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

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Hafa Adai,

Please see the attached Opposition for filing.

Thank you,

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ASC TRUST LLC'S OPPOSITION TO GGRF'S MOTION TO DISMISS.pdf
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**BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL**

ARRIOLA LAW FIRM, LLC HAGÅTÑA, GUAM 96910

In the Appeal of

ASC TRUST, LLC,

Appellant.

Docket No. OPA-PA-25-007

**ASC TRUST LLC’S OPPOSITION TO
GGRF’S MOTION TO DISMISS**

COMES NOW, ASC Trust, LLC (“ASC”) through the undersigned counsel, who submits ASC’s response to the Government of Guam Retirement Fund’s (“GGRF”) Motion to Dismiss filed in this matter on June 24, 2025.

GGRF’s Motion would turn Guam law on its head, allowing agencies to flout Guam law under the cover of night. Here, nothing in the procurement law requires GGRF to list verbatim those provisions of the Guam procurement law it is complying with and those it does not. Yet, GGRF takes the position that the lack of such recitation in its RFP put ASC on notice that GGRF intended to violate Guam law. This position would turn the Guam procurement law and the protest and appeal scheme into a catch me if you can game for agencies. GGRF’s position is not consistent with Guam law and should be rejected. GGRF’s motion to dismiss should be denied.

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FACTUAL BACKGROUND

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? If so, how will such preference be quantified, and what documentation is required?” 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).

ARGUMENT

GGRF posits that because it did not include a reference to 5 GCA Section 5008 and Guam the local procurement preference in the RFP, it is excused from complying with the law so long as no potential offeror calls out the omission within 14 days of the RFP’s publication. Mot. at pp. 3-6. GGRF’s argument must be rejected.

ASC concedes 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” under the procurement law at the point at which they become entitled to a remedy. DFS Guam L.P. v. A.B. Won Pat Int’l Airport Auth., 2020 Guam 20 ¶ 84. This remedy must be based “on allegations that the procurement is not in accordance with the statutes, regulations and the terms and conditions of the solicitation.”

Id. In order to determine the date on which the 14-day window of section 5425(a) begins to run, the court must conduct an analysis examining what facts are necessary to establish a protest claim and when the protester knew, or should have known, facts establishing the essential elements of that protest claim. Id. at ¶ 88. The Superior Court of Guam, has found “[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, *emphasis added*) (further reasoning “the focus is not on *what is being protested* but rather the *knowledge of the facts supporting the protest.*” (*emphasis added*)).

In CV0095-22, the purchasing agency argued that a bidder’s protest was untimely since the basis of the protest was public information *available* to the bidder for more than 14 days before the protest was filed. In rejecting this argument, the Court reasoned “to be aggrieved, a bidder must become aware of a *violation* of the procurement law.” Johndel Int’l, Inc. dba JMI-Edison, at p. 7. The Court determined that the proper measure was from when the aggrieved bidder became aware of the specific facts supporting its protest – there that a bidder did not hold a license for work contemplated by the RFP, not just when those facts were generally available. Id. at 6-7.

In DFS, the Supreme Court analyzed a timeliness challenge where a purchasing agency had discussions about random letter designations during an open meeting on March 28, 2013, where the protestor’s representatives were present. DFS Guam L.P., 2020 Guam 20 at ¶ 103-107. The Court found that at the conclusion of the meeting, there was no definitive answer on whether the designations would continue to be used, given the questions raised during the meeting. Id. At a subsequent meeting on April 12, 2013, it became clear that the Board would move forward with the letter designations. Id. at 107. The Supreme Court found the April 23, 2013 protest was within 14

days of the second meeting on April 12, 2013 and constituted a timely protest. The Court found the triggering date was not March 28, 2013 because it was not clear that the purchasing agency would use the letter designations after questions were raised during the initial March 28 Board Meeting – meaning the protestor was not at that point aggrieved by the potential use of the letter designations.

Here, ASC’s protest hinges on GGRF’s failure to apply the local procurement preference at 5 G.C.A. Section 5008. When the RFP was published on March 17, 2025, ASC timely submitted a written question as called for in the RFP, asking:

1. Will Guam-based offerors receive any preference in evaluation scoring?
If so, how will such preference be quantified, and what documentation is required?

Notice of Appeal, p. 2 (Apr. 30, 2025). GGRF could have answered the question in the affirmative, and explained how the preference would be applied. If this occurred, ASC would not have been aggrieved, similar to DFS and the letter designation protest found timely by the Supreme Court. If GGRF had responded that the procurement preference applied, ASC would not have been entitled to a remedy. When the RFP was issued, ASC had no definitive answer on whether the local preference would be applied or not, similar to the letter designation issue from DFS. However, when GGRF answered on April 11, 2025 that *inter alia* “the evaluation criteria do not include any geographic preference or scoring advantage based on offer’s location. Therefore, no additional documentation related to Guam-based status is required for evaluation purposes” – ASC became aware of a violation of the procurement law’s substantive provisions.

Put a different way, 5 GCA Section 5008 does not require GGRF to print the local procurement preference verbatim in its RFP. See 5 G.C.A. Section 5008. Therefore, the lack of the specific language from Section 5008 in the RFP did not trigger ASC’s right to protest since that omission did not itself constitute a violation of Guam law. Similar to the JMI case, GGRF cannot show that ASC

was aware GGRF would not follow the law, until GGRF said it would not follow the law. ASC's knowledge that GGRF did not intend to follow Section 5008 is what triggered the 14-day protest period, and not its lack of an affirmative statement in the RFP that it would follow the law – because no such statement is required. Because ASC was not entitled to a remedy or relief until April 11, 2025 when it had knowledge that GGRF intended not to follow the law, its April 16, 2025 protest four days later was timely.

GGRF's lone citation to *In re Appeal of DMR*, does not affect this analysis. In *DMR*, two protester representatives were present at a bid opening where the information concerning their protest was made known. OPA-PA-24-004, *In re Appeal of DMR*, Dec. & Order at 2 (Dec. 6, 2024).¹ The protest was filed 30 days after the bids were opened and 14 days after a notice of award was issued. *Id.* at pp. 2-3. The Public Auditor determined that the protestor was aware of lower bids and should have protested on learning that other bidders were being considered for award. *Id.* *DMR* is distinguishable from this case because ASC did not wait until a notice of award to a non-local vendor was issued. Rather, within 14 days from April 11, when GGRF stated it would not apply the local preference, ASC protested the procurement.

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

¹ *In re Appeal of DMR* also appears to be inconsistent with the Superior Court's holding in CV0095-22, which rejected the argument that where information necessary for a protest is publicly available, the availability of such information is the starting point to a 14-day protest timeline. CV0095-22, JMI, Dec. & Order at pp. 5-7.

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 and affirmatively 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.²

CONCLUSION

Based on the foregoing, ASC requests that the OPA deny the GGRF’s Motion to Dismiss this matter.

Respectfully submitted this 1st day of July, 2025.

ARRIOLA LAW FIRM, LLC
Attorneys for ASC Trust, LLC

By: 
WILLIAM B. BRENNAN

² ASC must restate that 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 then conceded, 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, GGRF’s Motion must be denied. How could ASC have known it was aggrieved before GGRF cemented its decision concerning the local preference one way or another?