



Jerrick Hernandez <jhernandez@guamopa.com>

In the Appeal of ASC Trust, LLC, OPA-PA-25-007- GGRF's Rebuttal

Trevor-Jon Ada Ybarra <tybarra@camachocalvo.law>

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To: Jerrick Hernandez <jhernandez@guamopa.com>, "wbrennan@arriolafirm.com" <wbrennan@arriolafirm.com>, "attorney@arriolafirm.com" <attorney@arriolafirm.com>

Cc: "Arsima A. Muller" <amuller@carlsmith.com>, "Joanne L. Grimes" <jgrimes@carlsmith.com>, Vince Camacho <vcamacho@camachocalvo.law>

Dear Mr. Hernandez and Attorney Brennan,

Attached, please find the following for filing:

- GGRF's Rebuttal to ASC's Comments to GGRF's Agency Statement

Thank you,

TREVOR-JON ADA YBARRA**Legal Assistant | CC Law Group LLC**[356 E. Marine Corps Drive, Suite 201](#)[Hagatna, GU 96910](#)**Tel:** 671.472.6813 Ext. 327 **Fax:** 671.477.4375tybarra@camachocalvo.lawwww.camachocalvo.law**IMPORTANT/CONFIDENTIAL:**

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GGRF's Rebuttal to ASC's Comments to GGRF's Agency Statement.pdf

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CARLSMITH BALL LLP

JOANNE L. GRIMES

jgrimes@carlsmith.com

ARSIMA A. MULLER

amuller@carlsmith.com

1001 Bishop Street, Suite 2100

Honolulu, HI 96813

Telephone No. 808.523.2500

Facsimile No. 808.523.0842.

CAMACHO CALVO LAW GROUP LLC

VINCENT C. CAMACHO

vcamacho@camachocalvo.law

356 E. Marine Corps Drive, Suite 201

Hagåtña, Guam 96910

Telephone No. 671.472.6813

Facsimile No. 671.477.4375

Attorneys for

THE GOVERNMENT OF GUAM RETIREMENT FUND

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

In the Appeal of

ASC TRUST, LLC,

Appellant

and

THE GOVERNMENT OF GUAM
RETIREMENT FUND

Purchasing Agency

Docket No. OPA-PA-25-007

**GGRF'S REBUTTAL TO ASC'S
COMMENTS TO GGRF'S AGENCY
STATEMENT**

I. INTRODUCTION

The Government of Guam Retirement Fund ("GGRF"), by and through its Counsel, hereby submits its Rebuttal to ASC's Trust, LLC's ("ASC") Comments on the Agency Statement, with respect to ASC's (first) protest and subsequent appeal filed in connection with RFP No. GGRF-002-25. Specifically, this Rebuttal outlines why ASC's protest was untimely under 5 GCA § 5425(a), thus depriving the Office of Public Accountability (OPA) of jurisdiction to review GGRF's denial of ASC's protest. The Rebuttal further draws upon the Supreme Court of Guam's decision in *DFS Guam L.P. v. A.B. Won Pat Int'l Airport Authority*, 2020 Guam 20, as a binding authority that underscores the jurisdictional consequences of an untimely procurement protest. Alternatively, if the OPA determines it has jurisdiction, GGRF asserts that its solicitation and procurement practices complied fully with Guam procurement law, including 5 GCA § 5008.

II. LEGAL STANDARD: 5 GCA § 5425(a) – Timeliness as a Jurisdictional Prerequisite

Section 5425(a) of Title 5 Guam Code Annotated provides that:

"Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to ... the head of a purchasing agency. ***The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.***"

5 GCA § 52425(a)(emphasis added).

The statute establishes a clear and strict 14-day window for submitting such protests, and failure to do so renders the protest jurisdictionally barred. The Guam Supreme Court in *DFS Guam L.P.* reaffirmed this principle: "Timeliness is an essential component of the procurement protest framework, and it functions as a jurisdictional bar if not satisfied." *DFS Guam L.P.* at 2020 Guam 20 ¶77.

III. RELEVANT FACTUAL BACKGROUND: ASC's Knowledge of Protest Basis

March 17, 2025 – RFP No. GGRF-002-25 was issued. GGRF PR000156 and GGRF PR000277. The solicitation did not contain any local procurement preference clause under 5 GCA § 5008.

March 31, 2025 – ASC submitted a written question to GGRF explicitly noting the absence of a local preference provision. GGRF PR000279 and GGRF PR000249.

April 10, 2025 – GGRF issued written responses to questions (GGRF PR000279), reaffirming the RFP's terms and making no changes regarding local preference (GGRF PR000246 and GGRF PR000250)).

April 16, 2025 – ASC filed its protest with GGRF. (GGRF PR000249-252; GGRF PR000280).

IV. ARGUMENT

A. ASC's Protest Was Untimely Under 5 GCA § 5425(a).

ASC's protest was untimely and legally barred under 5 GCA § 5425(a):

*“Any actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to ... the head of a purchasing agency. **The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.**”*

5 GCA § 5425(a) (emphasis added).

ASC alleges that GGRF violated Guam procurement law by omitting a local preference evaluation factor required by 5 GCA § 5008. However, the absence of any such local preference language was apparent in the RFP issued on March 17, 2025 and ASC should have then known of the alleged basis for its protest. On March 31, 2025, ASC had submitted a formal written question to GGRF, raising this specific issue and thereby confirming its actual knowledge and awareness of the alleged basis for its protest.

Accordingly, under § 5425(a), ASC had 14 calendar days from March 31, 2025, to file its protest. That deadline fell on April 14, 2025. Yet ASC did not file its protest until April 16, 2025—two days late. Because the statute imposes a jurisdictional time limit, ASC's protest is untimely and legally barred.

B. Guam Supreme Court Precedent Confirms Timeliness is Jurisdictional.

The Guam Supreme Court has made clear that strict compliance with § 5425(a) is a jurisdictional prerequisite. In *DFS Guam L.P.*, the Court held: “A protest that challenges the content of an RFP must be filed within 14 days of when the protestor knew or should have known of the basis of protest.” *DFS Guam L.P. at 2020 Guam 20*, ¶ 77.

The Court further explained: “The time runs from the date on which the protesting party first learned of the purported misconduct.” — *Id.*, ¶ 89.

Here, ASC learned of the absence of the § 5008 provision as early as March 17, 2025 when it received the RFP and no later than March 31, 2025, when it raised the issue in writing. The Supreme Court's reasoning in *DFS Guam L.P.* squarely applies: knowledge of the defect triggers the 14-day deadline, not the date of the proposal deadline or the issuance of any agency response. Moreover, *DFS Guam L.P.* rejected the notion that ongoing communications or proposal deadlines reset the statutory clock. The protestor must act promptly upon discovering the alleged impropriety.

C. OPA Precedent Confirms Protest Deadline Runs from the Date of Knowledge.

The OPA similarly held that a protestor's knowledge of the basis for protest—not the timing of contract award—controls the jurisdictional deadline under § 5425(a). In *OPA-PA-24-004*, the protestor, Data Management Resources, LLC (“DMR”), filed its protest on July 12, 2024, within 14 days of the Notice of Award. However, the Public Auditor found that the defect

in the procurement was apparent as of the bid opening on June 12, 2024. *See generally* OPA-PA-24-004, *Decision and Order re Motion to Dismiss* (Dec. 6, 2024)

The OPA finds "... that the date of when DMR 'knew or should have known' the issue to be June 12, 2024... [and] finds that DMR's protest was therefore untimely." *Id.*, at pp. 3–4.

Despite being within 14 days of the award, the protest was dismissed because DMR had failed to act within 14 days of becoming aware of the relevant facts. That ruling mirrors the analysis in *DFS Guam L.P.* and directly supports GGRF's position here.

ASC, like DMR, knew of the basis for its protest by March 31, 2025, but did not file until April 16, 2025. Under both Supreme Court and OPA precedent, this delay is jurisdictionally fatal.

D. Jurisdiction Cannot Be Waived and May Be Raised at Any Time.

Even if GGRF had not raised this objection, it would not waive the jurisdictional defect. It is a foundational legal principle that subject matter jurisdiction is non-waivable and may be raised at any stage of a proceeding.

The Guam Supreme Court reaffirmed this principle in *Port Authority of Guam v. Civil Service Commission*, "It is well settled that a lack of subject matter jurisdiction may be raised at any time during the proceedings and may even be raised by the court *sua sponte*." *Port Authority of Guam v. Civil Service Comm'n*, 2018 Guam 1, ¶ 18

This rule applies equally to administrative bodies such as the OPA. In *DFS Guam L.P.*, the Court emphasized that the 14-day protest rule under § 5425 is not a procedural formality but a jurisdictional threshold. *See generally*, *DFS Guam L.P.*, 2020 Guam 20.

As such, the OPA must independently dismiss this protest for lack of jurisdiction—even if neither party raised the issue in the initial stages.

V. ALTERNATIVE ARGUMENT: NO VIOLATION OF 5 GCA § 5008

Should the OPA determine that it has jurisdiction, GGRF asserts that the solicitation was lawful and consistent with Guam procurement statutes and regulations.

A. Section 5008(e) Encourages Local Preference but Does Not Mandate It.

Section 5008(e) of Title 5 Guam Code Annotated requires that solicitation terms “be drafted to promote participation in the solicitation by local bidders and offerors to the maximum extent practicable consistent with the needs of Guam.” 5 GCA §5008(e). The statute further clarifies that no specification “shall require off-island experience” unless justified in writing—but does not mandate that solicitations must include a local preference evaluation factor. *Id.*

B. Separate Qualifications-Based Criteria govern Professional Services Procurements.

RFP No. GGRF-002-25 was issued for plan administration services, which qualifies as procurement of professional services under 5 GCA § 5216 and 2 GAR § 3114. These regulations prioritize qualifications, competence, and performance history—not price preference—in selecting providers. 5 GCA § 5216; 2 GAR § 3114. Accordingly, omitting a local preference factor in this context was appropriate and legally permissible.

C. Commentary to § 5008 Supports Balanced Discretion.

The legislative comment to § 5008 acknowledges that while local business participation should be encouraged, it should not come at undue cost to the general treasury. The statute was not intended to compel automatic application of local preferences, particularly where government needs—such as experience and expertise in regulated plan administration—require broader considerations. 5 GCA §5008 cmt.

D. Emissions Technology Case Is Factually and Legally Distinct

ASC's reliance on *In the Appeal of Emissions Technology*, OPA-PA-07-002, is misplaced, because ASC does not allege that GGRF failed to comply with the terms of the RFP, as GPA had done in the underlying procurement. The OPA's decision in *In the Appeal of Emissions Technology*, OPA-PA-07-002, involved a protest concerning a Guam Power Authority (GPA) procurement for emissions testing services. In that case, Emissions Technology—a Guam-based vendor holding a valid Guam business license—submitted a timely and compliant proposal. However, GPA awarded the contract to TRC Solutions, an off-island firm that lacked a Guam business license at the time of proposal submission, as explicitly required by the RFP. The Public Auditor found that GPA's inconsistent application of this threshold eligibility requirement violated 5 GCA § 5008, resulting in preferential treatment of a non-compliant off-island vendor and the exclusion of a fully qualified local offeror. *Id.*

In contrast, GGRF's RFP No. GGRF-002-25 did not impose any threshold licensing or eligibility requirement that would exclude local or off-island vendors. The solicitation was issued as a qualifications-based procurement for professional services under 5 GCA § 5216 and 2 GAR § 3114 and applied neutral evaluation criteria across all offerors. No vendor was barred or disadvantaged based on licensure status, place of business, or other exclusionary terms.

Although GGRF's solicitation did not include a local preference factor under § 5008, this provision is discretionary and not mandatory in the context of professional services procurements, where selection is based on technical competence and experience—not solely on pricing. GGRF's approach preserved maximum participation by all qualified vendors and aligned with the statutory goal of promoting local engagement without contravening procurement law.

Accordingly, unlike *Emissions Technology*, there was no facial disqualification, unequal treatment, or selective enforcement of mandatory requirements in GGRF's RFP. The procurement was lawful, inclusive, and compliant with 5 GCA § 5008, and presents no basis for reversal under OPA's precedent.

E. Local Preference May Be Applied Only After Offerors Are Ranked in a Qualifications-Based Procurement

In qualifications-based procurements—such as GGRF's RFP No. GGRF-002-25—the primary goal is to select the best qualified offeror based on technical expertise, relevant experience, and past performance rather than on price. Pursuant to 5 GCA § 5216 and 2 GAR § 3114, GGRF is required to first evaluate and rank proposals based solely on these qualifications before entering into price negotiations or awarding cost-related points. 5 GCA § 5216; 2 GAR § 3114.

Because this evaluation framework does not involve a traditional lowest price determination, the only practicable way to apply a local preference under 5 GCA § 5008—if at all—is after the initial qualification ranking is complete. Any earlier application of a local firm preference would be inconsistent with the regulatory model governing professional services and could improperly skew the qualifications assessment.

Accordingly, GGRF's neutral position in this RFP—omitting a local preference factor while maintaining open eligibility—preserved the integrity of the qualifications-based process. Should a local firm emerge as a top-ranked best qualified offeror, GGRF retains the discretion to award the contract in complete alignment with both § 5008 and the procurement regulations. Thus, GGRF's approach is not only lawful but structurally designed to maximize both compliance and competition.

As GGRF noted in its Agency Statement, it would have been inconsistent to apply a local price preference before initial ranking, given the qualifications-based nature of the RFP governed by 5 GCA § 5216 and 2 GAR § 3114. *See GGRF Agency Stmt.* 4-5, May 15, 2025. The RFP was structured deliberately to maintain neutrality and maximize competition from all qualified providers, whether local or off-island at the time of their proposals. *Id.* The Agency Statement further affirms that the application of the local preference under § 5008 is not mandatory in all cases, particularly where it would conflict with the statutory framework for professional service procurements. *Id.*

This approach ensures both legal compliance and robust competition. By keeping the RFP open to all potentially qualified providers, GGRF preserved the fairness and objectivity of the selection process. Accordingly, GGRF's decision to omit a § 5008 local preference from the initial evaluation criteria reflects a neutral and legally sound approach.

VI. CONCLUSION

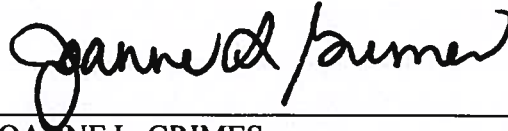
GGRF respectfully requests that OPA dismiss ASC's appeal for lack of jurisdiction under 5 GCA § 5425(a). ASC filed its protest more than 14 days after it known or should have known of the alleged violation of 5 GCA § 5008. Pursuant to the holding in *DFS Guam L.P.*, 2020 Guam 20, untimeliness is a jurisdictional bar, and no equitable extension is available.

Alternatively, should OPA determine it has jurisdiction, the protest should still be denied on the merits. GGRF's RFP was issued in full compliance with Guam procurement law, including 5 GCA § 5008 and applicable regulations governing professional services.

OPA must decline to hear or otherwise deny this protest in its entirety.

Respectfully submitted this 3rd day of June 2025.

CARLSMITH BALL LLP



JOANNE L. GRIMES
ARSIMA A. MULLER

Attorneys for
THE GOVERNMENT OF GUAM
RETIREMENT FUND

CAMACHO CALVO LAW GROUP LLC



VINCENT C. CAMACHO

Attorneys for
THE GOVERNMENT OF GUAM
RETIREMENT FUND