



Jerrick Hernandez <jhernandez@guamopa.com>

OPA-PA-25-007 In the Appeal of ASC Trust, LLC

Jamaica Nakama <jnakama@arriolafirm.com>
To: jhernandez@guamopa.com
Cc: William B Brennan <wbrennan@arriolafirm.com>

Tue, May 27, 2025 at 3:40 PM

Hafa Adai,

Please see the attached for filing.

Thank you.

Jamaica Nakama

Legal Assistant to William B. Brennan, Esq.

ARRIOLA LAW FIRM, LLC

259 Martyr Street, Suite 201

Calvo-Arriola Building

Hagatna, Guam 96910

Tel: 671.477.9730/33

Email: jnakama@arriolafirm.com

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OPA-PA-25-007 ASC Comments on Agency Report.pdf
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WILLIAM B. BRENNAN, ESQ.
ARRIOLA LAW FIRM, LLC
259 MARTYR STREET, SUITE 201
HAGÁTÑA, GUAM 96910
TEL: (671) 477-9730/33
attorneys@arriolafirm.com

Attorneys for Appellant
ASC Trust, LLC

**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

ARRIOLA LAW FIRM, LLC HAGÁTÑA, GUAM 96910

In the Appeal of

) Docket No. OPA-PA-25-007
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) **COMMENTS ON AGENCY STATEMENT**
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ASC TRUST, LLC,

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) Appellant.
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COMES NOW, ASC Trust, LLC (“ASC”) through the undersigned counsel, who submits
ASC’s comments in response to the Government of Guam Retirement Fund’s (“GGRF”) Agency
Statement filed in this matter on May 15, 2025.

COMMENTS ON AGENCY STATEMENT

On March 17, 2025, GGRF issued a request for proposal, seeking a provider of Plan Administration Services related to the Defined Contribution Retirement System 457(b) Deferred Compensation Plan and Welfare Benefit Plan (the “RFP”). On March 31, 2025, ASC timely submitted the following question to GGRF: “Will Guam-based offerors receive any preference in evaluation scoring?” Notice of Appeal, Ex. A at p. 1 (April 30, 2025). GGRF responded on April 11, 2025, “(t)he evaluation criteria do not include any geographic preference or scoring advantage based on the offeror’s location.” Notice of Appeal, Ex. A at p. 1-2. On April 16, 2025, ASC filed a protest alleging *inter alia* that Guam law requires that GGRF give preference to local businesses that meet

certain requirements. Notice of Appeal, Ex. A. at p. 3 (April 30, 2025). In its decision denying ASC's protest, GGRF responded it would not apply the local preference in this procurement for professional services. See Notice of Appeal, Ex. B at p. 1-2 ("Reading § 5008(d) to require awarding a contract to a lower ranked firm based solely on price would directly conflict with the structured process mandated under Section 5216. . . As such Section 5216 and 2 GAR Section 3114 must control the selection process for professional services.").

In a slight of hand, the GGRF now contends that it has left open the possibility of applying the local preference at some point after the evaluation of proposals. GGRF does not cite to anything beyond general language in the RFP stating that a business license is required when a contract is signed.

I. GGRF concedes Guam law requires application of the local preference even in procurements for professional services.

GGRF posits that "for purposes of submitting an offer to provide professional services to GGRF . . . an offeror is not required to first prove that it has a license to do business on Guam and maintain an office or other facility on Guam – those requirements are to be met before contracting." Agency Statement at 3-4. GGRF also contends professional services procurement procedures require "the Purchasing Agency to evaluate and rank offerors based solely on qualifications, and to then negotiate with the most qualified firm first." Agency Statement at p. 5.

GGRF's position on appeal cannot be reconciled with its decision denying ASC's protest. The protest hinged on GGRF's admission that it will not apply the local preference at 5 G.C.A. Section 5008. In its decision denying ASC's protest, GGRF clearly stated it would not apply the local preference in this procurement for professional services. See Notice of Appeal, Ex. B at p. 1-2 (quoted *supra*).

GGRF's Agency Statement now concedes, but without any clarity, that it must apply some form of the local preference as part of the RFP process. Agency Statement at p. 4 ("The underlying purposes and policies can be met by conducting 5 GCA § 5008 eligibility after evaluations have resulted in selection and ranking of qualified offerors, such as during negotiations on terms of contract including pricing, and certainly before contracts are executed." (emphasis in original)). If GGRF has changed its position on ASC's protest, this appeal should be decided in ASC's favor and GGRF should be ordered to amend the RFP to clearly articulate what the process for Section 5008 application to the RFP will look like. GGRF offers no clarity on how the local preference will be applied in any meaningful way beyond its admission that the preference is applicable to this RFP.

II. Guam law clearly requires a local preference related to an RFP and during the evaluation process.

To the extent GGRF walks back its admission and suggests that it is not required to apply the local preference related to the RFP at issue or that it should not apply the preference until it is in negotiations with the highest ranked offeror, GGRF's position is inconsistent with the plain language and structure of the Guam Procurement law. See 5 G.C.A. Section 5011 (recognizing procurement policy in favor of service-disabled veteran owned businesses "except for professional services"). The local procurement preference applies to "all procurement of supplies and services . . .". See 5 G.C.A. § 5008. The definition section of the procurement law makes clear that "services," encompasses "professional services" procured under Section 5216. See 5 G.C.A. § 5030(s) ("the furnishing of labor, time or effort by a contractor, not involving the delivery of a specific end product other than reports which are merely incidental to the required performance," excluding employees or collective bargaining); see also, 5 G.C.A. Section 5030, Comment, ("The definition of services includes what are now known as consultant agreements, and retainer agreements with attorneys"). "Professional Services" is not distinguished as separate from "services" in Section 5030.

GGRF's position is also contrary to OPA precedent. See OPA-PA-07-002, In re Emission Technologies, Inc., Decision (August 1, 2007) (hereinafter "Emission Technologies"). In Emission Technologies, the Guam Power Authority ("GPA") issued an RFP seeking "Annual Emission Testing for GPA Power Generating Units". After hearing, the Public Auditor determined that Emission Technologies qualified for local preference at the time of proposal, and "[a]ward to an off-island vendor without a comparison to the price *or availability* of local vendors is inconsistent with 5 G.C.A. Section 5008. OPA-PA-07-002, Emission Technologies, Decision at p. 12. (August 1, 2007) (*emphasis added*).¹ Emission Technologies makes clear: (1) the local preference applies to the procurement of professional services under 5 G.C.A. Section 5216 and (2) Government agencies are required to conduct the local preference analysis during the procurement process. Emission Technologies, Decision at p. 12 ("Award to an off-island vendor without a comparison to the price *or availability* of local vendors is inconsistent with 5 G.C.A. Section 5008. . . ." (*emphasis added*)).²

Here, assuming that an offeror meets the local preference requirements and is otherwise qualified, that offeror must be preferred over any other off-island offeror. GGRF focuses only to the price-based language embedded in Section 5008, and ignores the preceding sentence. Agency Statement at p. 5. The entirety of Section 5008 states:

"Procurement of supplies and services from off Guam may be made if no business for such supplies or services may be found on Guam or if the total

¹ Overruled on jurisdictional grounds in SP0160-07, TRC Environmental Corporation v. Office of the Public Auditor (Nov. 24, 2008).

² See also, OPA-PA-06-003, In re Appeal of L.P. Ganacias Enterprise, Inc., dba Radiocom, Findings and Recommendations of Hearing Officer at pp. 16-17 (Mar. 12, 2007) ("There is no evidence in the record that any attempt was made prior to the procurement to determine if a local business for this particular supply or service existed, except for the assurance of the awardee that it is the only one. The record does not indicate that any price comparison was done in the course of this procurement between the awardee's product and the product of any local business. The Hearing Officer agrees with the CPO that some needs of the government must be procured from off-island. However, these must be justified by a significantly lower price or by a determination that no business for such supplies or services may be found on Guam.").

cost F.O.B. job site, unloaded, of procurement from off island is no greater than eighty-five percent (85%) of the total cost F.O.B. job site, unloaded, of the same supplies or services when procured from a business licensed to do business on Guam that maintains an office or other facility on Guam and that is one of the above-designated businesses entitled to preference.”

5 G.C.A. § 5008 (emphasis added). The Legislature’s use of the word “or” defeats GGRF’s argument.

If one or more local offeror(s): (1) is a service business actually in business, (2) doing a substantial portion of its business on Guam, (3) hiring at least 95% [specifically listed persons], and (4) (a) if that offeror offers the services sought or (b) no off island vendor offers the services at less than 85% of the local offeror(s), then the local offeror(s) is entitled to a preference in the procurement.

Section 5008 can therefore be harmonized with the qualifications process without limiting the focus to GGRF’s price-based analysis using the requirement paraphrased in 4(a). An offeror who is qualified and who is entitled to local preference must therefore be ranked over those offerors who are not entitled to local preference for services under Section (d) and greater Section 5008. GGRF’s argument to the contrary that price is the only basis to apply the local preference is an unreasonable limitation on the statute the Legislature did not mandate.³

III. ASC’s protest was raised within 14 days of when GGRF stated it would not follow the law.

GGRF next posits that ASC’s protest is based on a solicitation defect and was not timely raised. First, as stated above, GGRF concedes that it will apply the local preference, after it stated it would not in its response to ASC’s protest. GGRF’s arguments on timeliness fall flat, given its conflicting positions in the protest decision and now in this appeal. How could ASC have known it was agreed before GGRF cemented its decision one way or another?

³ Even assuming GGRF were correct, the procurement process would still require GGRF to compare the price of services sought from an off-island offeror with those of an offeror entitled to the local preference. GGRF does not give any explanation for how it could meaningfully do this in its recitation of the RFP process it may follow, concerning the local preference. See Agency Statement pp. 4-5.

The protest and appeal timelines in the Procurement law are jurisdictional. See Teleguam Holdings LLC, v. Guam, 2018 Guam 5 ¶¶ 20-22. An aggrieved individual must submit a protest within fourteen (14) days after the aggrieved individual *knows or should know* the facts giving rise thereto. 5 G.C.A. § 5425 (*emphasis added*). “A party becomes aggrieved at the point in which they become aware of a violation of one of the procurement law’s substantive provisions or the terms of the request for a proposal and therefore becomes *entitled to a remedy*.” CV0095-22, Johndel Int’l, Inc. dba JMI-Edison v. OPA et al., Dec. & Order p. 5-6 (Sept. 22, 2022) (internal punctuation omitted).

Section 5008 mandates that government agencies give a local preference when procuring supplies and services. Section 5008 does not say that its provision must be printed verbatim in every solicitation. Seeking clarity in how GGRF would apply the local preference to this procurement, ASC timely submitted a question to GGRF in the ordinary course of the procurement process. GGRF’s response that it did not intend to apply the local preference was provided on April 11, 2025. ASC then filed its protest on April 16, 2025. This was four days after ASC had knowledge that GGRF, at the time, intended not to apply the local preference related to the RFP.

If GGRF were correct, ASC and other offerors would have to protest every provision of Guam law not clearly stated in every solicitation within 14 days of receiving the solicitation. Otherwise, Agencies would be free to flout those laws they do not clearly state they will follow or apply to any given solicitation. This “catch me if you can” style of procurement protest and appeal is not the basis for the jurisdictional timelines in the Guam procurement law. The law, as discussed above, is clear, only on learning of an actual violation of law, not on an agency’s lack of specific inclusion of the law in its solicitation, does the 14-day period for an aggrieved bidder to protest begin. Thus, ASC’s protest was timely and the OPA has jurisdiction to consider this appeal.

CONCLUSION

Based on the foregoing, ASC requests that the OPA find that:

1. the GGRF must apply the local preference to the RFP and during the evaluation process;
2. given the GGRF's change in position, the OPA could in the alternative either remand this matter and order GGRF to amend the RFP to articulate how and when it will apply the local preference to this RFP; or
3. the OPA should order GGRF to cancel and resolicit the RFP in accordance with Guam law.

Respectfully submitted this 27th day of May, 2025.

ARRIOLA LAW FIRM, LLC
Attorneys for ASC Trust, LLC

By: 
WILLIAM B. BRENNAN

ARRIOLA LAW FIRM, LLC HAGÁTÑA, GUAM 96910