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PROCUREMENT APPEAL

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of TAKECARE INSURANCE COMPANY, INC., Appellant, and DEPARTMENT OF ADMINISTRATION, Purchasing Agency.	**APPEAL NO. OPA-PA-19-005** TAKECARE'S REBUTTAL TO PURCHASING AGENCY REPORT

INTRODUCTION

TakeCare disputes many of the material facts in DOA's denial of TakeCare's protest and in its Agency Report. Inasmuch as material facts are in dispute, an appeal hearing before the Hearing Office will be required. As discussed in TakeCare's Protest dated May 3, 2019, TakeCare maintains that: (1) PL 35-2 and the RFP are an improper delegation of authority; (2) PL 35-2 and the RFP are inconsistent with the Organic Act; (3) PL 35-2 and the RFP eliminate "competition" and deny equal protection; (4) PL 35-2 and the RFP

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do not create a "level playing field"; (5) PL 35-2 and the RFP will not result in the "lowest cost option"; (6) PL 35-2 and the RFP will not "maximize" GovGuam purchasing power; (7) PL 35-2 and the RFP discriminate against other private clinics in Guam; and, (8) Guam Regional Medical City ("GRMC") is already in-network for emergencies and sole source situations

Notably, GovGuam makes no effort to directly address the issues raised by TakeCare in its Protest. Instead, GovGuam raises only procedural defenses in response to the Protest and argues that TakeCare's Protest is "untimely" and "beyond the scope of this procurement." Both these procedural defenses are factually and legal flawed.

DISCUSSION

I. TakeCare's Protest is Timely.

GovGuam argues that TakeCare should have filed its Protest within 14 days after the RFP was published on April 1, 2019. However, PL 35-2 does not require that offerors have a "direct contract" with GRMC or any other private hospital on the date the RFP is published. In fact, PL 35-2 does not require that TakeCare ever have a "direct contract" with GRMC. Instead, PL 35-2 merely require that GRMC be in the "network" of offerors when an offer is submitted. Thus, TakeCare was not required to know on April 1, 2019 whether GRMC would be in its network. More importantly, TakeCare **did not know until May 1, 2019** that GRMC would not be in its network because GRMC waited until that date to insist that TakeCare have a "direct contract" with GRMC, which is contrary to the requirements of PL 35-2.

Moreover, the RFP itself expressly allowed offerors to have an indirect relationship with GRMC via a "rental" or "lease" agreement. As explained in the Protest, TakeCare intended to utilize a previously arranged Network Access Services Agreement with NetCare; which arrangement allowed NetCare to lease to TakeCare in-network access to GRMC. (Protest Exhibits 11 and 12). TakeCare **did not know until May 1, 2019** that GRMC would "not allow any other local health plan to access NetCare's in-network rates with GRMC" and that all "Guam-based health plans need to directly contract with GRMC for in-network rates." (Exhibit 1).

In addition to challenging the constitutionality of PL 35-2 on its face, TakeCare is also challenging the constitutionality of PL 35-2 "as applied." **TakeCare could not have known on April 1, 2019 that PL 35-2 is unconstitutional "as applied"** because it did not know on that date that GRMC would: (a) Persist in requiring that TakeCare agree to allow its federal and commercial members to utilize GRMC; (b) Persist in requiring TakeCare to pay millions of dollars to GRMC that is not legally owed; (c) Persist in requiring that GRMC have a direct contract with it; and, (d) Refuse to allow local health plans to utilize NetCare's access service agreement with GRMC.

Lastly, contrary to the assertions of GovGuam, TakeCare's inability to "secure a business opportunity" with GRMC is most certainly relevant. Evidence Rule 401 provides that evidence is relevant if it has "*any* tendency to make a fact more or less probable . . . and the fact is of consequence in determining the action." "It is well established that the standard for

determining the relevancy of evidence is 'extremely liberal.'" Physician Care, P.C. v. Caremark, Inc., 16 F. Supp. 2d 806, 812 (E.D. Mich. 1998). The primary purpose of PL 35-2 and the RFP is to require an in-network business relationship between offerors and GRMC. The events taking place between April 1, 2019 and May 1, 2019 when TakeCare was attempting to secure a business relationship with GRMC are relevant because those facts establish that PL35-2 and the RFP are unconstitutional "as applied."

II. The Issues Raised by TakeCare are not "Beyond The Scope" of the Procurement

Unable to directly address the issues raised by TakeCare in its Protest, GovGuam instead argues that the wrongful and outrageous actions of GRMC are not related to the procurement process and "beyond the scope of this procurement." However, **PL 35-2 and the RFP *expressly* requires that as part of the procurement process a prospective offeror must have GRMC in its network**. Hence, it is undisputed that as part of the procurement process a potential offeror must have an "in-network" relationship with GRMC.

GovGuam itself confirms that an in-network relationship with GRMC is part of the procurement process when it then argues that because TakeCare was "unable to secure an agreement with GRMC" it "is not an actual or prospective offeror or contractor." That is exactly the point that TakeCare is making in its protest. Namely, that GRMC not GovGuam is deciding who may be an offeror because GRMC and not GovGuam controls who has GRMC in its network.

More importantly, as predicted by both DOA and Calvo's SelectCare in Legislative testimony on Bill No. 21-34, GRMC has used the power bestowed upon it by PL 35-2 to eliminate TakeCare as an offeror by demanding unreasonable conditions, and contract terms including higher rates. See e.g., Legislative testimony of DOA stating that requiring offerors to include GRMC in their networks would "force carriers to accept whatever fees are established" by GRMC and those that refused to do so "would be disqualified from bidding on the Government's health insurance contract since they would not have the private hospital as one of their providers." (Protest Exhibit 14 at 3). SelectCare also predicted that requiring offerors to include GRMC in their networks would allow GRMC to make unreasonable demands on prospective offerors. (Protest Exhibit 14).

The actions of GRMC have now confirmed that DOA's concerns about requiring offerors to have an in-network relationship with GRMC were justified because GRMC is now able to eliminate any prospective offeror by simply refusing to have a network relationship, which is exactly what has happened. GRMC has refused to enter into a contract with TakeCare relating only to GovGuam members and instead used the leverage given to it by PL 35-2 and the RFP to insist that TakeCare also enter into a contract with GRMC in-network for all of TakeCare's lines of business, including commercial and federal members. GRMC has also wrongfully insisted that TakeCare pay amounts to GRMC that TakeCare does not legally owe and proposes to charge TakeCare rates that are higher than the ones it charges

other carriers. It is for these reasons that TakeCare maintains in its Protest and in this appeal that PL 35-2 and the RFP are an improper delegation of authority.

Instead of trying to justify the legality of PL 35-2 and address the problems raised by TakeCare in its Protest, GovGuam is forced to merely argue that it is "required to follow the laws" such as PL 35-2 and as a consequence the validity of those laws is "beyond the scope of this procurement." TakeCare agrees that GovGuam is required to "follow the laws," just as TakeCare is legally entitled to challenge the validity of those laws. In its Protest and in this Appeal, TakeCare is challenging the validity of PL 35-2 and the RFP attempting to implement it.

However, in order to challenge the validity of PL 35-2 in Court, TakeCare must first exhaust its administrative remedies. Island Bay Utilities, Inc. v. Alabama Dep't of Environmental Management, 587 So. 2d 1210, 1212 (Ala. Civ. App. 1991)(A party can only resort to judicial review of an administrative action after exhausting all administrative remedies and raising constitutional issues is not sufficient to avoid that requirement.); and, Pickett v. Texas Mut. Ins. Co., 239 S.W.3d 826, 830-838 (Tex. App. 2007)(Even when raising "numerous violations of their constitutional rights," judicial claims will be dismissed for the "failure to exhaust administrative remedies."). TakeCare, therefore, is not merely allowed to pursue its administrative remedies in this Appeal, it is required to exhaust those administrative remedies before challenging the legal validity of PL 35-2 in Court.

Finally, the events taking place between April 1, 2019 and May 1, 2019 when TakeCare was attempting to secure a business relationship with GRMC are not "beyond the scope of the procurement" because those facts establish that PL35-2 and the RFP are unconstitutional "as applied." GovGuam cannot simply enact legislation like PL 35-2, which requires offerors to interact with a private entity, and then divorce itself from any wrongdoing committed by that private entity. This is especially true when it is undisputed that **GovGuam itself predicted that legislation like PL 35-2 would be used by a private entity like GRMC to "disqualify" offerors "from bidding on the Government's health insurance contract since they would not have the private hospital as one of their providers."** (Protest Exhibit 14 at 3).

III. PL35-2 and the RFP Are Unconstitutional and Inorganic

Both PL 35-2 and the RFP require that offerors have GRMC in their networks in order to bid on the GovGuam health insurance contract. Hence, if PL 35-2 is unconstitutional for any reason, then the RFP is "in violation of the law" and must either be "cancelled or revised to comply with the law." 5 G.C.A. 5451. However, in order to challenge the constitutionality of PL 35-2 and the RFP in Court, TakeCare must first exhaust its administrative procedures before the OPA. Island Bay Utilities, Inc. v. Alabama Dep't of Environmental Management, 587 So. 2d 1210, 1212 (Ala. Civ. App. 1991)(A party can only resort to judicial review of an administrative action after exhausting all administrative remedies and raising constitutional issues is

not sufficient to avoid that requirement.); and, Pickett v. Texas Mut. Ins. Co., 239 S.W.3d 826, 830-838 (Tex. App. 2007)(Even when raising "numerous violations of their constitutional rights," judicial claims will be dismissed for the "failure to exhaust administrative remedies."). Once those constitutional issues are raised, the OPA has jurisdiction to "determine de novo" any matters submitted to him/her and "no prior determination shall be final or conclusive on the Public Auditor." OPA Rule 12103(a).

A. PL 35-2 and the RFP Are An Improper Delegation of Authority.

TakeCare sought to comply with PL 35-2. The proposal by GRMC to TakeCare for GovGuam in-network was expressly conditioned upon TakeCare's inclusion of TakeCare's commercial and federal members also being in-network for health care services at GRMC. GRMC also insisted that none of TakeCare's plans include a buy up option. In addition, as a condition for entering into an agreement with TakeCare, GRMC wrongfully demanded that TakeCare pay for past services to its members, which TakeCare has no legal obligation to pay on the grounds that: (a) TakeCare had no Direct Payer Agreement with GRMC at the time of such alleged services; (b) Many of the alleged services were not covered by the terms of any of TakeCare's plans; and, (c) Even if TakeCare had a Direct Payer Agreement with GRMC, and even if the alleged services had been covered, the GRMC claims submitted to TakeCare patients/TakeCare were time-barred under the provisions of Guam's Prompt Payment Act and/or the statute of limitations. In simple terms, GRMC is holding up TakeCare and preventing it from qualifying to

respond to the RFP by demanding that TakeCare agree to include GRMC in-network for all of its members, including its commercial and federal members. GRMC is further insisting that TakeCare pay for claims that it does not owe. All of these extortionate demands must be met before GRMC will enter into a contract with TakeCare relating to GovGuam members.

If offerors are required by PL 35-2 to contract with GRMC in order to submit a proposal in response to the RFP, GRMC can completely control the outcome of the RFP process by eliminating any prospective offeror by simply refusing to have a network relationship with that insurer. That is exactly what has happened. GRMC has refused to enter into a contract with TakeCare relating only to GovGuam members. Instead, GRMC has wrongfully used the leverage given to it by PL 35-2 to insist that TakeCare also enter into a contract with GRMC in-network for all of TakeCare's lines of business, including commercial and federal members. GRMC has also wrongfully used its perceived leverage from PL 35-2 to demand that TakeCare pay amounts to GRMC that TakeCare does not legally owe. Lastly, GRMC proposes to charge TakeCare rates that are higher than the ones it charges other carriers.

GRMC is maliciously using PL 35-2 and the RFP to eliminate or disadvantage TakeCare as an offeror by demanding unreasonable conditions, and contract terms including higher rates. This scenario was predicted by DOA itself when it previously opposed Bill No. 21-34 that required offerors to include GRMC in their networks. In Legislative testimony on Bill No. 21-34,

DOA noted that requiring offerors to include GRMC in their networks would "force carriers to accept whatever fees are established" by GRMC and those that refused to do so "would be disqualified from bidding on the Government's health insurance contract since they would not have the private hospital as one of their providers." (Exhibit 14 at 3). DOA's fears about GRMC making unreasonable demands on offerors were well founded. SelectCare and TakeCare also predicted that requiring offerors to include GRMC in their networks would allow GRMC to make unreasonable demands on prospective offerors. (Exhibit 14).

The actions of GRMC clearly prove that the practical effect of PL 35-2 and the RFP has been to delegate the authority to GRMC to determine who can participate in the GovGuam RFP process. GRMC can make demands upon prospective offerors like it has done to TakeCare that are not required by PL 35-2, but which are designed to disqualify TakeCare. As a consequence of Pl 35-2, GRMC could in fact unilaterally refuse to have an in-network relationship with any potential offeror, and, thereby prevent GovGuam from having any health insurance coverage.

PL 35-2, therefore, is the text book case of an improper delegation of executive because it allows a private entity, such as GRMC, to determine what entities may participate in and ultimately win a contract with the government. *See e.g.* G. Curtis Martin Investment Trust v. Clay, 266 S.E.2d 82 (S.C. 1980)(It is an improper delegation of power to allow a private entity to control who participates in government owned sewer system); Texas Boll

Weevil Eradication Foundation v. Lewellen, 952 S.W.2d 454 (Tex. 1997)(It is an unconstitutional delegation of authority to allow a private foundation whose members have a pecuniary interest to assess costs against other private companies); and, People v. Pollution Control Board, 404 N.E. 2d 351 (Ill. App. 3d 1980)(Allowing private automobile association to determine which events are subject to regulations is an improper delegation of legislature authority).

B. PL 35-2 and the RFP Deny TakeCare Due Process of Law

It is undisputed that GRMC has refused to enter into a provider agreement with TakeCare relating to GovGuam members unless: (a) TakeCare also allows its federal and commercial members to access GRMC; and, (b) TakeCare agrees to pay millions of dollars to GRMC that is not legally owed. Thus, as a consequence of PL 35-2 and the RFP, TakeCare has been effectively debarred or suspended from bidding on any further GovGuam health care contracts.

Moreover, there is no procedural mechanism in place for GovGuam to review the refusal of GRMC to enter into provider agreements with potential offerors. To the contrary, GovGuam claims that it is "not able to respond" to the refusal of GRMC to enter into a provider agreement with TakeCare because GRMC is a "private entity." DOA Denial of TakeCare's Protests 5/21/19 at 2. In simple terms, GovGuam has interpreted PL 35-2 and the RFP to allow GRMC to unilaterally debar or suspend potential offerors

without any procedural mechanism in place for the review of GRMC's decisions.

The Organic Act states: "No person shall be deprived of life, *liberty, or property* without due process of law." 43 USC Section 1421b(e). "One who has been dealing with the government on an ongoing basis may not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing." Transco Sec., Inc. of Ohio vs. Freeman, 639 F.2d 318, 321 (6th Cir. 1981). "Due process requires that a contractor be given notice of a pending debarment proceeding and the opportunity of a hearing to present objections or arguments." Joseph Const. Co. vs. Veterans Admin. of U.S., 595 F. Supp. 448, 451 (N.D. Ill. 1984). "[F]undamental principles of due process mandate that standards must be established to define the conduct that will result in individual debarment." Department of Labor v. Titan Construction Company, 504 A.2d 7, 16 (N.J. 1985).

PL 35-2 and the RFP are constitutionally infirm because they do not contain a procedural mechanism that allows GovGuam to review the decision of a private entity such as GRMC to effectively debar or suspend TakeCare as a potential offeror. There are also no standards in PL 35-2 allowing an offeror to participate in the GovGuam health care procurement if GRMC refuses to enter into any network relationship with a potential offeror. TakeCare, therefore, has been denied both procedural and substantive due process.

C. PL 35-2 and the RFP Deny Equal Protection

"The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by the express terms of a statute or its improper execution through duly constituted agents." Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1075 (2000).

GovGuam has allowed GRMC pursuant to PL 35-2 and the RFP to decide who will be qualified as a potential offeror for the GovGuam health insurance contract. As already discussed, GRMC has refused to enter into a provider agreement unless TakeCare also agreed to allow its federal and commercial employees to access GRMC. **This decision by was arbitrary and capricious because TakeCare's federal and commercial members have nothing to do with GovGuam members**.

GovGuam certainly could not disqualify TakeCare as a potential offeror because TakeCare refused to allow its commercial and federal members to access GRMC. It is therefore logical to conclude that GovGuam cannot do so by delegating this power to a private proxy such as GRMC.

/ /

CONCLUSION

For the numerous reasons discussed herein and in TakeCare's Protest, TakeCare respectfully submits that the RFP at issue must be cancelled and re-issued without the requirement of a private hospital be included in the qualified offeror's network.

Respectfully submitted this 20th day of June 2019.

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