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OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

IN THE APPEAL OF TAKECARE INSURANCE COMPANY, INC., Appellant	)	**APPEAL NO. OPA-PA-18-003** **TAKECARE'S REPLY IN SUPPORT OF MOTION TO CANCEL**

INTRODUCTION

TakeCare Insurance Company, Inc. ("TakeCare") respectfully submits that the procurement process in this case was in violation of Guam law and that the Procurement Record is incomplete. As a consequence, the solicitation must be cancelled and thereafter revised. 5 G.C.A. § 5451 and 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).

DISCUSSION

I. Conflict of Interest.

The Department of Administration ("DOA") and the Negotiating Team ("NT") have not even attempted in their opposition brief to explain or even discuss Governor's

ORIGINAL

conflict of interest. In fairness, how could they explain it? The law prohibiting the Governor from participating "directly or indirectly" in the procurement process is clear and unequivocal.

For instance, it is undisputed that the Governor appointed both Roy S. Adonay (Bates Stamp 000966) and Brenda Judicpa (Bates Stamp 000976) as the NT Member for the General Public. This was a direct violation 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). It is undisputed that the Governor's family has a financial interest in the government health insurance procurement because of their connection to Calvo's SelectCare.

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."

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 team 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.

II. Lack of a Voting Sheet to Approve RFP.

Notably, DOA and the NT do not expressly state that there are actually voting sheets that were executed "upon casting of votes" pursuant to NT Rule No. VIII. Rather than stating definitively that voting sheets exist that were executed "upon the casting of votes," they instead argue that any "voting sheets cannot be disclosed as they contain information obtained in a meeting of the Negotiating Team." Opposition to TakeCare's Motion to Cancel RFP ("Opp. Brief"), at p. 3 (Jun. 29, 2018). In simple terms, DOA and the NT insist that they can testify that there are voting sheets, but that they are not required to disclose or produce those voting sheets. With all due respect, this contention strains common sense to the breaking point and is contrary to public policy.

First of all, 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). The integrity of the sealed bid procedure will not be compromised by DOA and the NT disclosing the voting sheets showing that the NT actually made a decision to approve the RFP "upon the casting of votes."

Furthermore, as explained in TakeCare's Motion to Compel, filed on June 15, 2018 at pages 3 – 7, the reliance on NT Rule IV relating to "confidentiality" is misplaced. 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.

It would also be an unconstitutional denial of substantive and procedural due process for DOA and the NT to be allowed to argue that there are voting sheets to approve the RFP, but then refuse to disclose the actual voting sheets. "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 does not have "notice" of voting sheets that it is not allowed to examine, and it cannot "respond" to undisclosed voting sheets.

More importantly, even assuming there are any voting sheets in existence, and that they were executed "upon the casting of votes," they are not identified in the Procurement Record produced to the Office of Public Accountability ("OPA"). They are also not identified in the two lists of allegedly privileged documents submitted by DOA and the NT. *See e.g.* TakeCare's Motion to Compel Production of Documents ("TakeCare's Motion. to Compel"), Tabs 3-7, (Jun. 15, 2018). As a consequence, the Procurement Record at this time is most definitely "incomplete." The Superior Court of Guam recently cancelled an RFP when the procurement agency 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. 28-33 (Feb. 2, 2018).

III. Failure to Conduct an Investigation.

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. Thereafter, on March 30, 2018 Francis Santos (a representative of GRMC) expressed concern "in person" to DOA about GRMC not being part of any provider network. Bates Stamp 000009.

NT Rule No. X expressly prohibits any unsolicited communications by sub-contractors "about any facet of the RFP prior to negotiations." When an improper contact or communication occurs with a person outside the NT, the NT is required by its rules to "request" that the Attorney General's Office "conduct an investigation." NT Rules and Regulation No. X.

DOA and the NT never requested that an investigation be conducted as required by Rule X. Their only excuse for failing to conduct an investigation is that the "offerors and sub-contractors" were "not known at this stage of the procurement process." Opp. Brief, p. 3. The Procurement Record indicates otherwise.

As noted in an email dated March 3, 2018 to AON, DOA and the NT knew by early March that there were RFP modifications regarding GRMC. *See e.g.*, TakeCare's Motion to Compel, Tab 2, at Bates Stamp 000007 (Jun. 15, 2018). In addition, every draft of the RFP in the Procurement Record prior to March 30, 2018 includes the provision that GRMC be a "minimum qualification." *See e.g.*, Procurement Record Bates Stamp 000163, 000439, and 000610. The NT meetings to review and approve the RFP, which made specific references to GRMC, took place on March 8, 2018 and March 22, 2018. *See e.g.*,

Procurement Record Bates Stamp 000997 and 000569. Thus, on March 30, 2018, DOA and the NT certainly knew that GRMC was going to be a sub-contractor under the terms of the RFP.

Similarly, DOA and the NT knew in March 2018 that the gym benefit was already a part of the then existing GovGuam health care contract. In fact, on March 3, 2018, AON sent an email to the Attorney General's Office requesting information about the gym benefit. *See e.g.*, TakeCare's Motn. to Compel, Tab 2, Bates Stamp 000007. Hence, both DOA and the NT knew on March 22, 2018, when Mr. Santos sent his email to the Attorney General, that the gym was not only a potential sub-contractor, but was actually an existing sub-contractor, who was attempting to influence the NT.

The failure of DOA and the NT to conduct even a minimal investigation was a violation of NT Rule X. 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.

IV. Lack of Determinations of Need.

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).

Guam law also required 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 Negotiating Team'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 plan 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, a determination of need relating to off-island experience and performance should have been prepared as required by Section 5008(e).

Instead of complying with Section 5008(3), DOA and the NT insist that they do not apply to this solicitation because Title 4 Guam Code Annotated Section 4301(8)(B) requires that notice of the RFP be placed in off island publications. This contention cannot succeed because "[u]nless two statutes are in irreconcilable conflict, it is the court's duty to regard each as effective and to arrive at a construction that will harmonize" them. Ex parte S.C.W., 826 So.2d 844 (Ala. 2001). "Repeals by implication are disfavored" and will not be allowed "if the two statutes can be reconciled." Sumitomo Constr. Co. v. Gov't of Guam, 2001 Guam 23, ¶ 16.

Sections 5008(e) and 4301(8)(B) are easily reconciled. One requires a determination of need when solicitations involve off-island services or performance, while the other requires off-island publication of that solicitation. If anything, the two statutes are harmonious, not inconsistent.

V. Lack of Prejudice to GovGuam or its Employees.

TakeCare noted in its Motion to Cancel that RFP that there will be no lapse in health insurance coverage should the RFP at issue be cancelled and the NT be required to approve a new RFP consistent with Guam law. DOA and the NT do not dispute this fact, which comes as no surprise. It is undisputed that the current health care contracts do not expire until September 30, 2018 and will thereafter be automatically renewed pursuant to a contractual provision.

CONCLUSION

The procurement record produced by DOA and the NT as part of this appeal is clearly incomplete and evidences that certain procedures required by Guam law and the NT rules of procedure have not been followed. As a consequence, the RFP at issue is in

violation of Guam law and "shall" be cancelled. 5 G.C.A. § 5451; DFS Guam L.P. v. GIAA, Superior Court of Guam Civil Case No. CV0943-14, Decision and Order, pp. 10-13, 28-33 (Feb. 2, 2018).

Respectfully submitted this 5th day of July, 2018.

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