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OFFICE OF PUBLIC ACCOUNTABILITY

IN THE APPEAL OF TAKECARE INSURANCE COMPANY, INC., Appellant	**APPEAL NO. OPA-PA-18-003** **APPEAL NO. OPA-PA-18-005** **TAKECARE'S COMMENTS TO DOA'S AGENCY REPORT**

INTRODUCTION

TakeCare Insurance Company, Inc. (hereinafter "TakeCare") respectfully rebuts herein the Agency Report of the Department of Administration (hereinafter "DOA") filed in Docket No. OPA-PA-18-005. DOA and the Negotiating Team (hereinafter "NT") have violated numerous procurement procedures and, as required by a mandatory Guam statute, the RFP at issue should be cancelled and revised to comply with the law. The undisputed procurement record confirms that: (1) A voting member was inappropriately appointed in violation of Guam law by someone with a conflict of interest; (2) DOA and the NT wrongfully refused to comply with TakeCare's request that they produce the procurement record relating to the approval of the RFP; (3) A NT member had improper contact with a

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"person of interest"; (4) DOA and the NT violated the automatic stay; and, (6) DOA and the NT failed to maintain a complete procurement record.

DISCUSSION

I. Conflict of Interest.

For many years, the Governor's Family has had a financial interest in the government of Guam group health insurance contract (hereinafter "government health insurance contract"). The NT and the DOA, along with everyone else in Guam, were well aware of that fact. Guam law expressly prohibits a government official from participating in a procurement process when his family has a financial interest in it. Rather than recusing himself from participating in the procurement process, the Governor instead participated in it. As a consequence, the RFP was developed and approved in an illegal manner, and it should be rescinded.

A. The Financial Interest of the Governor's Family.

It is undisputed that the Governor's family has a financial interest in the government health insurance contract: (1) The Governor's family owns and operates Calvo's SelectCare ("SelectCare"); (2) The SelectCare Plan Administrator Frank Campillo was quoted in a *Pacific Daily News* article on August 10, 2018 stating that SelectCare had been "providing continuous coverage to GovGuam since 2001"; (3) SelectCare has bid on every government health insurance contract for a number of years; (4) SelectCare has an existing contract to provide health insurance to government members; (5) Prior to the NT meeting to approve the RFP on March 30, 2018, DOA and its consultants had repeated contact with SelectCare on the following dates January 6, 2018 (Bates Stamp 000006); January 8, 2018 (Bates Stamp 000006); January 10, 2018 (Bates Stamp 000006); February

20, 2018 (Bates Stamp 000002); February 28, 2018 (Bates Stamp 000007); March 21, 2018 (Bates Stamp 000008); and, March 22, 2018 (Bates Stamp 000008); (6) After the NT meeting to approve the RFP, SelectCare on April 9, 2018, acknowledged receipt of the RFP (Bates Stamp 000011); and (7) On April 13, 2017, SelectCare had questions about the RFP (Bates Stamp 000011).

B. The Governor Participated In The Procurement Process.

Despite the fact that the Governor's family had an interest in the government health insurance contract, the Governor on February 7, 2018 appointed Roy S. Adonay as the NT Member for the General Public. (Bates Stamp 000966). When it became apparent Mr. Adonay had a conflict of interest because of his connections to Guam Radiology Consultants, the Governor on February 21, 2018 then appointed Brenda Judicpa as the NT Member for the General Public. (Bates Stamp 000979).

Thus, not only did the Governor participate in the procurement process, he actually appointed a NT member who would play a part in developing the RFP and selecting the winner of the win. Furthermore, unlike some NT members, the NT member for the General Public cannot delegate his/her duties to another person. NT Rule No. II(D)(5). Because of the Governor's conflict of interest, the appointments he made to the NT were improper, and there was never a qualified NT member appointed for the General Public.

C. The Governor Should Not Have Participated "Directly or Indirectly."

As a consequence of the Governor's family having an interest in the government health insurance contract, his appointment of Mr. Adonay and Ms. Judicpa to the NT were direct violations of Guam's procurement law, which bars any Government official from

participating "directly or indirectly" in the "procurement" process if his "family" has a "financial interest pertaining to the procurement." 5 G.C.A. §§ 5628(a)(1) and 5601(g).

The Governor should have recused himself from participating "directly or indirectly" in the procurement process, and allowed the Lieutenant Governor to make that appointment. He should have also "disclosed" his family's financial interest in the procurement and placed that disclosure "in the official records of the agency." 4 G.C.A. § 15205(g) and 5 G.C.A. § 5628(c). There are no "official records" in the Procurement Record wherein the Governor disclosed his conflicts and executed a "written statement of disqualification."

D. The RFP Should Be Cancelled and Revised.

Under Guam law, when the procurement procedures are violated, then the RFP "shall be . . . cancelled" and thereafter may be "revised." 5 G.C.A. § 5451. "The word 'shall,' when used in a statutory context, is generally construed to be mandatory." Genetics & IVF Institute v. Kappos, 801 F. Supp. 2d 497, 504 (E.D. Virg. 2011). The procurement procedures to approve the RFP were in violation of Guam law because the NT members from the General Public (Roy S. Adonay and Brenda Judicpa) were appointed by someone who was barred from participating "directly or indirectly" in the procurement process.

E. The Governor's Conflict Existed *Before* SelectCare Picked Up the RFP.

The only excuse proffered by the NT and DOA to try and justify the Governor participating in the procurement process is that a conflict only arises when "potential offerors pick up the RFP or submit a proposal." 7/27/18 DOA Letter at 1. Hence,

according to the NT and DOA, the Governor is allowed to participate in the procurement process until April 9, 2018, when SelectCare picked up the RFP. This is patently preposterous for several reasons.

First of all, the Governor was prohibited by law from participating "directly or indirectly" in the "procurement" process because his "family" had a "financial interest pertaining to the procurement." 5 G.C.A. §§ 5628(a)(1) and 5601(g). There is no exception in Guam law that allows a government official to participate in the procurement process until an RFP is actually picked up by a family member.

Second, the procurement process did not start when SelectCare picked up the RFP on April 9, 2018 (Bates Stamp 000011). As evidenced in the Procurement Record, the procurement process started on December 5, 2017 when the various government agencies started appointing members to the NT (Bates Stamp 000005). Also, as noted above, there were numerous contacts between DOA and SelectCare during January and February 2018.

Third, the appointment of NT members is a critical part of the procurement process. In fact, it might be the most important part of the process, because NT members are responsible for deciding who will win the government health insurance contract. Guam law clearly prohibited the Governor from participating in that process because of his family's interest in that contract.

Fourth, the argument of the NT and DOA is against public policy and contrary to Guam law which requires that government employees "conduct themselves in such a manner as to foster public confidence in the integrity of the territorial procurement organization." 5 G.C.A. § 5625. Allowing a government official whose family has an interest in a government contract to appoint the people who will decide who wins the

contract does not "foster public confidence in the integrity" of the procurement process. To the contrary, it is a blatant and glaring conflict of interest that is akin to allowing a litigant to appoint the judge who will decide his/her case.

Fifth, allowing the Governor to participate in the procurement process until an RFP is actually picked up by SelectCare allows the Governor through his NT appointment to influence the minimum qualifications for who can participate in the health insurance bid. It should be noted that the minimum qualifications for the bid at issue were changed in such a manner as to favor SelectCare, because for the first time ever the RFP for the government health insurance contract requires that offerors have Guam Regional Medical Center ("GRMC") in their networks.

Sixth, even if SelectCare had no intention of participating in the bidding process for the RFP at issue, SelectCare nevertheless had a continuing financial interest in the health insurance negotiations because of the renewability clause in the existing SelectCare contract. That renewability clause requires that SelectCare continue providing health insurance to government employees even after October 1, 2018 if open enrollment is delayed for any reason, such as a protest.

In sum, it is utterly frivolous for the NT and DOA to argue that SelectCare's financial interest in the government health insurance contract did not start until it picked up a copy of the RFP and is utterly without merit. SelectCare has had a financial interest in the government health insurance contract for many years and this fact is well-known by almost everyone in Guam.

II. DOA and NT Have Refused to Produce the Procurement Record.

The central issue in this dispute is the NT approval of the RFP that requires as a minimum qualification that all offerors include GRMC in their networks. In order to flush out the reasons for the new minimum qualification and approval of the RFP, TakeCare requested that DOA and the NT produce the entire Procurement Record relating to the RFP. However, DOA and the NT based on NT Rule IV have refused to produce anything relating to the approval of the RFP, such as voting sheets, minutes or audio recordings. At the same time, DOA and the NT have disclosed the alleged reasons that the NT approved the RFP with the minimum qualification that Guam Regional Medical City ("GRMC") be in any offerors network. *See e.g.*, DOA Letter of 5/2/18 at 1-2 and DOA Response dated 6/7/18 in Docket No. OPA-PA-18-005 at 3-4.

DOA and the NT cannot have it both ways. They cannot on the one hand argue that they are not allowed as a consequence of NT Rule IV to disclose anything that occurs in approval process for the RFP, and then at the same time present evidence of the alleged reasons the RFP was approved. This does not make common sense and is contrary to both Guam and federal law. It also denies TakeCare the opportunity to review the propriety of the approval process.

Guam's procurement law explicitly states that it is intended to "provide for increased public confidence in the procedures followed in public procurement" and to allow "public access to all aspects of procurement consistent with the sealed bid procedure and integrity of the procurement process." 5 G.C.A. § 5001(b)(3). "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." Forsythe v.

Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 455 (Fl. 1992). Hence, NT Rule IV must be harmonized with Section 5001(b)(3) of Guam's Procurement Law.

Furthermore, the majority rule in the United States is that claims of privilege are "narrowly construed because the privilege reduces the information discoverable during the course of a lawsuit." United States v. Collis, 128 F.3d 313, 320 (6th Cir. 1997); and, In re Grand Jury Proceedings, 78 F.3d 251, 254 (6th Cir. 1996). When narrowly construed, NT Rule IV does not grant the sweeping privilege of confidentiality claimed by DOA and the NT. The words "confidential" and "confidentiality" in NT Rule IV are contained in sentences that also refer to "proposals," and not merely "meetings." NT members are not even required by Rule IV to sign a Confidentiality Agreement until "prior to . . . opening proposals." In other words, NT members are allowed to prepare the RFP, issue the RFP, and are still not be required to sign a Confidentiality Agreement until "prior to . . . opening proposals." Inasmuch as no proposals have yet been received, there is no legal requirement at this time that the NT members even sign a Confidentiality Agreement.

Moreover, even if NT Rule IV did provide the sweeping confidentiality and privilege claimed by DOA and the NT, they waived this privileged when they disclosed the alleged reasons why the NT approved the RFP in the DOA Letter of 5/2/18 at 1-2 and the DOA Response dated 6/7/18 in Docket No. OPA-PA-18-005 at 3-4. *See e.g.*, United States v. Jones, 696 F.2d 1069 , 1072 (4th Cir. 1982)(Any voluntary disclosure 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 and the NT have revealed in the DOA Letter of 5/2/18 at 1-2 and the DOA Response dated 6/7/18 in Docket No. OPA-PA-18-005 at 3-4 the purported reasons that the NT approved the RFP containing the minimum requirement that all offerors include GRMC in their networks. Moreover, DOA and the NT revealed these alleged reasons voluntarily in order to gain an advantage in the dispute with TakeCare. As a consequence, based on the majority rule in the United States, even if discussions in NT meetings were privileged, DOA and the NT have waived that privilege by discussing the reasons the NT approved the RFP.

It is also an unconstitutional denial of substantive and procedural due process for DOA and the NT to be allowed to present evidence as to why the RFP was approved, but, at the same time, deny TakeCare the ability to review the actual evidence of that approval. "The essential requirements of due process are notice and an opportunity to respond." Cleveland Bd. of Educ. Loudermill, 105 S. Ct. 1487, 1489 (1985). TakeCare cannot "respond" to the allegations of DOA and the NT without being able to examine the evidence of those allegations. Also, without examining the evidence of what occurred in the meetings to approve the RFP, neither TakeCare nor the OPA can confirm that the alleged reasons for approval proffered by DOA and the NT were in fact the reasons that the RFP was approved.

Lastly there is no public policy reason for the NT to refuse to disclose the evidence (documents, audio recordings and voting sheets) showing when, how and why it actually decided to include GRMC as a "minimum requirement" when it developed the RFP. Doing so will not compromise the sealed bid process, because no proposals have yet been received. TakeCare is merely seeking information about how the RFP at issue was developed, which is directly at issue in this appeal.

III. A NT Member Had Contact With A "Person of Interest."

According to the Procurement Record, on March 22, 2018, Matt Santos sent an email to Shannon Taitano, Esq., and Senator BJ Cruz noting that someone on the NT had "obviously" spoken with a "party of interest" regarding the removal of the gym benefit. Bates Stamp 001018 and 001019. In other words, a Member of the NT had "obviously" communicated to a "party of interest" that the gym benefit may be removed. According to DOA and the NT, the "disclosure of the removal of the gym benefit from the FY19 RFP appears to violate the confidentiality requirement in Section IV of Public Law 32-083 . . ." 7/27/18 Letter from DOA.

Under Guam law, when procurement procedures are in violation of the law, then the RFP "shall be . . . cancelled" and thereafter may be "revised." 5 G.C.A. § 5451. "The word 'shall,' when used in a statutory context, is generally construed to be mandatory." Genetics & IVF Institute v. Kappos, 801 F. Supp. 2d 497, 504 (E.D. Virg. 2011). Inasmuch as DOA and the NT have admitted that the procurement procedures relating to the RFP have been violated, Guam law mandates by use of the word "shall" that the RFP now be cancelled and may thereafter be revised to comply with the law.

IV. DOA and the NT Violated the Automatic Stay.

Guam law requires that the procurement record "shall include . . . the requesting agency's determination of need." 5 G.C.A. § 5249(e). On March 30, 3018, two DOA staff members exchanged emails and acknowledged that a determination of need was required. Bates Stamp 001118. However, no "determination of need" was prepared until **after** the filing of TakeCare's protest on April 18, 2018.

According to DOA, when it was putting together the Procurement Record to produce to the OPA relating to TakeCare's appeal, DOA realized then that written determinations had never been executed. DOA then prepared and executed two written determinations dated May 7, 2018 and May 16, 2018. Bates Stamp 000743-000744 and 001116-001117. Unfortunately for DOA, its procurement actions after April 18, 2018 are "void" as a matter of law. "In the event of a timely protest . . . the Territory shall not proceed further with the solicitation or with the award of the contract prior to final resolution of such protest, and any such further action is **void**." 5 G.C.A. § 5425(g). *See also* DFS Guam L.P. v. GIAA, Superior Court of Guam Civil Case No. CV0943-14, Decision and Order, pp. 8-9 (Feb. 2, 2018). A "void" action cannot be ratified or enforced and "is treated as though it never existed." Illinois State Bar Ass'n Mut. Ins. Co. v. Coregis Ins. Co., 821 N.E.2d 706, 713 (Ill. App. Ct. 2004).

The violation by DOA and the NT of the automatic stay is a *per se* violation of the procurement procedures. Under Guam law, when procurement procedures are in violation of the law, then the RFP "shall be . . . cancelled" and thereafter may be "revised." 5 G.C.A. § 5451.

V. DOA and NT Failed to Maintain Complete Procurement Record.

Guam procurement procedures require that DOA prepare a determination of need when a solicitation calls for off-island experience or past performance. 5 G.C.A. § 5008(e). The RFP published by DOA makes specific reference in Section 500.3(b) of the NT's Rules of Procedure to a carrier's "experience" and "data" relating to "off island referrals." Bates Stamp 000152. The Proposed Contract published by DOA entitled GOVGUAM PPO 1500 makes specific references in Sections 2.29.4 and 2.29.5 to "services which are unavailable in Guam." Bates Stamp 000885. Section 2.31 of GOVGUAM PPO 1500 makes specific reference to emergency care "needed off island." The Governor himself noted in a letter that the government health insurance contract involved members going "off-island to seek specialty care." Bates Stamp 000989.

Clearly, the solicitation at issue involves a carrier's off-island experience and performance. Hence, Guam's procurement procedures required that a determination of need relating to off-island experience and performance should have been prepared as required by Section 5008(e). It is undisputed that DOA and the NT failed to prepare the required determination of need relating to off-island experience and performance. As already noted above, under Guam law, when procurement procedures are in violation of the law, then the RFP "shall be . . . cancelled" and thereafter may be "revised." 5 G.C.A. § 5451.

Furthermore, the lack of a required determination of need relating to off-island experience and performance means that the procurement record is incomplete. The Superior Court recently cancelled an RFP when the procurement agency failed to follow the required procedures relating to a solicitation and failed to maintain "a complete

procurement record." DFS Guam L.P. v. GIAA, Superior Court of Guam Civil Case No. CV0943-14, Decision and Order, pp. 10-13 and 28-33 (Feb. 2, 2018).

CONCLUSION

For the numerous reasons discussed herein, as well as the evidence to be presented at the hearing on this appeal, TakeCare respectfully submits that the RFP at issue must be cancelled and revised to comply with the law.

Respectfully submitted this 22nd day of October, 2018.

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By: _____
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