Office of the Attorney General
Leevin Taitano Camacho
Attorney General of Guam
Solicitor Division
590 S. Marine Corps Drive
ITC Bldg., Ste. 802
Tamuning, Guam 96913 • USA
Tel. (671) 475-3324 Fax. (671) 472-2493
www.guamag.org
Attorneys for the Government of Guam

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

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

INTRODUCTION

Comes now the Guam General Services Agency ("GSA") by and through its counsel and files this Reply to Appellant's Opposition to GSA's Motion to Dismiss.

///

///

///

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATUTORY INTERPRETATION OF 5 G.C.A. §5216(E)

A. APPELLANT MISINTERPRETS 5 G.C.A. §5216(E) BY INFUSING A TIMING ELEMENT AND A PROHIBITION ON AMENDMENTS

In the Opposition, Page 4, Appellant **misinterprets** 5 G.C.A. §5216(e) in stating that determinative factors must be made before publication of the RFP. Section 5216(e) states that the award will go to the best qualified offeror based on evaluation factors in the RFP. Nothing there precludes an amendment from taking place- an amendment the right for which was **properly and expressly reserved[1] by GSA, as admitted by Appellant in the Opposition, Page 4, Footnote 4.** An amendment **becomes** part of the RFP, so if evaluative factors were amended (and they were), this would not violate 5 G.C.A. §5216(e) which simply requires that the best qualified be awarded based on such factors.

II. STATUTORY INTERPRETATION OF 5 G.C.A. §11.102(E)(1)

A. APPELLANT COMPLICATES A CLEAR STATUTE

As pointed out in the Motion to Dismiss, Pages 6 and 7, "proposal" means "proposal" (rather than "request for proposal"). This is because Page 2 of the RFP, in §§III and II(1), clarifies how the proposal is *of the offeror*, and Page 3 of the RFP specifies that proposals are "**in response to this RFP solicitation**" (as opposed to being the solicitation itself). Thus, the statute[2] directs the offeror to devise the voucher system. This is in line with the usual framework

---

[1] Reserved- Page 11 of the RFP, §X states "[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.**"

[2] Statute- 5 G.C.A. §11.102(e)(1) states "the MRAO may: (1) develop a **request for** proposal…. This **proposal** shall use a voucher type system…." "This" refers to the **ensuing nature** of the proposal. Appellant's criticism of GSA here (saying GSA has no real understanding of the applicable law) is a backhanded criticism of the legislators who drafted the law because they, too, would need a marked lack of understanding of procurement law to think that a proposal is the same thing as a request for proposal.

of an RFP where the offeror makes a plan and the agency buys into it (rather than the IFB framework where the agency states to a tee what it wants and seeks a best price).

B. PER GUAM SUPREME COURT PRECEDENT, THE PLAIN MEANING PREVAILS

The binding local precedent of *Sumitomo* states "it is a cardinal rule of statutory construction that courts must look first to the language of the statute itself" and "[a]bsent clear legislative intent to the contrary, the **plain meaning prevails."** *Sumitomo Const. Co., Ltd. V. Gov't of Guam,* 2001 Guam 23 ¶17. The plain meaning of "proposal" is "proposal", and Appellant points out no legislative intent to the contrary. A "proposal" is defined as "including a technical, management or cost proposal **submitted by a contractor in response to the requirements of a solicitation for competitive proposal.**" *Raher v. Federal Bureau of Prisons,* 2011 WL 2014875 (Dist. Ct. Or. 2011).

C. APPLYING APPELLANT'S INTERPRETATION OF 5 G.C.A. §11.102(E)(1) TO THE REMAINDER OF THE SAME SUBSECTION YIELDS AN ABSURD RESULT

Even if we were to ignore the Guam Supreme Court precedent in *Sumitomo* and the 9th Circuit district definition of "proposal", Appellant's interpretation that "proposal" means "request for proposal" would compel us to use the same interpretation for "proposal" at least for the remainder of the same statutory paragraph. This means that the final sentence of the same statutory paragraph should be understood to say "[a] limit of 15% of the negotiated *request for proposal* is set for administrative overhead of such a request for proposal." This does not make sense. There is no overhead for a request for proposal except for possibly the cost of publication at roughly $192.00, fifteen percent (15%) of which would be negligible compared to fifteen percent (15%) of a proposal's worth. Such an interpretation would step on the toes of GSA's

enabling statute rather than focusing on the operations of the MRAO, which is the intent of this new MRAO statute.

III. CIRCUMSTANTIAL EVIDENCE SHOWS NO BIAS

A. APPELLANT SHOWS NO "HARD FACTS" OF BIAS, AND IMPLEMENTING NEW LEGISLATION IS LEGITIMATE JUSTIFICATION

In *Hudson Valley*, the complainant had facts **much more specific** than in the present case. For instance, the complainant established that there was an "**ongoing dispute** between [the complainant] and a doctor employed by New York, whose duties included **monitoring [complainant's] performance** under its ... contracts". *Hudson Valley Medical Professional Review Organization*, 1984 WL 46722, at 3. The doctor had produced a **negative assessment** of complainant's performance. *Id.* After a complaint to New York, the state's review **sided with the doctor**. *Id.* Complainant showed how it was refused a contract despite having a **higher objective performance rating** than others who did receive contracts. *Id.* Complainant also produced **multiple affidavits** from its staff stating that they had heard from other successful vendors that complainant would **not be awarded a contract as a co-prime contractor,** but *might* get an award as a subcontractor. *Id.* Complainant then established that its geographic area was split and was adamant that this was a disadvantage. *Id.* The state countered by showing that complainant was not awarded and that the geographic realignment occurred "because of the **program changes taking place to implement the legislation**". *Id.* The state also only needed one (1) contractor but had invited complainant to compete on two (2) other occasions. *Id.* That was sufficient justification in *Hudson Valley*. The Comptroller General **denied and dismissed all claims of bias**, holding that the state had "**legitimate... reasons"** for actions and that "**the mere appearance of, or opportunity for, bias is not a sufficient basis for questioning a contract award, but that a protester must provide 'hard facts' showing actual bias."** *Id.*

Hudson Valley is analogous to the present case in that it dealt with RFPs and implementing new pertinent legislation. Appellant has made no comparable allegations in this case, and even if it did, it would be insufficient to establish bias. *Id.* There are no "hard facts" showing actual bias, no affidavits showing disparate future results, and no specific individuals or entities who have caused, or shown the propensity to cause, negative assessments of Appellant's performance. The only relevant issue that held for complainant was that evaluative factors cannot be hidden and that they all must have values, not simply be listed. GSA assigned values to every evaluative factor and hid none. Based on this precedent and analysis, Appellant fails to establish bias.

B. GSA-APPELLANT INTERACTION IN THIS CASE SHOWS NO BIAS

Regarding circumstantial evidence, GSA granted in part Appellant's 12-23-19 protest and granted in full Appellant's 11-18-19 protest. GSA also amended the record in response to Appellant's 3-3-20 protest. This counts against bias and shows that GSA is listening to Appellant, giving a fair shake, granting requests, and even amending when the catalyst protest is **untimely and improper.** Appellant's most recent protest (3-3-20) was **untimely and improper** in that it criticized the procurement record. The time for commenting on the procurement record had already passed because the deadline for Comments on the Agency Report had already passed. Appellant did submit Comments on the Agency Report, but did not include these new objections. Thus, this new protest is simply a way to get around this deadline. If there was any circumstantial evidence, Appellant violated the filing requirements in Part IV of Appendix A on Page 2 of its Notice of Appeal when the Appeal failed to include such evidence substantiating any claims.

C. IF ADDING THIS MANDATED FACTOR IS BIAS, THEN GSA COULD NEVER ADD ANY FACTORS

In the Opposition, Page 4, Appellant criticizes the five (5) point decrease for past performance and calls it an example of re-weight bias. Every evaluative factor will affect an offeror. The mere fact that an amendment or factor does not favor an offeror does not prove that there is bias. Otherwise GSA could never add (or subtract) a factor. Even the Legislature in Bill 30-34 acknowledged that these services have "evolved". How many points justify a proper evolution? Five (5)? In the end, all we are talking about is five (5) evaluative points being taken away from past experience.

D. EVALUATIVE POINTS MUST COME FROM SOMEWHERE, AND APPLYING THIS DOES NOT SHOW BIAS

Also, on Page 4 of the Opposition, Appellant criticizes the reweighting of the ability to meet schedules and deadlines. If the maximum is 100%, then the percentage points must come from somewhere, and taking it from somewhere does not show bias. Moreover, in its Comments on the Agency Report, Footnote 3, Appellant quotes DOA in saying "the GSA itself sees the voucher system as no more than an accounting practice to ensure **proper billing and compensation**." Is proper billing and compensation just a throw-away aspect of medical referral services? On the contrary, it is a huge aspect of these services, worthy of the displacement of a few evaluative points.

E. REQUIRING ALL OFFERORS TO DEVISE A VOUCHER SYSTEM DOES NOT SHOW BIAS

In the context of the statutory construction of 5 G.C.A. §11.102(e)(1)(the aim of which is to determine whose duty it is to devise a voucher system), Appellant sticks in a comment on Opposition Page 3 that GSA must be favoring its preferred rooster. This is incoherent in that **every** offeror must devise a voucher system for its proposal, not just Appellant.

F. TIMING OF AMENDMENT DOES NOT INCONVENIENCE OFFERORS

Amendment 6, editing the RFP's evaluative criteria to fit the MRAO statute, occurred sometime after publication and statutory enactment. Any preparation time lost by one offeror was lost by the others as well, thus prejudicing no one. Also, the timing of the amendment and the amendment itself does not prejudice offerors since there is still, especially in light of the automatic stay, time to react to the amendment.

G. POINT REALLOCATION ANALYSIS IS PRESENT IN THE RECORD AND SHOWS NO BIAS

On Page 3 of the Opposition, Appellant states that the procurement record has no evidence of GSA's analysis that went into the inclusion and reallocation of the voucher system and its points. Regarding inclusion, not much analysis is required. It was the predominant section of the new MRAO statute and it needed to be added. The analysis of reallocation is found in GSA's Agency Report which is part of the record.

H. OTHER ASPECTS WERE RIGHTLY NOT GIVEN WEIGHT

The Opposition on Page 3, repeating[3] the Comments on the Agency Report ("All manner of things…") argues that none of these other aspects (no collusion, agree to special and general conditions) were given weight as a criterion the way the voucher system was. This is correct. However, the difference is that these other aspects were not noticeable large portions of the new law.

---

[3] Repeating- Numerous points in the Opposition simply repeat exactly what was stated in the Comments on the Agency Report, which was addressed in the Motion To Dismiss. For instance, Page 3 of the Opposition repeats Page 3 ¶2 of the Comments on the Agency Report objecting to the reallocation of five (5) evaluative points toward the voucher system and calling it an undeveloped system not germane to performance. As addressed in the Motion to Dismiss, Page 4 and 5, the system's being undeveloped is only remedied by Appellant (and any other interested vendor) doing its duty under the RFP and presenting its planned version of the system in its proposal and/or during Negotiations. Regarding not being germane to performance, this, too, is addressed in the Motion To Dismiss on Page 7 when GSA points out that managing, approving, verifying, and recording services received by each patient and authorized escort is related to contract performance.

IV. A SERIES OF HOLLOW COMPLAINTS

A. COMPLIANCE WITH ONE'S OWN PLAN IS NO REASON TO COMPLAIN

In the Opposition, Page 4, ¶2, Appellant argues that offerors are competing by demonstrating an ability to comply with a system that has not and does not yet exist. The design and planned execution of this system are also part of this competition. However, an offeror should hardly protest its being evaluated for the **ability** to comply with a system that the offeror itself devised. That would be a slam dunk across the boards, for all offerors.

B. IRRATIONAL HYPOTHETICALS UNDERCUT APPEAL

The irrationality of hypotheticals in the Opposition undercuts the Appeal's foundation. In the surgeon hypothetical on Page 5 of the Opposition, what Appellant misses is that if the man really were a surgeon, he *would* have experience (via residency, clinicals, etc.) and a *license* to practice. This new surgeon would also likely have a clear mind, unburdened by a cling to past methods. Being gung-ho would be a perk to an otherwise valid choice. Similarly, the MRAO and GSA would never consider an offeror that was unqualified. Also, the MRAO does not hold itself out to favor or disfavor Caucasians. One of its many values, among efficiency, bridging gaps in services, and keeping track of such services, is to assist *Guam residents* who need medically necessary off island care. Thus, the fear expressed in the Opposition on Page 4, Footnote 4 (additional points for non-Caucasian offerors) is unfounded because it is incongruent with any MRAO value and with any GSA action in this case (effectuating a statutorily mandated and authorized amendment, granting Appellant protests, granting Appellant requests to amend the record despite untimeliness). Procurement Appeals cannot be rooted in unfounded fear.

V. CONCLUSION

Again, Appellant fails to establish bias; misinterprets the applicable statute; proposes absurd results; ignores multiple non-biased actions, GSA discretion, and a statutory factor mandate; and falls short of both Guam Supreme Court and Comptroller General precedent. Appellant also fails to address arguments in the Motion to Dismiss, including the post-publication amendment issue, which should be considered conceded. For these reasons and those in the Motion to Dismiss, GSA requests that the 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 8th day of June, 2020.

OFFICE OF THE ATTORNEY GENERAL
Leevin Taitano Camacho, Attorney General

By: _____
MATTHEW E. WOLFF
Assistant Attorney General