

1 **FISHER & ASSOCIATES**
2 **ATTORNEYS AT LAW**
3 Suite 101 De La Corte Building
4 167 East Marine Corps Drive
5 Hagåtña, Guam 96910
6 Phone (671) 472-1131
7 Fax (671) 472-2886

DATE: 3-6-2020
TIME: 3:40 PM
REF ID: OPA-PA 20-002

BEFORE THE OFFICE OF PUBLIC ACCOUNTABILITY
HAGÁTÑA, GUAM

7	GUAM MEDICAL REFERRAL)	Case No. OPA-PA 20-002
8	SERVICES,)	
9	Appellant,)	COMMENT ON AN AGENCY
10	vs.)	REPORT
11	GENERAL SERVICES AGENCY,)	
12)	
13	Appellee.)	

14 **COMES NOW** Appellee Guam Medical Referral Services (GMRS) and comments on an
15 Agency Report served on it 26 February 2020.

- 16 ▪ The General Services Agency (GSA) has improperly included criterion designed
17 to favor one offeror over another.
- 18 ▪ The GSA awards evaluation “points” for performing an obligation that properly
19 belongs to the Agency and demonstrating an ability to perform a function that
20 doesn’t yet exist.

21 On 29 January 2020 Appellee GSA amended a Request for Proposal (RFP) to change the
22 evaluation criteria. This was done *after* publication and distribution of the RFP to potential
23 offerors. As a result of the change, a wholly new criterion for evaluation was created “[t]o
24 demonstrate ‘Voucher System’ to manage, approve, and verify record services will be
25 performed.” *See Amendment 6, GSA/ RFP-20-0240-001, 29 January 2020.*

Heretofore a “voucher system” was not required or used in the performance of the
contracted service. It may fairly be said that neither offerors nor the GSA presently know what
the voucher system will be nor how it will be used. *See Procurement Record at Tab 6, DOA*

1 Letter to GMRS dated 23 December 2019, “A voucher system that will be approved, will be
2 discussed during negotiation.” And See *Id* at Tab 10¹, DOA Letter to GMRS dated 27 January
3 2020, “The Voucher System that is to be developed is an internal control between the Guam
4 Medical Referral Office and the winning Offeror to manage, approve and verify and record
5 services being received by each patient (and authorized escort.)” *Id*, *emphasis added*. This
6 scheme is contrary to law. 5 Guam Code Ann. §11.102(e)(1) states,

7 “(e) For those residents who are not eligible for existing services provided by health
8 insurance companies, referring facilities, or local not-for- profits, **the MRAO²** may:
9 (1) develop a request for proposal to provide assistance services from a duly registered
10 Guam-based not-for-profit organization that can provide such services, including
11 coordination of appointments, transportation, and lodging. **This proposal shall use a**
12 **voucher type system to provide direct services to residents seeking off-island care.**
13 The contracted not-for-profit shall, to the greatest extent possible, coordinate with
14 existing services provided by insurance carriers and referring facilities for the provision
15 of transportation and lodging services. A limit of fifteen percent (15%) of the negotiated
16 proposal is set for administrative overhead of such proposal.

17 *Id*, *emphasis added*.

18 The law states that the MRAO and not the contracted provider has the responsibility for
19 developing the voucher system, that is the Medical Referral Assistance Office within the Office
20 of the Governor and not the contracted assistance provider. Additionally, the system is to be
21 designed to provide direct services to residents seeking off-island care. It is not an internal
22 control between the Guam Medical Referral Office and the winning Offeror to “manage, approve
23 and verify and record services being received by each patient.”

24 ¹ GMRS cannot provide a pinpoint citation since GSA failed to number pages within the
25 Procurement Record as required.

² The MRAO is a “Medical Referral Assistance Office (MRAO) within the Office of I
Maga’låhen Guåhan (the Governor of Guam)” and is distinguished from the contracted service
provider. See 5 Guam Code Ann. §11.101.

1 On or about 25 February 2020 the GSA filed an Agency Report responding to GMRS’
2 Appeal of GSA’s denial of a protest. That Report, in its entirety says,

3 “We stated that in reviewing the law that establishes the criteria for the medical referral
4 assistance program, a voucher system was a required item. As such inclusion of this
5 system in the evaluation criteria was appropriate to ensure that it met the requirement of
6 law. The establishment of this system should not be difficult for a current contractor to
7 capture the costs for running the program.” *See Agency Report at Tab 1.*

8 It should be noted that all manner of things are necessary to meet the requirements of law and
9 make a successful response to the Request for Proposals, e.g. the offeror must be a not-for-profit,
10 the offeror must not have colluded with another to obtain a contract, the offeror must agree to the
11 general and special conditions etc. None of these aspects were given weight as a criterion for
12 selection though contrary to law and sense, the creation of a voucher system was. This in spite
13 of the fact that the GSA itself has no clear idea of what that system is. As amended, the Request
14 for Proposal now assigns one-fifth of the possible points awarded to an undeveloped system that
15 is not germane to performance³ nor is it the responsibility of the Offeror to create that system.
16 There is no reason for this, and a review of the Procurement Record contains no evidence of any
17 consideration or analysis of the propriety of the inclusion nor the re-weighting of criteria⁴.

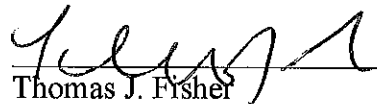
18 As an example of the re-weight absurdity, where an entity has performed similar
19 services, the weighted value of that prior performance is now **reduced** to 15% of possible
20 awarded points though this is by any measure a cardinal, relevant requirement. As a further
21 example of the bias, where an entity has specific experience performing the service, the value of
22 that experience is **diminished** to 15% though this too is an obvious, necessary, relevant
23 requirement. As another example of the re-weight bias, where an entity has a record of past

24 ³ The GSA itself sees the voucher system as no more than an accounting practice to ensure
25 proper billing and compensation.

⁴ Appellant is aware of no prior protest concerning the weight assigned to the categories and
concludes that this change may well have been the result of improper influence or ex parte
communication between the agency and a potential offeror.

1 performance of similar work, the value of that work is also **diminished** to 15% though this is, like
2 the preceding criteria, a cardinal, relevant requirement. Yet another example of this weight bias
3 is found in the importance assigned an offeror's demonstrated ability to meet schedules or
4 deadlines. Here the GSA reassigned a **lesser** value of 15% to that demonstrated ability though it
5 too is of central importance to determining qualification. **By contrast, the GSA assigned the**
6 **lion's share of points to a "voucher system" which is unrelated to contract performance.**

7 Taken as a whole, it appears that GSA has done this in order to assist an inexperienced
8 offeror to the detriment of any offeror which has the necessary experience. Functionally, the
9 GSA post-publication amendment works to the prejudice of Appellant and the advantage of other
10 inexperienced offerors by including this new criterion unrelated to contract performance and
11 discounting the value of relevant criteria. At the outset, this is an impermissible amendment.
12 Criteria for selection must be made before publication of the Request for Proposal. *See 5 Guam*
13 *Code Ann. §5216(e)*, "Award shall be made to the offeror determined in writing by the head of
14 the purchasing agency or a designee of such officer to be best qualified based on the evaluation
15 factors set forth in the Request for Proposals". Secondly, offerors are competing for points by
16 demonstrating an ability to comply with a system that has not and does not yet exist. There is no
17 explanation for this other than Agency outcome bias.

18
19
20
21
22
23
24
25

Thomas J. Fisher
Attorney for Appellant