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10 **PROCUREMENT APPEAL**  
11 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

12 In the Appeal of  
13 TAKECARE INSURANCE COMPANY,  
14 INC.,  
15 Appellant,  
16 and  
17 DEPARTMENT OF ADMINISTRATION,  
18 Purchasing Agency.

19 **APPEAL NO. OPA-PA-19-005**  
20 TAKECARE INSURANCE COMPANY,  
21 INC.'S OPPOSITION TO  
22 DEPARTMENT OF  
23 ADMINISTRATION'S MOTION TO  
24 DISMISS

25 **INTRODUCTION**

26 Noticeably absent in the Department of Administration's ("GovGuam")  
Motion to Dismiss is GovGuam's failure to address issues raised in TakeCare  
Insurance Company, Inc.'s ("TakeCare") Protest. Instead, GovGuam raises only  
procedural defenses in response to the Protest and argues that TakeCare's  
Protest is "untimely" and that TakeCare is not an actual prospective offeror.  
These procedural defenses are factually and legal flawed.

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**ORIGINAL**

**ARGUMENTS**

**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).

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

10  
11 **II. TakeCare Could Not be Prospective Bidder or Offeror Because**  
12 **PL 35-2 Subordinates DOA's Authority to GRMC.**

13 In its motion, DOA argues that because TakeCare "has not been able to  
14 secure an agreement with Guam Regional Medical City." The problem is  
15 TakeCare could not be an actual or prospective bidder, offeror or contractor  
16 because PL 35-2 improperly granted a private party, the unilateral right to  
17 prevent TakeCare from submitting a bid.

18 GovGuam itself confirms that an in-network relationship with GRMC is  
19 part of the procurement process when it then argues that because TakeCare  
20 was not able to successfully contract with GRMC and it is therefore not  
21 approved. That is exactly the point that TakeCare is making in its protest.  
22 Namely, that GRMC not GovGuam is deciding who may be an offeror because  
23 GRMC and not GovGuam controls who has GRMC in its network.

24 More importantly, as predicted by both DOA and Calvo's SelectCare in  
25 Legislative testimony on Bill No. 21-34, GRMC has used the power bestowed  
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1 upon it by PL 35-2 to eliminate TakeCare as an offeror by demanding  
2 unreasonable conditions, and contract terms including higher rates. See e.g.,  
3 Legislative testimony of DOA stating that requiring offerors to include GRMC  
4 in their networks would “force carriers to accept whatever fees are established”  
5 by GRMC and those that refused to do so “would be disqualified from bidding  
6 on the Government’s health insurance contract since they would not have the  
7 private hospital as one of their providers.” (Protest Exhibit 14 at 3). SelectCare  
8 also predicted that requiring offerors to include GRMC in their networks would  
9 allow GRMC to make unreasonable demands on prospective offerors. (Protest  
10 Exhibit 14).  
11

12 The actions of GRMC have now confirmed that DOA’s concerns about  
13 requiring offerors to have an in-network relationship with GRMC were justified  
14 because GRMC is now able to eliminate any prospective offeror by simply  
15 refusing for any reason or for no reason, to have a network relationship, which  
16 is exactly what has happened. GRMC has refused to enter into a contract with  
17 TakeCare relating only to GovGuam members and instead used the leverage  
18 given to it by PL 35-2 and the RFP to insist that TakeCare also enter into a  
19 contract with GRMC in-network for all of TakeCare’s lines of business,  
20 including commercial and federal members. GRMC has also wrongfully  
21 insisted that TakeCare pay amounts to GRMC that TakeCare does not legally  
22 owe and proposes to charge TakeCare rates that are higher than the ones it  
23 charges other carriers. It is for these reasons that TakeCare maintains in its  
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1 Protest and in this appeal that PL 35-2 and the RFP are an improper delegation  
2 of authority.

3 Instead of trying to justify the legality of PL 35-2 and address the  
4 problems raised by TakeCare in its Protest, GovGuam is forced to merely argue  
5 that it is TakeCare could not secure an agreement with GRMC and therefore is  
6 not a qualified offeror is aggrieved. TakeCare agrees that GovGuam is required  
7 to “follow the laws,” just as TakeCare is legally entitled to challenge the validity  
8 of those laws. In its Protest and in this Appeal, TakeCare is challenging the  
9 validity of PL 35-2 and the RFP attempting to implement it.

10 GovGuam cannot simply enact legislation like PL 35-2, which requires  
11 offerors to interact with a private entity, and then divorce itself from any  
12 wrongdoing committed by that private entity. This is especially true when it is  
13 undisputed that **GovGuam itself predicted that legislation like PL 35-2**  
14 **would be used by a private entity like GRMC to “disqualify” offerors “from**  
15 **bidding on the Government’s health insurance contract since they would**  
16 **not have the private hospital as one of their providers.”** (Protest Exhibit  
17 14 at 3).

### 18 **III. PL35-2 and the RFP Are Unconstitutional and Inorganic**

19 Both PL 35-2 and the RFP require that offerors have GRMC in their  
20 networks in order to bid on the GovGuam health insurance contract. Hence,  
21 if PL 35-2 is unconstitutional for any reason, then the RFP is “in violation of  
22 the law” and must either be “cancelled or revised to comply with the law.” 5  
23 G.C.A. 5451.  
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1                   **A. PL 35-2 and the RFP Are An Improper Delegation of Authority.**

2                   TakeCare sought to comply with PL 35-2. The proposal by GRMC to  
3 TakeCare for GovGuam in-network was expressly conditioned upon TakeCare's  
4 inclusion of TakeCare's commercial and federal members also being in-network  
5 for health care services at GRMC. GRMC also insisted that none of TakeCare's  
6 plans include a buy up option. In addition, as a condition for entering into an  
7 agreement with TakeCare, GRMC wrongfully demanded that TakeCare pay for  
8 past services to its members, which TakeCare has no legal obligation to pay on  
9 the grounds that: (a) TakeCare had no Direct Payer Agreement with GRMC at  
10 the time of such alleged services; (b) Many of the alleged services were not  
11 covered by the terms of any of TakeCare's plans; and, (c) Even if TakeCare had  
12 a Direct Payer Agreement with GRMC, and even if the alleged services had been  
13 covered, the GRMC claims submitted to TakeCare patients/TakeCare were  
14 time-barred under the provisions of Guam's Prompt Payment Act and/or the  
15 statute of limitations. In simple terms, GRMC is holding up TakeCare and  
16 preventing it from qualifying to respond to the RFP by demanding that  
17 TakeCare agree to include GRMC in-network for all of its members, including  
18 its commercial and federal members. GRMC is further insisting that TakeCare  
19 pay for claims that it does not owe. All of these extortionate demands must be  
20 met before GRMC will enter into a contract with TakeCare relating to GovGuam  
21 members.  
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24                   If offerors are required by PL 35-2 to contract with GRMC in order to  
25 submit a proposal in response to the RFP, GRMC can completely control the  
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1 outcome of the RFP process by eliminating any prospective offeror by simply  
2 refusing to have a network relationship with that insurer. That is exactly what  
3 has happened. GRMC has refused to enter into a contract with TakeCare  
4 relating only to GovGuam members. Instead, GRMC has wrongfully used the  
5 leverage given to it by PL 35-2 to insist that TakeCare also enter into a contract  
6 with GRMC in-network for all of TakeCare's lines of business, including  
7 commercial and federal members. GRMC has also wrongfully used its  
8 perceived leverage from PL 35-2 to demand that TakeCare pay amounts to  
9 GRMC that TakeCare does not legally owe. Lastly, GRMC proposes to charge  
10 TakeCare rates that are higher than the ones it charges other carriers.  
11

12 GRMC is maliciously using PL 35-2 and the RFP to eliminate or  
13 disadvantage TakeCare as an offeror by demanding unreasonable conditions,  
14 and contract terms including higher rates. This scenario was predicted by DOA  
15 itself when it previously opposed Bill No. 21-34 that required offerors to include  
16 GRMC in their networks. In Legislative testimony on Bill No. 21-34, DOA noted  
17 that requiring offerors to include GRMC in their networks would "force carriers  
18 to accept whatever fees are established" by GRMC and those that refused to do  
19 so "would be disqualified from bidding on the Government's health insurance  
20 contract since they would not have the private hospital as one of their  
21 providers." (Exhibit 14 at 3). DOA's fears about GRMC making unreasonable  
22 demands on offerors were well founded. SelectCare and TakeCare also  
23 predicted that requiring offerors to include GRMC in their networks would  
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1 allow GRMC to make unreasonable demands on prospective offerors. (Exhibit  
2 14).

3 The actions of GRMC clearly prove that the practical effect of PL 35-2  
4 and the RFP has been to delegate the authority to GRMC to determine who can  
5 participate in the GovGuam RFP process. GRMC can make demands upon  
6 prospective offerors like it has done to TakeCare that are not required by PL  
7 35-2, but which are designed to disqualify TakeCare. As a consequence of PL  
8 35-2, GRMC could in fact unilaterally refuse to have an in-network relationship  
9 with any potential offeror, and, thereby prevent GovGuam from having any  
10 health insurance coverage.

11  
12 PL 35-2, therefore, is the textbook case of an improper delegation of  
13 executive because it allows a private entity, such as GRMC, to determine what  
14 entities may participate in and ultimately win a contract with the government.  
15 *See e.g. G. Curtis Martin Investment Trust v. Clay*, 266 S.E.2d 82 (S.C. 1980)(It  
16 is an improper delegation of power to allow a private entity to control who  
17 participates in government owned sewer system); Texas Boll Weevil Eradication  
18 Foundation v. Lewellen, 952 S.W.2d 454 (Tex. 1997)(It is an unconstitutional  
19 delegation of authority to allow a private foundation whose members have a  
20 pecuniary interest to assess costs against other private companies); and,  
21 People v. Pollution Control Board, 404 N.E. 2d 351 (Ill. App. 3d 1980)(Allowing  
22 private automobile association to determine which events are subject to  
23 regulations is an improper delegation of legislature authority).

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

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

9           Moreover, there is no procedural mechanism in place for GovGuam to  
10 review the refusal of GRMC to enter into provider agreements with potential  
11 offerors. To the contrary, GovGuam claims that it is “not able to respond” to  
12 the refusal of GRMC to enter into a provider agreement with TakeCare because  
13 GRMC is a “private entity.” DOA Denial of TakeCare’s Protests 5/21/19 at 2.  
14 In simple terms, GovGuam has interpreted PL 35-2 and the RFP to allow GRMC  
15 to unilaterally debar or suspend potential offerors without any procedural  
16 mechanism in place for the review of GRMC’s decisions.

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

8 PL 35-2 and the RFP are constitutionally infirm because they do not  
9 contain a procedural mechanism that allows GovGuam to review the decision  
10 of a private entity such as GRMC to effectively debar or suspend TakeCare as  
11 a potential offeror. There are also no standards in PL 35-2 allowing an offeror  
12 to participate in the GovGuam health care procurement if GRMC refuses to  
13 enter into any network relationship with a potential offeror. TakeCare,  
14 therefore, has been denied both procedural and substantive due process.  
15

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

17 “The purpose of the equal protection clause of the Fourteenth  
18 Amendment is to secure every person within the State’s jurisdiction against  
19 intentional and arbitrary discrimination, whether occasioned by the express  
20 terms of a statute or its improper execution through duly constituted agents.”  
21 Village of Willowbrook v. Olech, 120 S. Ct. 1073, 1075 (2000).  
22

23 GovGuam has allowed GRMC pursuant to PL 35-2 and the RFP to decide  
24 who will be qualified as a potential offeror for the GovGuam health insurance  
25 contract. As already discussed, GRMC has refused to enter into a provider  
26

1 agreement unless TakeCare also agreed to allow its federal and commercial  
2 employees to access GRMC. **This decision by was arbitrary and capricious**  
3 **because TakeCare's federal and commercial members have nothing to do**  
4 **with GovGuam members.**

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

9  
10 **CONCLUSION**

11 For the reasons set forth above, Appellant TakeCare respectfully requests  
12 the Office of Public Accountability to deny Purchasing Agency Department of  
13 Administration's Motion to Dismiss this appeal.

14 Respectfully submitted this 8th day of July, 2019.

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16 Attorney for Appellant  
17 TakeCare Insurance Company, Inc.

18 By. \_\_\_\_\_

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