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**OFFICE OF PUBLIC ACCOUNTABILITY
 PROCUREMENT APPEALS**

IN THE APPEAL OF)	APPEAL NO. OPA-PA-18-003
)	APPEAL NO. OPA-PA-18-005
TAKECARE INSURANCE COMPANY,)	
INC.,)	TAKECARE'S SECOND
)	MOTION TO COMPEL
Appellant)	PRODUCTION OF
)	AON DOCUMENTS
)	
)	
)	

INTRODUCTION

AON and its representative Suzanne Kohlmann were retained as experts by the Department of Administration (hereinafter "DOA") and the Negotiating Team (hereinafter "NT") to "revamp" the RFP at issue in this dispute. Bates Stamp 000967. How and why the RFP was "revamped" to include Guam Regional Medical City (hereinafter "GRMC") as a minimum requirement is one of the central issues in dispute in this appeal. Hence, communications to and from AON relating to GRMC are highly relevant to this proceeding.

When DOA and the NT filed the Procurement Record in this appeal on May 17, 2018, a number of communications to and from AON regarding the preparation of the RFP

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were produced. However, several communications between DOA and AON were withheld from production on the basis that they were “privileged” or “confidential.”

TakeCare Insurance Company, Inc. (hereinafter “TakeCare”) filed a motion to compel DOA and the NT to produce the withheld AON communications and that motion was granted by the Hearing Officer on July 18, 2018. After the Hearing Officer granted TakeCare’s motion to compel and ordered that DOA and the NT produce non-confidential AON communications, DOA and the NT on August 2, 2018 filed a pleading entitled “DOA Non-Confidential AON Documents.”

The title of “DOA Non-Confidential AON Documents” is at best misleading, because there are no communications to or from AON attached to it. The only document attached to that pleading that even refers to AON is Bates Stamp 001258, which is not a communication to or from AON. Bates Stamp 001258 is merely an internal email between DOA and Shannon Taitano stating that “AON wanted to have an internal meeting with DOA prior to meeting with the team.” DOA and the NT have simply refused to produce any communications to or from AON in response to the Hearing Officer’s Order of August 2, 2018.

DISCUSSION

I. Potential Relevance Of AON Communications.

“Relevance is broadly construed at the discovery stage of the litigation and a request for discovery should be considered relevant if there is any possibility the information sought may be relevant to the subject matter of the action.” Height v. City of Hays, Kan., 300 F.R.D. 496, 499 (D. Kan. 2014)(Emphasis added). AON communications that refer to GRMC or to the alleged reasons for including GRMC as minimum

requirement are either relevant or, at the very least, “may be relevant to the subject matter of this action.” Height, *Id.* at 499.

II. Communications With AON Are Neither Privileged Nor Confidential.

A. The Majority Rule re Experts and Discovery.

It is undisputed that AON produced reports to DOA about the RFP and that AON played a key role “revamping” it. *See e.g.*, Bates Stamp 0009671; 000940-000946; 000017; 000117; 000961; 000273; 000389; and 000977-000978. The majority rule is that communications with experts are not privileged or confidential and are not protected from disclosure. “The majority view and the better view . . . is that all things communicated to the expert and considered by the expert in forming an opinion must be disclosed even if it constitutes opinion otherwise protected as work product.” Ass’n. of Irrigated Residents v. Dairy, 2008 WL 2509735 at *1 (E.D. Cal. 2008).

Even if AON and Ms. Kohlmann were “non-reporting” experts, and had not prepared reports relating to the “revamping” of the RFP, the communications with them would still have to be produced. “The minutes of the Civil Rules Advisory Committee meeting show that the committee did not intend that communications between a party’s counsel and non-reporting experts generally be protected.” U.S. v. Sierra Pacific Industries, 2011 WL 2119078 at *6 (E.D. Cal. 2011)(Emphasis added).

Furthermore, AON and Ms. Kohlmann were not retained as after-the-fact experts to prepare reports in anticipation of litigation. They were directly involved in the “revamping” of the RFP, which is the primary matter at issue in this appeal. All of the communications with AON and Ms. Kohlmann being sought in this Motion to Compel occurred before any protest was filed by TakeCare. As a consequence, AON and Ms.

Kohlmann are percipient witnesses to events at issue in this dispute and communications with them relating to GRMC or to the alleged reasons for including GRMC as minimum requirement “may be relevant to the subject matter of this action.” Height, Id. at 499.

B. AON Communications are not Confidential Pursuant to NT Rule IV.

The only reference to “confidential” or “confidentiality” in the NT Regulations is in Rule IV. The Hearing Officer ruled on July 18, 2018 that pursuant to NT Rule IV “**only** the information contained in the proposals, Negotiation Team meetings, and or its negotiations are confidential.” 7/17/18 Order at 11 ll. 24-25 (Emphasis added).

There have been no proposals or negotiations in the procurement at issue. Moreover, as a consequence of the Hearing Officer ruling that TakeCare cannot seek discovery of events at a NT “meeting,” TakeCare is not seeking disclosure of statements by AON representatives at NT meetings. TakeCare is only seeking disclosure of AON communications taking place outside the confines of a NT meeting.¹ For instance, if communications were exchanged between AON and either DOA or the NT prior to or after a NT meeting, then it must be produced if it refers in any way to GRMC or the alleged reasons to include it as a minimum requirement.

C. Guam’s Procurement Law.

On August 2, 2018, DOA filed a pleading entitled “Amended Purchasing Agency Privileged and Confidential Communication Law.” In this pleading, DOA contends that

¹ On July 18, 2018, the Hearing Officer ruled that anything taking place in a NT meeting is confidential. TakeCare respectfully disagrees and maintains that the confidentiality provision in Rule IV was only intended to apply to meetings related to the consideration of proposals and negotiations. TakeCare also maintains that its constitutional and discovery rights have been prejudiced by the ruling of the Hearing Officer and reserves its right to challenge that ruling at the appropriate time.

numerous of its communications with AON are protected from disclosure Title 5 Guam Code Annotated Section 5001(b)(8) (hereinafter “Section 5001(b)(8)”) and Title 2 Guam Administrative Regulation Division 4, Chapter 1 Section 1102(7) (hereinafter “Section 1102(7)”). Neither of these contentions has any merit whatsoever.

The stated purposes of Section 5001(b)(8) and Section 1102(7) are to provide “public access to all aspects of procurement consistent with the sealed bid procedure and integrity of the procurement process.” The AON communications being sought by TakeCare will not interfere with the “sealed bid procedure” because no proposals have yet to be submitted and the sealed bid procedure has not even commenced. To the contrary, production of AON communications being sought will further the primary purpose of Guam’s Procurement Law, which is to “provide for increased public confidence in the procedures followed in public procurement.” 5 GCA Section 5001(b)(3).

D. The Attorney-Client Privilege does not Apply to AON Communications.

“Courts disfavor assertions of evidentiary privilege because they shield evidence from the truth-seeking process.” RLI Ins. Co. Conseco, Inc., 477 F.Supp. 2d 741, 748 (E.D. Va. 2007); *See also*, Herbert v. Lando, 99 S. Ct. 1635, 60 (1979); In re Grand Jury Proceedings, 727 F.2d 1352, 1355 (4th Cir. 1984). “[T]he burden is on the proponent of the attorney-client privilege to demonstrate its applicability.” U.S. v. Lentz, 419 F. Supp. 2d 820, 827 (E.D. Va. 2005). The attorney-client privilege is also “strictly construed” and a “conclusory allegation that a communication is protected by the attorney-client privilege is inadequate to meet this burden.” RLI Ins., *Id.* at 750-751.

On July 18, 2018, the Hearing Officer ordered that DOA submit a revised privilege log specifying among other things “the client . . . for those records the Purchasing Agency claims to be subject to the Attorney-Client Privilege.” 07/18/18 Order at 11¶ 6. On August 2, 2018, DOA submitted a revised privilege log entitled “Amended Purchasing Agency Privileged and Confidential Communication Log” (hereinafter “Revised Privilege Log”).

The Revised Privilege Log identifies several communications with Suzanne Kohlmann (the AON representative), but DOA does not claim that AON was actually the “Client” of anyone in regard to those communications. In fact, the column for “Client” in the Privilege Log next to each communication with Suzanne Kohlmann is completely blank. DOA, therefore, is not claiming that AON was the “Client” of anyone and, as a consequence, the attorney-client privilege does not apply to AON communications. This comes as no surprise because under Guam law the Attorney General’s Office is only allowed to represent the Government of Guam and its agencies in “civil” proceedings. 5 G.C.A. Section 30109(c). AON is not an agency of the Government of Guam.

E. OPA Rule 12106 does not Apply to AON Communications.

OPA Rule of Procedure Section 12106 states, in part, as follows: “The Public Auditor shall . . . make available . . . information submitted that bears on the substance of the Appeal except where information is proprietary, confidential, or otherwise permitted or required to be withheld by law or regulation.” (Emphasis added).

As already discussed, the AON communications outside the confines of NT meetings are not confidential pursuant to NT Rule IV. They are also not protected from disclosure by the Guam’s Procurement laws or regulations such as Section 5001(b)(8) and

Section 1102(7). If anything, disclosure of the AON communications will “provide for increased public confidence in the procedures followed in public procurement.” 5 G.C.A. Section 5001(b)(3).

The AON communications are also not proprietary because they do not contain “trade secrets” and disclosure will not “harm” DOA or the NT. “It is well settled that no absolute privilege exists for trade secrets or proprietary business information . . . To resist discovery . . . the party has the burden to establish that the information sought is in fact a trade secret and must then demonstrate that its disclosure would be harmful.” DIRECTV v. Puccinelli, 224 F.R.D. 677, 689-690 (D.C. Kan. 2004).

DOA and the NT are not private businesses and cannot plausibly maintain that they have “trade secrets.” Also, inasmuch as DOA and the NT have produced communications with AON involving modifications of the RFP, they cannot hardly argue that the disclosure of other AON communications about GRMC or the reasons for including it as a minimum qualification will cause “harm” to the procurement process.

During oral argument on July 9, 2018 involving TakeCare’s first Motion to Compel, DOA maintained that production of AON’s “actuarial report” would be harmful to the procurement process. TakeCare has serious doubts about the merits of that contention, but nevertheless is willing to agree that DOA and the NT do not have to produce any “actuarial reports,” unless they specifically refer to GRMC or the alleged reasons to include it as a minimum requirement. Should an AON actuarial report refer to GRMC or the alleged reasons to include it as a minimum requirement, then only that portion of the actuarial report needs to be produced.

III. DOA Has Waived Its Right To Withhold AON Communications.

When a party discloses allegedly privileged documents, it results in a waiver of the privilege not only as to the communication disclosed, but to all other communications relating to the same subject matter. *See e.g.*, United States v. Jones, 696 F.2d 1069 , 1072 (4th Cir. 1982)(Any voluntary disclose to a third party waives the privilege not only as to the specific communication disclosed, but often as to all other communications relating to the same subject matter); In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982)(When a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter); Edwards v. Whitaker, 868 F. Supp. 226, 229 (M.D. Tenn. 1994)(Voluntary disclose of the content of a privileged communication constitutes waiver of the privilege as to all other such communications on the same subject).

DOA has disclosed numerous communication with AON during the time frame of January 2018 to March 2018 relating to the preparation and drafting of the RFP: (1) Communications between AON and various health insurers about “network changes under consideration” (Bates Stamp 000940-000946); (2) Communications between AON and DOA about the exclusive/non-exclusive provisions in the RFP (Bates Stamp 000017); (3) Communications between AON and DOA about doing “a complete re-write to simplify the RFP” (Bates Stamp 000117); (4) Communications between AON and DOA about the “sole source” provision, which implicates GRMC when it is a sole source provider (Bates Stamp 00961); (5) Communications between AON and Shannon Taitano about the “thoughts” on “updates to the RFP” (Bates Stamp 000273); (6) Communications between AON and DOA about the “most up-to-date versions” of the RFP “for the committee to review” (Bates

Stamp 000389); and, (7) Communications between AON Shannon Taitano about PL 34-83 (Bates Stamp 000977-000978).

Unfortunately, rather than producing all of the AON communications, DOA and the NT have cherry picked the ones they want to disclose, and refused to produce others, even those not taking place in a NT meeting. DOA and the NT cannot have it both ways. By disclosing numerous AON communications relating to the RFP, DOA has waived its right to assert that other AON communications regarding the RFP are privileged.

IV. The AON Communications That Should Be Produced.

The Hearing Officer ruled on July 18, 2018 that as a consequence of NT Rule IV, TakeCare cannot seek discovery of events taking place during a NT meeting.² TakeCare, therefore, in this Motion is only seeking production of AON communications created or occurring on dates when the NT was not meeting.

According to the “Meeting Log” submitted to the OPA by DOA on May 17, 2018, the NT meet on only five dates: 02/22/18, 03/12/18, 3/22/18, 04/17/18 and 04/26/18 (Bates Stamp 000002-000003). TakeCare is not seeking the disclosure of any AON communications on those dates. Instead, TakeCare is requesting that the Hearing Officer order DOA to review the AON communications identified below, all of which took place on dates when the NT was not meeting. DOA should be ordered to produce any of the communications identified below that refer to either GRMC or the alleged reasons for including GRMC as minimum requirement:

01/11/18 communication from Suzanne Kohlmann to Shannon Taitano (Bates Stamp 001253).

² TakeCare reserves its right to challenge that ruling at the appropriate time.

01/30/18 communication from DOA to AON re FY19RFP and “Plan Designs” (DOA does not appear to have filed this document with the OPA and given it a specific Bates Stamp number, but it is referred to in the FY19 Communication Log at Bates Stamp 000006).

01/30/18 communication from DOA to AON re GovGuam Plan Design Questions (DOA does not appear to have filed this document with the OPA and given it a specific Bates Stamp number, but it is referred to in the FY19 Communication Log at Bates Stamp 000006).

02/09/18 communication from Suzanne Kohlmann to Shannon Taitano (Bates Stamp 001260).

02/13/18 communication from Shannon Taitano to Suzanne Kohlmann and Leonara Candaso (Bates stamp 001263).

02/14/18 communication from Shannon Taitano to Suzanne Kohlmann (Bates Stamp 001267).

03/03/18 communication from Suzanne Kohlmann to Shannon Taitano and Leonara Candaso. (Bates Stamp 001272). The FY19 Communication Log of DOA indicates that there was a communication on 03/03/18 that specifically refers to “GRMC.” (Bates Stamp 000007).

03/03/18 communication from Suzanne Kohlmann to Shannon Taitano and Leonora Candaso. (Bates Stamp 001275). The FY19 Communication Log of DOA indicates that there was a communication on 03/03/18 that specifically refers to “GRMC.” (Bates Stamp 000007).

03/04/18 communication from Stephen Caulk to Suzanne Kohlmann and Shannon Taitano (Bates Stamp 001276).

03/08/18 communication from Suzanne Kohlmann to Shannon Taitano and Leonora Candaso (Bates Stamp 001282).

03/10/18 communication to or from Suzanne Kohlmann (Bates Stamp 001266).

03/10/18 communication from Shannon Taitano to Suzanne Kohlmann (Bates Stamp 001286).

03/15/18 communication from Suzanne Kohlmann to Shannon Taitano (Bates Stamp 001291).

03/19/18 communication from AON regarding Public Law 34-83 (DOA does not appear to have filed this document with the OPA and given it a specific Bates Stamp number, but it is referred to in the DOA FY19 Communication Log at Bates Stamp 000008).

03/23/18 communication from Shannon Taitano to Suzanne Kohlmann and Leonora Candaso (Bates Stamp 001295).

03/23/18 communication from Shannon Taitano to Suzanne Kohlmann (Bates Stamp 001295).

03/31/18 communication to AON from AON re FY19 RFP clarifications (DOA does not appear to have filed this document with the OPA and given it a specific Bates Stamp number, but it is referred to in the DOA FY19 Communication Log at Bates Stamp 000010).

04/18/18 communication from Shannon Taitano to Suzanne Kohlmann, Leonora Candaso, Trey Sarsfeld, and Stephen Caulk (Bates Stamp 001353).

CONCLUSION

For the reasons discussed herein, DOA and the NT should be required to produce any of the communications identified above that refer to either GRMC or the alleged reasons for including GRMC as minimum requirement. Otherwise, TakeCare will be denied due process and hampered in its ability to present its claims.

Respectfully submitted this 12th day of October, 2018.

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By: 
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