



OFFICE OF THE PUBLIC AUDITOR

PROCUREMENT APPEALS

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)	Appeal No. <u>OPA-PA-07-006</u>
IN THE APPEAL OF)	
)	
GREAT WEST RETIREMENT SERVICES,)	
)	FINDINGS AND RECOMMENDATIONS
APPELLANT.)	OF HEARING OFFICER
)	
)	

I. INTRODUCTION

A hearing on this procurement appeal was held on January 21, 2008. These are the findings of the Hearing Officer, Robert G.P. Cruz, Esq., on an appeal filed on June 22, 2007, by Great-West Retirement Services (hereafter "GWRs"), regarding the Government of Guam Retirement Fund's (hereafter "GGRF") procurement for Investment Management and Plan Administration related to the 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan. Elyze McDonald, Esq., Carlsmith Ball, LLP, represented GGRF, Thomas M. Tarpley, Esq. represented GWRs, and Joaquin C. Arriola, Jr., Esq, Arriola, Cowan, Arriola, represented Administrative Services Corporation, (hereafter "ASC").

II. FINDINGS OF FACT

These findings of fact are based on the Procurement Record and all documents submitted by the parties in the appeal in addition to the oral argument.

1. GWRs submitted its proposal to GGRF and was found to be the best qualified offeror among those responding to the Request for Proposal (RFP) No. GGRF-028-06. It was so notified

ORIGINAL

1 letter dated March 6, 2007. The letter requested that GWRS submit custodial and pricing data for
2 negotiation, specifically including the following information:

- 3 a. the independent custodian selected to provide trust services, preferably a local trust
4 company;
- 5 b. that no fees would be assessed to participant account balances;
- 6 c. that GWRS's fee would be .25% (1/4 of 1) of the total assets; and
- 7 d. that all reallowances and rebates of 12b-1 fees received from the investment options
8 managers would be remitted to GGRF.
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11 2. GWRS responded in a letter dated March 12, 2007, and addressed the following: (1)
12 that it would use Wells Fargo or another local firm as a Custodian, (2) that there would be no
13 explicit fee deducted from participant accounts, (3) that a .33% to .27% fee would be offered
14 depending on total plan assets, and (4) any excess funding from investment options (fixed and
15 variable) would be refunded to the plan each year.
16

17 3. GGRF in a March 18, 2007 letter did not accept GWRS' cost pricing submitted on
18 March 12 and requested a best and final offer.

19 4. GWRS responded to GGRF on March 21, 2007, and modified their March 12th
20 proposed fee to .27% of total plan assets.
21

22 5. In an internal analysis dated April 27, 2007, an Administrative Assistant determined
23 that the GWRS March 12, 2007 answers were non-responsive. This argument was repeated by
24 the GGRF at the formal hearing. We disagree. Responses by GWRS addressed each item of
25 interest of GGRF. They simply did not give the answer that GGRF sought in each category.
26

27 6. On April 27, 2007 GGRF responded to GWRS' modified proposal and determined that
28 their best and final offer was not fair and reasonable, terminated negotiations, and began

1 negotiations with the next best offeror, ASC. GGRF never adequately explained why the .25%
2 that they sought was reasonable, but that the .27% GWRS offered somehow was neither
3 reasonable nor acceptable. Reference is made to Tab # 11 of the Agency Record, but a review of
4 the material is not helpful in discerning the importance of the .25% figure.
5

6 7. GWRS filed a timely appeal on June 22, 2007 protesting the termination of its
7 negotiations with GGRF. GWRS asserts that its best and final offer was “fair and reasonable”
8 based upon a comparison of its offer to GGRF with participant fees charged for two categories of
9 employee plans in various states. (Declaration of Kent Morris, Vice President, Western Region,
10 GWRS). GWRS also argued that GGRF was arbitrary and capricious in comparing GWRS’s
11 proposal to other bidders on Guam, rather than considering fees charged in other jurisdictions as
12 GWRS wanted GGRF to do.
13

14 8. Two pre-hearing conferences were held before the Hearing Officer. The first pre-
15 hearing conference was held on December 18, 2007. It was agreed that there would be oral
16 argument on GWRS’s Motion to Lift Seal and Compel Production of Documents at a second
17 pre-hearing conference, on January 10, 2008. After studying the Motion, and the Response of
18 GGRF, and considering the oral argument presented by all counsel, including ASC’s, the
19 Hearing Officer orally denied the motion on January 10, 2008, as allowed by 2 GAR Division
20 4, section 12109 (d).
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24 III. ANALYSIS

25 1. GWRS’s contention that GGRF was arbitrary and capricious in terminating
26 negotiations with GWRS appears to be accurate. GGRF requested that GWRS provide its offer
27 in a two-part format addressing custodial arrangements and pricing data. GWRS submitted its
28 offer in the format required by GGRF. In our opinion, the March 12, 2007 response of GWRS

1 addressed both required points, custodial services and pricing. GGRF subsequently halted the
2 March 2007 negotiations, rejecting GWRS's best and final offer.

3 2. GWRS's Motion to Lift Seal and Produce Documents was an inappropriate motion
4 during negotiations. Such details are normally public record after an award of a contract during a
5 procurement process, not during the negotiation stages. GWRS argued that the GGRF should
6 have revealed details of the procurement that were confidential during negotiations. 2 GAR
7 Division 4, Chapter 3, Section 3114(h)(1) states that the Register of Proposals becomes part of
8 the public record only after the award of the contract and that the proposals of offerors who are
9 not awarded the contract shall not be opened to public inspection. At this point no award has
10 been made and the negotiations that have occurred between GGRF and ASC and GWRS contain
11 proposals that GGRF is not by law at liberty to disclose.
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15 **IV. CONCLUSION**

16 Based on the foregoing, the Hearing Officer recommends that the Public Auditor
17 determine the following:
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19 1. Although GGRF claims it negotiated in good faith with GWRS, there was no showing
20 in the documents provided that GWRS's best and final offer of a fee of 0.27% of valued assets
21 was not fair and reasonable, compared to the fee of 0.25% of valued assets sought by GGRF
22 negotiators.
23

24 2. Although GGRF claimed that GWRS was non-responsive in providing the items
25 requested by GGRF in the format requested by GGRF during the negotiation period, in fact
26 GWRS provided its response in its March 12, 2007 letter addressing the issues GGRF required.
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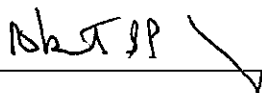
1 3. GWRS's contention that GGRF was arbitrary and capricious in terminating the
2 negotiations with GWRS appears to be substantiated. GGRF did not respond to GWRS's request
3 for an analysis why its 0.27% fee was not fair and reasonable.
4

5 4. GGRF should continue its negotiations with the best qualified offeror, GWRS, in order
6 to complete the procurement of Investment Management and Plan Administration related to the
7 401(a) Defined Contribution Plan, 457 Deferred Compensation Plan and Welfare Benefit Plan.
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9 5. The Chairman of the GGRF serves on the Board of Directors of the proposed Trustee
10 for ASC. Thus should renewed negotiations between GWRS and GGRF ultimately fail, the
11 Chairman should find a replacement negotiator so that he is not involved in negotiating with
12 ASC.

13 A copy of these Findings shall be provided to the parties and their respective attorneys,
14 in accordance with 5 G.C.A. Section 5702, and shall be made available for review on the OPA
15 website www.guamopa.org.
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18 RESPECTFULLY SUBMITTED THIS 12th day of March, 2008

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22 **ROBERT G.P. CRUZ, ESQ.**
23 **Hearing Officer, Office of the Public Auditor**
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