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OFFICE OF PUBLIC ACCOUNTABILITY

In the appeal of TakeCare Insurance Company, Inc.	)	**Docket No. OPA-PA-18-003**
Appellant,	)	**TAKECARE'S REBUTTAL TO DOA'S 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 herein, TakeCare maintains that: (1) Rules of procedure re "minimum qualifications have not been promulgated; (2) Requiring GRMC to be in network will not result in "parity" or a "level playing field"; (3) Including GRMC will not result in the "lowest cost option" as defined by Guam law; (4) It is not necessary to include GRMC in the networks of offerors because of "emergencies" or because "GRMC provides services not available at GMH"; (5) The Negotiating Team has never before

required in an RFP as a "minimum qualification" that an offeror include any specific private hospital in its network in any jurisdiction; and, (6) DOA has wrongfully refused to produce evidence that is relevant to this appeal and TakeCare will be filing a formal motion to compel production of that information.

TakeCare also filed a supplemental protest with DOA on May 30, 2018, a copy of which is being simultaneously filed with the Office of Public Accountability ("OPA) along with this Rebuttal of DOA's Agency Report. In that supplemental protest, TakeCare maintains that: (1) A voting member was inappropriately appointed in violation of Guam law due to a conflict of interest; (2) DOA and the Negotiating Team have not produced a "voting sheet" required by Guam law; (3) Improper communications with sub-contractors occurred; (4) The required "investigation" and "recommendation" relating to the improper communications are not evidenced in the procurement record; (5) DOA and the Negotiating Team have violated the automatic stay; and, (6) DOA and the Negotiating Team have failed to maintain a complete procurement record. These issues should also be addressed by the OPA, which has de novo review of all procurement matters in an appeal. OPA Rule of Procedure 12103(a).

DISCUSSION

I. Rules of Procedure Re: "Minimum Qualifications" Were Not Promulgated

The Negotiating Team is required by Guam law to "develop minimum qualification for proposals" and "develop its rules of procedure in accordance with the Administrative Adjudication Law." 4 G.C.A. Section 4302(c). As admitted by the Director of DOA in its

denial of TakeCare's protest, the *only* Rules and Procedures developed by the Negotiating Team are those contained in Public Law 32-83.

However, Negotiating Team Rules and Regulations neither contain a process for nor a list of factors that the Negotiating Team will consider when developing "minimum qualifications." Nor do those Rules and Regulations explain what weight or importance is to be given to any particular factor relating to the development of "minimum qualifications." The Negotiating Team Rules and Regulations merely reiterates verbatim the requirement in Section 4302(c), which is that "Negotiating Team members are responsible for the development of the minimum qualification for proposals . . ." Negotiating Team Rule XIV(C). This is the only reference in Public Law 32-83 to the development of "minimum qualifications" for proposals.

It is undisputed that the Negotiating Team has not promulgated any "rules of procedure" to establish a process for nor the factors that it will consider when developing "minimum qualifications." Without promulgated "rules of procedure" to establish a process for or to identify the factors to be considered when developing "minimum guidelines," or the weight/importance to be given to any particular factor, the Negotiating Team is simply making up the "minimum guidelines" arbitrarily each year on a case-by-case basis.

Government agencies are not allowed to apply informal standards on a case-by-case or year-by-year basis because it results in arbitrary and capricious actions. *See, e.g.*, Ethyl Corp. v. E.P.A., 306 F.3d 1144, 1149–50 (D.C. Cir. 2002). "Members of the public, and others affected thereby, should not be subjected to critical agency rules and regulations that are known only by agency personnel." Hallmark Cards, Inc. v. Kansas Dept. Of Commerce And Housing, 88 P.3d 250, 257 (Kan. App. 2004). "If a state agency suddenly applies a new

(but unpromulgated) generally applicable policy, even *within* a case-specific adjudication, the agency may be at fault for failure to promulgate the new policy." Degraffenreid v. State Bd. of Mediation, (Slip. Op.) --- S.W.2d ---, 2012 WL 1499890 (Mo. Ct. App. May 1, 2012), reh'g and/or transfer denied (May 29, 2012).

Recently, in DFS Guam L.P. v. GIAA, Civil Case No. 0943-14, the Superior Court of Guam invalidated the award of a multimillion dollar contract because GIAA had failed to establish proper procedures relating to an RFP. *Id.* at Decision and Order dated February 2, 2018 at pages 10-13. Inasmuch as DOA has never promulgated any rules regarding the factors that it will consider when developing minimum requirements of offerors, the RFP at issue should be cancelled pursuant to 2 G.A.R. §9105, and all proposals should be rejected in whole pursuant to 2 G.A.R. §3115. *See also* 5 G.C.A. §5451 ("If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be: (a) cancelled; or (b) revised to comply with the law.").

II. Requiring GRMC to be in Network Does Not Result in "Parity" or "Level Playing Field"

When denying TakeCare's protest, DOA makes the factual contention that requiring all proposals to include GRMC in their provider networks will result in "parity" and a "level playing field." Nothing could be further from the truth.

First, not all health insurers in Guam have a contractual relationship with GRMC. As a consequence, requiring that GRMC be in the provider network of prospective offerors as a "minimum qualification" will eliminate some prospective offerors, which is the exact opposite of "parity" and a "level playing field." Eliminating prospective offerors violates

Guam's Procurement Law because it does not "foster effective broad-based competition within the free enterprise system." 5 G.C.A § 5001(6) and 2 GAR Div. 4 § 1102(5). Under Guam's Procurement Law the "specifications" in a bid must "encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive." 5 G.C.A. § 5265.

Second, GRMC is a private entity over which the Negotiating Team has no authority to audit or otherwise to vet. The Negotiating Team cannot compel GRMC to enter into a contract with a prospective offeror. As a private entity, GRMC can simply eliminate a prospective offeror by refusing to have a contract with it, or, in the alternative, demand that an offeror pay excessive rates thereby making it impossible for that offeror to have the "lowest cost option." This fact was noted in the Legislative Testimony submitted by Calvo's Select Care on Bill No. 21-34, which stated that requiring that all prospective offerors to include GRMC in their networks would give GRMC "a significant advantage against insurers knowing that the insurers MUST have an agreement with them and possibly demand rates that may not be feasible in our market place." 3/16/17 Campillo Letter at 1.

Third, even assuming GRMC is willing to offer a contract to every prospective offeror does not "level the playing field," because TakeCare will present evidence at the hearing in this matter that GRMC does in fact charge different rates to different health insurance carriers. Requiring that prospective offerors contract with a private entity that is offering different terms and charging different rates violates Guam's Procurement Law because it fails to "ensure the fair and equitable treatment of all persons who deal with the procurement system." 5 G.C.A. § 5001(4) and 2 GAR Div. 4 § 2201(3). Furthermore, without uniform contracting, including the same terms and rates with GRMC, there is by definition not going to be "parity" or a "level playing field" amongst the prospective offerors.

DOA acknowledged in Legislative Testimony on Bill No. 21-34 that requiring prospective offerors to include GRMC in their network "forces carriers to accept whatever fees are established by the private entity." 3/15/17 Letter from Director of DOA at 1.

Fourth, requiring all prospective offerors to include GRMC in their networks discriminates against other private health care providers (both on-island and off-island) that the RFP does not require offerors include in their networks. DOA submitted Legislative Testimony on Bill No. 21-34 and said that requiring GRMC to be included in the network of prospective offerors "violates the spirit and intent of the law as it would provide special recognition and treatment to the private hospital on Guam." 3/15/17 Letter from Director of DOA at 1.

III. Including GRMC Will Not Result In "Lowest Cost Option"

Guam law requires that the Negotiating Team select the "most economical and beneficial" proposal, which "shall be ***defined*** as the lowest cost option of either the exclusive or non-exclusive proposal." 4 G.C.A. Section 4302(c)(2) as enacted by Public Law 34-83 Section 2. It is an actuarial fact that requiring offerors to include GRMC in their networks will violate Guam law because it will not result in the "lowest cost option." It also violates other provisions of Guam's Procurement Law, which require that government contracts "maximize to the fullest extent practicable the purchasing value of public funds of the Territory." 5 G.C.A. § 5001(5) and 2 GAR Div. 4 § 1102(4).

When testifying on Public Law 34-83, Mr. Eric Plinske, the Director of Corporate Affairs at GRMC, admitted that a surgical room at GRMC is $2,400.00, whereas it is about $600.00 at GMH. Committee Report Digest for Bill No. 3-34 at 24. When testifying at the same Legislative Hearing, the representative from Calvo's SelectCare agreed and said "I

think [Mr. Plinske] said it clear and that is the new hospital has a higher price cost than GMH." Committee Report Digest for Bill No. 3-34 at 24.

The Director of DOA prepared a chart comparing the cost of GRMC with those of GMH. 3/15/17 Attachment to Letter of DOA Director submitted as written testimony on Bill 21-34. The DOA chart clearly evidences the substantially greater costs of health care at GRMC. For instance, according to the DOA chart, the fee for the first 30 minutes of surgery at GRMC is $4,096.80, whereas the fee at GMH is only $1,418.74. The fee for each additional 15 minutes of surgery at GRMC is $1,024.20, whereas the fee at GMH is only $236.45. There are many such comparisons in the DOA chart that plainly indicate that substantially increased cost of health care at GRMC.

Requiring offerors to include GRMC in their networks is directly contrary to the spirit of the law, which on its face requires the selection of the health care plan that is "the lowest cost option of either the exclusive or non-exclusive proposal." 4 G.C.A. Section 4302(c)(2) as enacted by Public Law 34-83 Section 2. The substantially increased cost of having GRMC in network will of course have to be passed onto *all* the government employees, even those that do not utilize GRMC.

IV. GRMC Is Required To Provide Treatment Not Available At GMH.

When denying TakeCare's protest, the Director of DOA argued that it was necessary to include GRMC in the networks of offerors because of "emergencies" and that "GRMC provides services not available at GMH." These arguments are factually erroneous and cannot withstand scrutiny.

The Emergency Medical and Treatment Labor Act (known as "EMTALA") passed by Congress in 1986 explicitly forbids any hospital from the denying care to any patients in

emergency situations. 42 U.S.C. Section 1399dd. Thus, GRMC is required by federal law to provide care to patients in emergency situations regardless of whether the patient's health insurer has GRMC in its network.

Furthermore, the RFP at issue and all other GovGuam health care RFPs have always had a provision that allows for GovGuam employees to seek treatment at GRMC when that hospital "provides services not available at GMH." This provision states: "If a carrier does not contract with the provider of any sole source service in Guam, it must reimburse for the sole source provided by such Guam provider as if sole source provider were a participating provider." See, e.g., Procurement Record Bates Stamp # 000159, 000364, 000436, 000609, and 000800. Hence, GovGuam employees are already allowed to use GRMC for "services not available at GMH" and the health care insurer is required to "reimburse" the cost of that care "as if the source provider were a participating provider."

V. Contracts With Specific Private Hospitals Have Never Been Required.

When denying TakeCare's protest, the Director of DOA notes that in the past the Negotiating Team has required that prospective offerors have provider networks to "include Guam, Philippines, Hawaii and the U.S." What the Director fails to note is that the Negotiating Team has never required in any RFP as a "minimum qualification" that an offeror include a specific private hospital in its network in any of those jurisdictions. Thus, the Negotiating Team's requirement that all offerors have GRMC in their networks is unprecedented and has never happened in the past.

VI. DOA's Refusal To Produce Documents Is Without Merit.

The Director of DOA has refused to produce hundreds of pages of documents and audio records. See e.g. Sealed Purchasing Agency Attorney-Client Privileged And Confidential Communication Log, 5/17/18, Bates Stamp # 001251-001400. According to the Director of DOA, this information cannot be produced "until award of the contract or cancellation of the solicitation." The Director of DOA is wrong and the withheld evidence must be produced. TakeCare intends to file a formal motion to compel production of that evidence.

Much of the evidence that DOA and the Negotiating Team are withholding bears directly on the factual issues in this appeal. For instance, DOA and the Negotiating Team have refused to produce the following: (a) evidence relating to confidentiality breaches (Bates Stamp #001297A and 001297B); (b) written determinations (Bates Stamp #001293 and 001324); (c) a voting sheet(s); (d) a record of who on the Negotiating Team disclosed to a third party that the gym benefit was not being included in the RFP (Bates Stamp # 001018 and 001019); (e) a record of who the GRMC representative spoke to "in person" at DOA about GRMC being included as a minimum requirement in the RFP (Bates Stamp #000009); (f) a record of the complete email from Chuck Tanner to Lester Carlson on March 28, 2018 (Bates Stamp #001020); (g) a copy of the email from Aon on March 3, 2018, regarding RFP modifications and GRMC (Bates Stamp #000007); (h) a record of the 2017 emails forwarded from Matthew Santos to the Negotiating Team regarding PL 32-189 and eliminating gym benefit (Bates Stamp #000008); and, (i) a record of the "formal objection" of Chuck Tanner on March 28, 2018, to the removal of gym benefit (Bates Stamp #000009).

There is no legal basis for the refusal of DOA and the Negotiating Team to produce the evidence relating to this appeal. The Negotiating Team Rules and Regulation IV merely provide that "proposals received are confidential in nature." Once those proposals are received, "no information contained in the proposals, meetings or negotiations can be divulged to any person outside the Negotiating Team." However, no proposals have yet been received and TakeCare is not seeking information about any proposals. TakeCare is merely seeking information about how the RFP at issue was developed, which is directly at issue in this appeal. Nothing in Guam law shields the procedures relating to the development of an RFP from public scrutiny.

In order to determine if the RFP was developed in good faith and in compliance with the law, the Hearing Office and TakeCare must be allowed access to all information relating to how the RFP was developed, including, but not limited to, listening to the audio records of the Negotiating Team meetings. Neither the Hearing Officer nor TakeCare should be required to rely solely upon the Director of DOA's explanation as to the reasons behind including GRMC as a "minimum qualification." The best evidence of those reasons is in the documents and audio recordings of meetings prior to the RFP being published.

DOA also filed with the OPA an alleged privilege log on May 17, 2018 claiming a blanket application of the attorney-client privilege to hundreds of pages of documents (Bates Stamp #001251-001400). To say the least, the privilege log is deficient in numerous respects.

Rules 26(b)(5) of the Rules of Civil Procedure expressly require that a privilege log: (1) expressly make the claim of privilege; and, (2) describe the nature of the withheld information in a way that "will enable other parties to assess the claim." "Generally, a

privilege log should not only identify the date, the author, and all recipients of each document listed therein, but should also describe the document's subject matter, purpose for its production, and specific explanation of why the document is privileged or immune from discovery." U.S. v. Louisiana, 2015 WL 4619561 at *2. The privilege log at issue does not even indicate that an attorney actually participated in any of the meetings or was a party to any of documents referred to in the privilege log. DOA's privilege log also does not identify the client of any attorney; who drafted each document; all the recipients of the communications; or why each document is allegedly privileged.

It should also be noted that Shannon Taitano, Esq., was serving as a Member of the Negotiating Team on behalf of the Attorney General's Office. Procurement Record Bates Stamp #000928. As a consequence, her actions as a Negotiating Team member are not protected by attorney-client privilege merely because she happens to be an attorney.

Lastly, communications with third party experts such as AON representatives are not protected by the attorney-client privilege. "The majority view and the better view . . . is that all things communicated to the expert and considered by the expert in forming in forming an opinion must be disclosed even if it constitutes opinion otherwise protected as work product." Ass'n of Irritated Residents v. Dairy, 2008 WL 250935 at *1; See also U.S. v. Sierra Pacific Industries, 2011 WL 2119078 at *7.

CONCLUSION

For the numerous reasons discussed herein, as well as those in TakeCare Supplemental Protest and the evidence to be presented at the hearing on this appeal, TakeCare respectfully submits that the RFP at issue must be cancelled.

Respectfully submitted this 31st day of May, 2018.

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By: _____
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