in conjunction with 2 G.A.R. Div. 4, Chap. 3 § 3118(d) that it is meant to apply only *post-award*. To arrive at a pool of three qualified offerors from which to begin negotiations, GGRF considered prices available on the open market, prior price quotations, contract prices charged by GWRS, and price proposals of the other offerors. 2 G.A.R. Div. 4, Chap. 3 § 3118(d)(3) calls for

certification of pricing to be made after an agreement on price is reached. (Emphasis added). 2 G.A.R. Div. 4, Chap. 3 § 3118(f)(1) states, "if certified cost or pricing data are subsequently found to have been inaccurate, incomplete, or non-current as of the date stated in the certificate . . ." (Emphasis added). Since the pricing is not certified until after a price is agreed upon by the parties, it cannot be determined to be overstated, inaccurate, or non-current until an agreed upon price is reached and certified.

While submission of pricing or cost data occurs prior to negotiation, the offeror must keep this information current throughout negotiations and the parties must mutually agree upon a price before certification. See 2 G.A.R. Div. 4, Chap. 3 § 3118(d). This is evidenced by the fact that GWRS's proposal contained a certificate of cost pricing dated May 14, 2004, which is unlikely to be current in 2007. See Supp. Procurement R. Tab #21.

Thus, GGRF was not required to make a finding that the price proposal was inaccurate, incomplete, or non-current because no price had been mutually agreed upon or certified. Such a finding is necessary only where a contract has been awarded and subsequently needs adjustment.

**GGRF PROPERLY DETERMINED THAT GWRS'S BEST AND FINAL OFFER WAS NOT FAIR AND REASONABLE UNDER THE CIRCUMSTANCES**

As stated in its Agency Report, GGRF considered many factors in determining that GWRS's "best and final offer" was not fair and reasonable. These factors included listings from other similar contracts in the industry serviced by providers who were not offerors to the RFP, in-house determinations of actual governmental needs, comparison to packages submitted by other actual offerors, and GWRS's past pricing in other jurisdictions.

While it is true that GGRF compared GWRS's pricing against the relevant pool of proposals as stated in GGRF's Procurement Protest Decision, GWRS attempts to read the statement in isolation. In fact, the statement was made in response to GWRS's initial protest that

gave no basis for price comparison other than its past contract pricing in other jurisdictions and its claim (based upon its own survey) that it is the largest provider of defined contribution services to state governments. *See Procurement R. #13 (protest letter dated May 9, 2007)*. The protest letter attempted to state that because GWRS was chosen as the plan provider in Montana, a state with similar participant numbers to that of Guam, the price proposed to GGRF must have been "fair and reasonable."

GWRS fails to acknowledge that the Procurement Protest Decision addresses this very one dimensional argument put forth by GWRS in its protest. GGRF states in the Procurement Decision (Procurement R. #16 at 3, ¶ C(1)) that GWRS's success "must be weighed not in isolation, but against the value (price) given the scope and complexity of services to be provided." While prices obtained by similar plans in other jurisdictions, whether serviced by GWRS or another provider, are relevant and were considered, they are merely one portion of the analysis and comparison. Indeed, 2 G.A.R. Div. 4, Chap. 3 § 3118(i) clearly states:

Evaluation of cost or pricing data should include comparisons of costs and prices of an offeror's cost estimates with those of other offerors and any independent territorial price and cost estimates.

There are many factors that affect negotiations and pricing: the goals of a particular jurisdiction, the relative stability of a fund, past growth, projected growth, transparency and the like. All of these factors have some effect on the pricing of a contract and how a fee should be structured. Therefore, GWRS oversimplifies the determination process of what is fair and reasonable by assuming that what was acceptable in one jurisdiction should be acceptable here. The procurement process itself is designed to encourage fair competition among providers so that the Government of Guam can get the most value for its dollar. If the only criteria used to judge value is what the same provider charges in another jurisdiction, the procurement process

would be stripped of its basic purpose.

GGRF properly exercised its procurement authority in determining that given the nature, scope and complexity of the services needed under the RFP, the pricing proposal submitted in GWRS's best and final offer was not fair and not reasonable. As governmental fiduciaries tasked with spending monies held in trust, GGRF properly determined that negotiations should be halted so that the process could commence with the next qualified offeror to secure desired services at the best value.

**GGRF CONSIDERED ALL OF THE TERMS AND CONDITIONS OF GWRS'S  
PROPOSAL, NOT JUST PRICING**

GWRS makes a blatantly false allegation that GGRF disclosed in its March 6, 2007 letter to GWRS that other offerors had a fee of .25% of total assets. The truth is that this letter simply asked GWRS to price its fee at 0.25% of total assets. There is no indication in the letter or elsewhere that this fee request was based on another offeror's proposal. GWRS simply assumes that because the fee requested is different than their proposal that GGRF simply plucked the fee from another offeror's proposal and gave no consideration to other pricing factors, terms, or conditions. Furthermore, it claims that in GGRF's letter of March 18, 2007 "GGRF rejected GWRS's price of 0.27% for the sole reason that it was higher than 0.25% fee from the other offerors." (See Appellant's Comment on Agency Report, p. 4.) Again, this claim is wholly without support as the letter referenced simply rejects the cost pricing submitted by GWRS and requests its best and final offer. There is no mention of fees or other offerors.

GGRF considered the pricing submitted by GWRS and the various terms and conditions presented with its pricing options. GWRS's terms and conditions created contingencies to the pricing that were unacceptable to GGRF. Moreover, and as stated in the Agency Report, GWRS was non-responsive to most of GGRF's requests. Contrary to GWRS's allegations and

assumptions, all pricing terms and conditions were carefully considered in GGRF's final determination.

### **NEGOTIATIONS WERE SIMPLY NOT SUCCESSFUL**

GWRS states "GGRF did not negotiate in good faith because it refused to . . . accept GWRS's fair and reasonable 0.33% original fee or GWRS's 0.27% best and final offer fee . . ." (See Appellant's Comment on Agency Report, p. 6.) GWRS continues to assert that because it was chosen as the best qualified offeror, GGRF was constrained to accept its offer. This is simply not the case. GWRS has yet to provide any evidence of the fairness and reasonableness of its proposed fee outside of its own past contract pricing. Further, the RFP in several places, and specifically in the "Evaluation Factors" section on page 29 of 29 states that while negotiations will be entered with the company given the highest initial evaluation score, "[i]f these negotiations do not result in a successful contract, then the GGRF will enter into negotiations with the next ranked company."

Unlike a sealed bid procurement where the lowest bidder is awarded the contract, this services contract is not awarded unless negotiations are successful. The determination of the best qualified offeror from the initial proposals is a starting point for negotiations that, if successful, will lead to the award of the contract. Here, negotiations simply were not successful. GGRF determined that GWRS's "best and final" offer was non-responsive and not fair and reasonable. GWRS's desire to reopen the negotiations so that it can haggle over pricing demonstrates that it did not submit its "best and final" offer; accordingly GWRS should not be granted a second bite at the apple.

### **NO MINIMUM PRICING NOR NEW EVALUATION CRITERIA WERE ADDED TO THE RFP**

GWRS alleges that GGRF illegally changed the RFP by making the price proposal 100%

of its determination instead of 40% as stated in the RFP and by placing a limit on fees of 0.25% of total assets. See Appellant's Comment on Agency Report, p. 7. It further alleges that the result will be an award of the contract to a technically inferior offeror without consideration of GWRS's superiority, even if higher in price. *Id.*

Again, the RFP was not modified, and the record demonstrates that pricing was only 40% of the initial evaluation to determine who was the best qualified offeror. Furthermore, the 0.25% fee issue was only one of four requests of which GWRS either failed to address or could not satisfy. The fact that GGRF will begin negotiations with the next best qualified offeror does not mean the next best offeror is "materially inferior" or that there is a "relatively insignificant price difference." None of the offerors would have been chosen on the short list of three unless the offerors were qualified to provide the services desired by GGRF. Furthermore, all of the issues GGRF requested GWRS to address were of significance, whether as to pricing, transparency, or to independent management. When dealing with a retirement plan with thousands of participants, a seemingly minor change in the fee structure can have a great impact on the fund and its participants. Lastly, the procurement process clearly does not require the government to purchase more or higher quality services than it requires if it determines that it must pay an unfair or unreasonable amount for such services.

GWRS cites *Lateocoere International Inc. v. U.S. Department of the Navy, et. al.*, 19 F.3d 1342 (11th Cir. 1994) for the proposition that it is improper to reject an offer on the basis of an insignificant price difference where there is a material difference in technical ability of the offerors. The *Lateocoere* case is inapposite here as the unreasonableness of the award in that case was evidenced by intentional manipulation of evaluation criteria, including changing an offerors technical rating from "marginal" to "acceptable." *Id.* Had the bidder been evaluated

"marginal," it would not have been eligible for the contract award. *Id.* Here, there is no evidence of intentional manipulation by GGRF of any sort.

Furthermore, when determining what constitutes arbitrary and capricious in the procurement context, courts have taken a narrow view and give great deference to the government agency so as not to simply substitute the court's judgment. *Patriot Contract Services v. U.S.*, 388 F. Supp. 2d 1010 (N.D.Cal. 2005). The courts recognize the heavy burden on protestors to demonstrate by clear and convincing evidence that there was no rational basis for the agency's decision or that there was a clear and prejudicial violation of procurement laws or regulations. *Id.* at 1019. Where any rational basis exists for an agency's decision, the court should stay its hand. *Id.* GWRS cannot prove any violation of law by GGRF, nor can it prove any prejudice, as it was given every opportunity to respond to GGRF's requests, but simply chose not to.

#### **GGRF HAS LAWFULLY DEALT WITH CONFIDENTIAL INFORMATION**

GWRS complains on one hand that GGRF illegally disclosed information regarding an offeror on one hand and illegally withheld information on the other. GWRS makes another blatant mischaracterization of GGRF's "disclosures" in the Agency Report on page 4 and paragraph (C)(1) of the Protest Decision dated June 1, 2007. These documents merely state that GGRF considered the price quotes of other bidders as it is instructed to do under 2 G.A.R. Div. 4, Chap. 3, § 3118(i). Nowhere in either of these documents does GGRF disclose anything about any of the other offers.

Furthermore, GGRF has been extremely careful to protect the proprietary nature of all offerors during this appeal by submitting proprietary or confidential documents to the auditor for in camera review. Although GWRS cites 2 G.A.R. Div. 4, Chap. 3, § 3118(e)(4)(A) to support

that the written record regarding termination is part of the public record, in fact this regulation makes no reference to the written record being part of the public record. It only requires a written record to be made in the agency's files and for notification of termination to be given to the offeror.

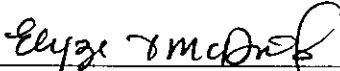
Additionally, while the procurement record is generally a public record open for review and copying, 2 G.A.R. Div. 4, Chap. 3, § 12104(c)(6) states that if any portion thereof is considered to contain confidential information, the same may be withheld by affixing a statement to this effect on the front page of the document and noting the same wherever such document or information appears. The Public Auditor shall make available any information that is not confidential in nature to interested parties pursuant to 2 G.A.R. Div. 4, Chap. 3, § 12106, which also allows for submission of confidential information in the format presented by GGRF in this case.

### CONCLUSION

GGRF has diligently complied with all procurement rules and regulations regarding the bidding process and the confidentiality of information submitted by bidders. GGRF's determination to terminate negotiations was completely informed, based on substantial review of various pertinent factors and was done in good faith. Their decision was sound and should be upheld.

SUBMITTED this 23<sup>d</sup> day of July, 2007, Hagåtña, Guam.

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