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

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Please see the attached Hearing Brief for filing.

Kind regards,

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

In the Appeal of

ASC TRUST, LLC,

Appellant.

Docket No. OPA-PA-25-007

HEARING BRIEF

COMES NOW, ASC Trust, LLC (“ASC”) through the undersigned counsel, who submits
ASC’s hearing brief in anticipation of the hearing in this matter set for September 29, 2025 at 9:00
a.m.

BACKGROUND

GIAA anticipates offering the following into the record at a hearing of this matter through the testimony of Ms. Paula Blas, the Government of Guam Retirement Fund’s (“GGRF”) Executive Director. 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. “The 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.").

ISSUES PRESENTED

Does GGRF intend to apply the local procurement preference at 5 G.C.A. Section 5008 to the RFP? If so, how will the local preference affect the RFP process?¹

ARGUMENT

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.

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

¹ This Hearing Brief assumes the issue of timeliness will be addressed via GGRF's currently pending and argued motion to dismiss on timeliness grounds.

(“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.” (emphasis added)).

GGRF’s Agency Statement offered a different position, that GGRF must apply some form of the local preference as part of the RFP process. Agency Report 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 waffling demonstrates 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.

II. Guam law clearly requires local preference be given, even related to an RFP and during the evaluation process.

To the extent GGRF argues 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 awarding procurements to service-disabled veteran owned businesses “except for professional services”). The local procurement policy speaks to “all procurement of supplies and services”. See 5 G.C.A. § 5008. Similarly, 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”).

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 the 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).² 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*)).³

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 attempts to buttress

² Overruled on jurisdictional grounds in SP0160-07, TRC Environmental Corporation v. Office of the Public Auditor (Nov. 24, 2008).

³ 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.”).

its argument by pointing only to the price-based language embedded in Section 5008, and ignoring the preceding sentence. 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 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 qualification. An offeror who is qualified and who is entitled to local preference must be ranked over those offerors who are not entitled to local preference for services under Section (d) and greater in 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 intend.⁴

CONCLUSION

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

1. The GGRF must apply the local preference to the RFP;

⁴ 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.

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.⁵

Respectfully stipulated this 19th day of August, 2025.

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⁵ ASC reserves the right to modify its request for relief in a remedies relief depending on the evidence put forward during a hearing of this matter.