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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF: **GUAM MEDICAL REFERRAL SERVICES,** Appellant, vs. **GENERAL SERVICES AGENCY,** Purchasing Agency.	DOCKET NO. **OPA-PA-20-002** **GENERAL SERVICES AGENCY MOTION TO DISMISS**

INTRODUCTION

Comes now the Guam General Services Agency ("GSA") by and through its counsel and files this Motion To Dismiss based on mootness and lack of merit in the Appeal and underlying Protest.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS

On November 7, 2019, the Medical Referral Assistance Office ("MRAO"), which exists within the Office of the Governor of Guam and is now governed by 5 G.C.A. Chapter 1, Article 11.1, published a Request for Proposals ("RFP") in this case. *Tab 3, Procurement Record.* Amendments to the RFP occurred on November 13 and 18, 2019 regarding advertisement date and submission and Question & Answer dates, respectively. At least six (6) potential offerors filled out the Offerors' Register on the 20th and 21st of the same month. A third amendment to the RFP, again about submission date, occurred on November 29, 2019. The first of several Notices of Stay of Procurement was issued on December 16, 2019. This was followed by Amendment #4, regarding compensation, occurring on December 23, 2019. Three (3) days later, on the 26th, Appellant filed its Protest[1] Letter at issue in this case. The next day, on the 27th, there was an MRSI protest, again about submission date.

On the 30th of December, 2019, there was a 5th RFP amendment about submission date, another Notice of Stay of Procurement was issued, and GSA issued a Question Response about the postponement of the offer opening date until further notice. More Notices of Stay of Procurement were issued on January 27, 2020, and on February 3, 12, and 17, 2020. GSA issued RFP Amendments #6 and 7 on January 29 and February 10, 2020, about revised evaluative criteria and submission date respectively. GSA's Protest Denial to Appellant was on February 8, 2020, and Appellant filed the ensuing Protest Appeal at the Office of the Public Auditor ("OPA") on February 11, 2020. GSA's Procurement Record was filed at the OPA on February 19, 2020 (and forwarded to the Executive Management Office of the Office of the Governor two (2) days prior. GSA's filed Agency Report followed on February 26, 2020. On Mar. 3, 2020, GSA's counsel entered an appearance and simultaneously, Appellant filed an additional protest about the procurement record. Appellant submitted Comments on GSA's Agency Report three (3) days later, and on the 11th of March, GSA filed the present Motion To Dismiss.

[1] Protest- Appellant also filed protests on November 13, 2017, December 16, 2018, and December 26, 2018.

II. BIAS IS SPECULATIVE AND UNSUPPORTED BY EVIDENCE; SIMPLE RATIONAL BASIS FOR FACTOR AMENDMENT IS EASY TO FIND

Appellant asserts in the Appeal and in the Comments[2] to the Agency Report ("Comments") that the amendments made by GSA to the RFP evaluative factors have no other explanation than to show bias favoring a less experienced offeror. This assertion is flawed for four (4) reasons.

First, **no evidence** is offered to establish such bias. Appendix A (Page 2 of 2-11-20 Notice of Appeal) shows that Appellant is **blowing smoke** regarding alleged bias because Appellant cannot even name *any* other *potential* **Competing Offerors.** This **violates** the **filing requirements** in Part IV of Appendix A of the Protest Appeal Process which requires an eligible Appellant to **submit evidence substantiating any claims.**

Second, Appellant's language choice showcases its speculative nature. In the Notice of Appeal, (the page after Appendix A), Appellant argues that the RFP amendment has re-weighed the evaluation criteria "for no apparent reason and **most probably** to disadvantage one potential offeror and favor another". This is conjecture at best, and again **violates** the **filing requirements in Part IV of Appendix A requiring Appellant to submit evidence substantiating any claims.**

Third, if there is any bias, it would not be against Appellant since treatment toward Appellant so far has been even-handed if not polar towards Appellant. This is displayed in how GSA has granted-in-part Appellant's December 23, 2019 Protest, and granted-in-full Appellant's November 18, 2019 protest.

Fourth, in stark contrast to Appellant's characterization of the new evaluative factors and values only having one possible explanation of bias, a first-blush fresh-eyes glance at the edited factors gives the simple sense that A) the Guam Medical Referral Assistance Office ("MRAO") desired to consider more factors and evaluative percentage points had to come from *somewhere*, B) the MRAO desired to comply with the new statute (5 G.C.A. §11.2(e)(1)) which requires the

[2] Comments- The Comments are essentially a rehash of the Appeal.

voucher system, and C) the MRAO desired to have this noticeably different new statutorily-mandated aspect paid-attention-to and **done right the first time** for precedent's sake.

III. VOUCHER SYSTEM IS REQUIRED BY NEW MRAO STATUTE

As mentioned above, the voucher system is required by the new MRAO statute, 5 G.C.A. §11.2(e)(1). On Page 3 of the Appellant's Comments on the Agency Report, in ¶2, Appellant argues against 1/5 of the possible evaluative points going towards an "**undeveloped system that is not germane to performance**". Appellant roots this statement in its Footnote 3 which states "the GSA itself sees the voucher system as no more than an accounting practice to ensure proper billing and compensation". It matters not what GSA sees the voucher system as. What matters is that it is required by the new MRAO statute and it is the MRAO's right to determine and amend the weight given to it.

IV. THE MRAO AND GSA HAVE THE POWER TO DETERMINE AND AMEND EVALUATIVE CRITERIA

The regulation at 2 GAR, Div. 4, §3114(f)(2) states, in relevant part, "(2) Evaluation. Proposals shall be evaluated only on the basis of evaluation factors stated in the Request for Proposals. The following factors may be appropriate to use in conducting the evaluation. **The relative importance of these and other factors will vary according to the type of services being procured. ....**" (emphasis added). In dissecting this regulation, "shall be evaluated" refers to an act by the MRAO. *Id.* Such evaluation is on the basis of factors. *Id.* The weight or "relative importance" of these factors will vary based on the type of services being procured. *Id.* Here, the **type** of services being procured and the method of procuring it have drastically and recently been changed[3] by statute. It follows that the "relative importance" of its determinative factors would

[3] Drastically and recently been changed- Even Bill 30-34 by Sen. Rodriguez acknowledges that these services have "evolved".

change alongside it. Additionally, imagine the chaos that would result if evaluative factors and the weight given to them were determined by offerors and interested parties. The turmoil would not end at Appellant's gentle suggestions. Others would chime in endlessly, tailoring the factors to their not-for-profit's strengths.

In its Comments on the Agency Report, Appellant argues against this factor-and-weight determinative power of the MRAO by stating that as a result of the change, a "wholly new criterion for evaluation was created" and that up till now, a voucher system was not required or used in the performance of the contracted service. This is unavailing because it is not a defense to say that the old law applies, and per §3114(f)(2), the MRAO's authority over factors and weight is evident.

To bolster the MRAO's factor-determinative power, Page 11 of 58 of the RFP, §X ("Right To Amend, Cancel, or Reissue") clarifies that "[t]he MRAO **reserves the right to amend... the RFP, in whole or in part at any time... when this action serves the best interest of the MRAO**". It would be in the best interests of the MRAO to comply with the voucher system provisions of the new applicable statute, and to adjust evaluative factors according to its reasonable, reserved, and explicit discretionary right to amend.

V. NATURE OF THE RFP PROCESS DETERMINES WHO DEVELOPS VOUCHER SYSTEM

Let us return to Appellant's complaint above that this voucher system is an "**undeveloped** system that is not germane to performance". Appellant doubled down on this complaint by adding that neither the offerors nor the GSA presently know what the voucher system will be nor how it will be used. This, however, is the nature of a request for proposals ("RFP"). In an RFP, the offeror makes the plan and effectively tells[4] the using agency what the using agency wants. Put

[4] Tells- This is in contrast to the IFB process in which the using agency specifies exactly what it wants and basically asks for a lowest price.

another way, this RFP system basically says "this is what I want to happen, you tell me how you would make it happen". In other words, this objection of Appellant simply points out its own nonresponsiveness and nonresponsibiity in having no willingness to create a plan, and points out no flaw of GSA or the MRAO since the using and purchasing agencies are not expected to know what offerors will be planning in their packaged offers. Moreover, if Appellant really is unwilling to try to plan a voucher system, it can pose questions and discuss this issue during the Question and Answer phase of the solicitation and during Negotiation (after which there is *still time* to amend the offer, per the RFP), rather than protest a fundamental aspect of the RFP process.

VI. DEVELOPING VOUCHER SYSTEM IS OFFEROR'S DUTY

Appellant argues on Page 2 of its Comments and in its Appeal, on the page after Appendix A, that developing the voucher system is "an obligation that **properly belongs to the Agency**." This argument is flawed for several reasons.

First, the **plain language** of the statute shows that development of the voucher system is the duty of the offeror. 5 G.C.A. §11.102(e)(1) states, in pertinent part,

> "For those residents who are not eligible for existing services provided by health insurance companies, referring facilities, or local not-for-profits, the MRAO may: (1) develop a request for proposal to provide assistance services from a duly registered Guam-based not-for-profit organization that can provide such services, including coordination of appointments, transportation, and lodging. This **proposal** shall use a voucher type system to provide direct services to residents seeking off-island care...." (emphasis added).

The statute does not pin the voucher system setup on the MRAO. *Id.* On the contrary, the passage above, highlighted in Appellant's Comments, states "**this proposal**" shall use a voucher type system. *Id.* It does not state this "**request for proposal**" (which is drafted by the MRAO). *Id.* Rather, it states "this **proposal** (shall use a voucher type system)". *Id.* The proposal is the **result** of the RFP, which means it is **drafted by the offeror.**

Second, per Page 2 of 58, §III, of the RFP, the MRAO "is soliciting written proposals". This shows that a proposal is the **offeror's** job, not the MRAO's job. Per the same page, §II(1),

the MRAO "will require **Offeror(s)....to be ultimately responsible for services provided as part of the proposal of Offeror(s).**" This maps out, in case it is not already known through experience, which entity creates and is responsible for a proposal.

Third, to be even more clear, in case one would venture into saying that "proposal" can be interpreted as "request for proposal", Page 3 of 58 of the RFP states, at §VII, that "all proposals **in response to this RFP solicitation**". In so stating, §VII establishes that the proposal is the offeror's duty and is separate and apart from the RFP and from any MRAO duty (the MRAO would have no need to respond to itself by filing a proposal to its own RFP).

VII. VOUCHER SYSTEM FACTOR WAS GIVEN APPROPRIATE WEIGHT

Appellant discusses "re-weight absurdity" on Pages 3 and 4 of its Comments[5] and closes by concluding that GSA incorrectly assigned the lion's share of points to a voucher system which is "unrelated to contract performance". GSA proposes that managing, approving, verifying, and recording[6] services received by each patient and authorized escort **is** related to contract performance.

From a common-sense and appropriate-to-complain perspective, would one protest a math exam being twenty (20) questions? Of course not. Many math exams are twenty (20) questions long. This is relevant in that each question on such a math exam would be worth only five percent (5%) of the grade. It would be irrational to protest the weight given to each question. Yet Appellant is clamoring for the importance of an evaluation criterion (experience) that already is given more than that five percent (5%). The factor of experience has been given fifteen percent (15%) importance. Fifteen percent (15%) of importance is not nothing in any evaluation. Even if

[5] Comments- Appellant's Comments on the Agency Report call itself the Appellant in the caption, but call itself the Appellee in the body of Page 1.

[6] Managing, approving, verifying, and recording- Appellant had previously complained about how Tab 10 of the Procurement Record states "the Voucher System that **is to be developed** is an internal control between the Guam Medical Referral Office and the winning Offeror to manage, approve, and verify and record services being received by each patient (and authorized escort)".

the student in the math test were more familiar with and had more experience with division, is it not the teacher's prerogative to give the new material, like integrals and derivatives, that many students (and perhaps even the teacher) have not figured out yet, more weight?

VIII. EXPERIENCE

A. REPUTATION IS WHAT MATTERS, LION'S SHARE IS STILL EXPERIENCE/REPUTATION

IF an offeror happens to be an **incumbent**, its **reputation will speak volumes and will speak for itself**. The evaluative factor of **reputation**, more specifically, "[t]he firm's reputation for proposal and professional integrity and competence", in §XII(4) of the RFP, **retained its same weight at ten (10) points**. Who, among the Evaluation Committee members walks around all year with the various past offerors' **record of past performance in hand**? No one. What lasts is the **impression given**, which is reputation. This almost shows that having both the record of past performance factor and the reputation factor is duplicative and that they are effectively the **same, lion's share factor** with the reigning[7] amount of thirty (30) points.

B. APPELLANT WILL BE ABLE TO MENTION EXPERIENCE THROUGH OTHER METHODS THAN EVALUATIVE CRITERIA

If Appellant is concerned about not being able to adequately mention its experience with similar contracts (at least under the old statute), those fears are put to rest by §XI(2)(E) of the RFP which calls for "[a] list of other contracts under which services similar in scope, size and discipline for the required services which the firm substantially performed or accomplished as the prime and/or principal in the past three years". Appellant and any other offerors can show off their experience in this subsection of the Statement of Qualifications and regardless of the official weight given, this statement will be visible and noticed.

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[7] Reigning- More than the voucher system factor #7 which weighs only twenty (20) points.

In addition, if seasoned offerors fail to adequately elaborate about their experience in writing in this Statement of Qualifications, they can say it out loud during the **Evaluation Interview** described on Page 5 of 58 of the RFP, §XIII(A), or during the **Discussions** described on Page 10 of 58 of the RFP, §IV. In other words, this evaluative factor amendment does not gag experienced offerors and tie their hands behind their backs. They can more than sufficiently make their experience known through established mechanisms in this RFP process.

C. IN LIGHT OF STATUTE CHANGE, APPELLANT HAS LIMITED EXPERIENCE

Having experience would be the prime basis for arguing for more evaluative weight to be given to experience. However, one could argue that Appellant has no experience doing *this* type of procurement since the law now is so markedly changed, expanded, and specialized. This, then, would moot the argument of bias (an argument for which Appellant has offered no proof), and would also moot the argument of giving too much weight to voucher system over experience since experience would no longer favor Appellant.

Along the same vein, this is a whole new program per the amended statute, so perhaps it would be prudent for the MRAO not to give so much weight[8] to experience. Rather, the MRAO may want an offeror that can demonstrate an ability to take the new ball and run with it.

IX. ALL AMENDMENTS ARE POST-PUBLICATION AMENDMENTS

Appellant repeatedly criticizes GSA's "post-publication amendment" when complaining about the January 29, 2020 Amendment 6, and also on Page 4 of its Comments. Most, if not all, solicitation amendments come **after** the **Q&A period**, which can only come once the RFPs have been published and distributed so that potential offerors and interested parties have something

[8] So much weight- Appellant essentially asks that the MRAO put five (5) evaluative points back to the factor of experience.

meaningful and non-speculative about which to ask questions. A pre-publication amendment would simply be another draft of the specifications.

Appellant cites 5 G.C.A. §5216(e)("Award shall be made to the offeror determined in writing by the head of the purchasing agency or a designee of such officer to be best qualified based on the evaluation factors set forth in the Request for Proposals") in arguing that an amendment after publication is impermissible at the outset. However, an amendment, once adopted and not objected to, *becomes* part of the Request for Proposals. So when the amendment occurs, it does not affect an award's being properly made based on evaluation factors in the RFP.

To cross-check the **nature of amendments** (all being post-publication), see Page 8 of 58 of the RFP, under §II of the General Terms and Conditions. Moreover, if it is so bad that amendments are done **post-publication,** as alleged, then **why is Appellant not complaining about the other numerous post-publication amendments** to the RFP? There were roughly seven (7) in total.

X. MANY IMPORTANT REQUIREMENTS DO NOT APPEAR ON EVALUATIVE FACTOR LIST, BUT THIS DOES NOT RENDER LIST OR RFP INCORRECT

Appellant attempts to undermine the MRAO's evaluative factor list and weight designation by stressing that **all manners of things are necessary** to meet the requirements of law to make a successful RFP response, and cites being a not-for-profit, not colluding, and agreeing to general and special conditions as examples. This is correct; there are various requirements that do not make it to the evaluation criteria, at least not explicitly. This falls within GSA's and MRAO's discretion under 2 GAR, Div. 4, §3114(f)(2). And this is not unheard of in procurement. It occurs in the realm of IFBs as well. Not being or hiring a sex offender is required but not explicitly part of the evaluation criteria in the boilerplate General Terms & Conditions. The same goes for attending mandatory Pre-Bid Conferences and submitting communication and meetings logs. Yet,

this does not mean that the IFB (or the RFP) evaluation criteria are off-kilter. Back in the RFP realm, evidence that the offeror is licensed to conduct business in Guam, and evidence that a transmittal letter was sent are requirements of the offeror, but did not explicitly make it to the evaluative criteria. This does not, however, relieve offerors of needing to comply, and does not render the factor list as lacking, per Page 4 of 58 of the RFP, Tab 3 of the Procurement Record.

XI. CONCLUSION

This Appeal lacks any supportive evidence for bias, and actually shows that Appellant is given more attention. Various simple common-sense rationales exist for the MRAO's amending and weighing factors as it did, including having the regulatory and statutory authority to do so (including at the post-publication stage), wanting to consider more, complying with the new statute, and having the new large voucher requirement done right the first time. The thrust of Appellant's Appeal, that the MRAO must first develop the voucher system on its own is unsupported by the plain language of the statute and by the nature of the RFP process. Experience, an aspect that Appellant is worried about being able to adequately express, has multiple additional established avenues of expression, and the more important factor of reputation remains untouched. For these reasons, the Appeal lacks merit. Accordingly, GSA requests that this Appeal be DISMISSED, that the Appellant take nothing by way of this Appeal, and for any further relief that the OPA deems appropriate.

Dated this 11th day of March, 2020.

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