MAIR & MAIR, Attorneys at Law
238 Archbishop Flores Street, Suite 801
Hagåtña, Guam 96910
Telephone: (671) 472-2090
Facsimile: (671) 477-5206
Email: DMair@mmstlaw.com

Attorneys for TakeCare Insurance
Company, Inc.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: July 5, 2018
TIME: 1:27 ☐AM ☒PM BY: Chris
FILE NO OPA-PA: 18-003

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 COMPEL PRODUCTION OF DOCUMENTS**

INTRODUCTION

The central issue in this appeal is how and why the Department of Administration ("DOA") and the Negotiating Team ("NT") decided to require as a minimum qualification that GRMC be in the network of offerors. In order to determine why and how this decision was reached, TakeCare Insurance Company, Inc. ("TakeCare") and the Hearing Officer must have access to the evidence relating to that issue, which includes the audio recordings, minutes and notes of the meetings where the decision was made to approve the RFP, and any other evidence discussing or referencing Guam Regional Medical City ("GRMC"). TakeCare must also be provided with access to evidence already submitted to the Office of Public Accountability ("OPA") and Hearing Officer under seal.

ORIGINAL

DISCUSSION

I. Public Law 32-18 and NT Rule IV.

The refusal of DOA and the NT to produce documents to TakeCare that are relevant to this appeal is based *entirely* on Public Law 32-18, which approved NT Rule IV regarding "confidentiality." That rule states:

> **Rule IV. Confidentiality.** Members, delegates of member, consultants of the Negotiating Team, and applicable Department of Administration staff as determined by the Director of Administration **must adhere to the strictest of confidentiality and acknowledge that the *proposals received are confidential***. Team members, delegates of members, consultants, and applicable Department of Administration staff acknowledge that **no information contained in *proposals*, meetings or negotiations can be divulged to any person outside the Negotiating Team**. Team members, delegates of members, consultants and applicable Department of Administration staff must sign a confidentiality agreement attesting to such. **Confidentiality agreements shall be signed prior to** the predetermined meeting date and time for **opening *proposals*** referenced in Section IX.

The words "confidential" and "confidentiality" in NT Rule IV are contained in two sentences, both of which refer to "proposals," and not merely "meetings." Notably, NT Rule IV does not even require NT members to sign a Confidentiality Agreement until "prior to . . . opening proposals." Rule IV must also be harmonized with Guam's Procurement Law, which 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) and 5001(b)(8). "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). TakeCare respectfully submits that the intent of NT Rule IV was to make confidential any meetings relating to proposals and negotiations relating to those proposals.

Moreover, as a practical matter, in order to defend this appeal, DOA and the NT must disclose the "reasons" they elected to include GRMC as a minimum qualification. Not surprisingly, when denying TakeCare's protest and submitting their Agency Report, DOA and the NT have already proffered some of their "reasons" for including GRMC as a minimum requirement. Hence, the "reasons" for including GRMC as a minimum requirement are not by definition "confidential" because they are already being disclosed by DOA and the NT. In order to test the veracity and accuracy of the those alleged "reasons," or whether those "reasons" were actually considered by the NT, TakeCare must be allowed access to the audio recordings of the NT meetings, voting sheets and other documents making reference to GRMC.

Allowing DOA and the NT to discuss the "reasons" they elected to include GRMC as a minimum qualification, but, at the same time, refusing to produce the actual evidence of what occurred in the NT meetings, would be an absurd result that Guam's Legislature could not have possibly intended. "[I]n construing a statute, (courts) must seek to avoid an interpretation that leads to an absurd result." State v. Nieto, 993 P.3d 493, 501-502 (Colo. 2000).

II. Filing Evidence Under Seal With The OPA.

DOA and the NT apparently understand that in order for their witnesses to be allowed to testify about the "reasons" they elected to include GRMC as a minimum requirement, they are going to be required to provide the evidence of the communications,

documents and meetings on that subject. However, instead of simply producing that evidence to TakeCare, DOA and the NT argue that they should be allowed to file this evidence "under seal." *See* Opposition Brief, Conclusion, p. 6. There are several problems with this approach.

First, DOA and the NT cannot merely submit this evidence to the OPA and Hearing Officer. TakeCare must also be allowed access to this evidence in order to be able to verify the accuracy of the testimony of witnesses called by DOA and the NT. To allow DOA and NT witnesses to testify about the "reasons" they included GRMC, without allowing TakeCare access to the information needed to cross examine those witnesses, would be a denial of both substantive and procedural due process.

Second, providing this evidence *only* to the Hearing Officer and OPA, without providing it to TakeCare, is an improper ex parte contact. OPA Rule 12107 expressly provides that parties cannot "communicate" with the OPA or Hearing Officer "any evidence, explanation, analysis, or advice, whether written or oral, regarding any matter at issue in the appeal."

Third, if TakeCare is provided the evidence being sought in this motion, then it should also be accessible to other potential offerors in order for there to be a "level playing field" in the bid process. More likely than not, providing the evidence to TakeCare, but not other offerors, will understandably result in one of the other offerors filing a protest.

Fourth, if TakeCare and the other potential offerors have the evidence sought in this motion, then the public should have it as well. The tax paying public and especially the government employees have every right to know how and why DOA and NT elected to include GRMC as a minimum qualification. There is no good reason to keep the public in

the dark about how and why DOA and the NT elected to include GRMC as a minimum requirement. One can only wonder why DOA and the NT wish to conceal this information from the public.

Fifth, it is patently frivolous for DOA and the NT to argue that TakeCare and the public are not being harmed because they will eventually have access to the information *after* the contract is awarded. Guam law allows a "prospective offeror" to challenge a "solicitation" that violates the law *before* the contract is awarded. 5 G.C.A. § 5425(a) and 2 GAR Div. 4 § 9101(c)(1). A prospective offeror is not required to simply wait until a contract is awarded before protesting a solicitation produced in violation of the law. That would be like shutting the barn door after the horse has already left the stable. The proper procedure is to address problems with an RFP *before* the contract is awarded, not afterwards.

III. Communications with AON.

DOA and the NT concede that AON was acting as a consulting expert for them and then boldly assert *without citing any legal authority* that communications with AON are privileged. This contention has no support in the law. "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 Irritated Residents v. Dairy, 2008 WL 250935 at *1; *See also* U.S. v. Sierra Pacific Industries, 2011 WL 2119078 at *7. The majority rule in the United States requires that all the communications between DOA, the NT and AON be produced.

Also, the fact that DOA and the NT have apparently already submitted AON communications to the OPA and Hearing Officer, without also providing them to

TakeCare, is a violation for the OPA Rules of Procedure for Appeals. Although OPA Rule 12016 allows parties to designate filed documents as "confidential," it does not authorize parties to submit those documents *only* to the OPA and Hearing Officer. In order to comply with OPA Rule 12017, documents filed with the OPA and Hearing Officer must also be provided to the other parties in the action. The submittal of evidence *only* to the OPA and Hearing Officer is an improper ex parte contact that violates OPA Rule 12107.

Any evidence relating to communication with AON that has been filed with the OPA or Hearing Officer must also be provided to TakeCare. Those documents include, but are not necessarily limited to, the following: Bates Stamp 001257, 001258, 001260, 001263, 001267, 001272, 001275, 001276, 001279, 001282, 001266, 001291, 001295, and 001353.

IV. Tab 4 - The Defective "Privilege Log"

DOA and the NT have made no effort whatsoever to defend the defective privilege log that is marked as Tab 4 attached to TakeCare's Motion to Compel. In fairness, it would be difficult to defend any privilege log that does not "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 produced by DOA as Tab 4 is patently inadequate because it does not indicate that an attorney actually participated in any of the meetings or was a party to any of the documents referred to in the privilege log; does not identify the attorney or the client relating to any specific document; does not identify who drafted each document;

does not identify all the recipients of each document; and, does not explain why each document is allegedly privileged.

DOA and the NT must revise their privilege log to include the information required by law. Furthermore, in order for documents in the privilege log to be legitimately withheld on the basis of the attorney/client privilege, DOA and the NT have the burden of showing that each such communication was: (a) either sent to Ms. Taitano or prepared by her; (b) that none of the communications to Ms. Taitano were disclosed to non-clients, such as third-parties like AON; and, (c) that each communication to her was "for the purpose of seeking (her) legal advice." RLI Ins. Co. Conseco, Inc., 477 F.Supp. 2d 741, 751 (E.D. Va. 2007).

CONCLUSION

For the reasons discussed herein, TakeCare respectfully submits that DOA and the NT must be compelled to produce the documents identified herein and in the Proposed Order submitted along with this Motion to Compel. Otherwise, TakeCare will be denied both procedural and substantive due process to present its claim and defend against the contentions of DOA and the NT.

Respectfully submitted this 5th day of July, 2018.

MAIR & MAIR, Attorneys at Law
Attorneys for TakeCare Insurance Company, Inc.

By: _____
DAVID A. MAIR