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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

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

TakeCare respectfully submits that before the Hearing Officer determines whether the Department of Administration (“DOA”) and the Negotiating Team (“NT”) violated Guam law by requiring that GRMC be in the network of offerors, the Hearing Officer must first determine whether the procedures followed when developing and approving the RFP violated Guam law. If those procedures were in violation of Guam 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).

ORIGINAL

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). The Procurement Record in this matter evidences that Guam law was violated because the proper procedures were not followed and a complete Procurement Record was not maintained.

DISCUSSION

In its Protest, TakeCare requested that DOA and the NT produce “the complete procurement file and all supporting documents.” TakeCare Protest 4/18/18 at 1. The Office of Public Accountability (“OPA”) has also required that DOA and the NT “submit to the Public Auditor a complete copy of the Procurement Record relevant to the appeal within five (5) working days of receiving notice of an Appeal.” OPA Rule 12104(c)(3). Thus, the Procurement Record produced by DOA and the NT is at issue in this appeal. The OPA also has jurisdiction to “determine de novo any matter properly submitted.” OPA Rule 12103(a).

I. Lack of “Official Records” Disclosing Conflicts of Interest.

A public “employee means any nominated, appointed, or elected officer or individual . . . including members of boards or commissions . . .” 4 G.C.A. § 15102(d). Thus, both Governor Calvo and Roy Adonay (the person he appointed to serve on the NT) are considered “employees” of the Government of Guam and must comply with both Guam’s Standards of Conduct for Public Employees (4 G.C.A. §§ 15100 *et. seq.*) and Guam’s Procurement Laws (5 G.C.A. §§ 5601 *et. seq.*).

Public employees must “conduct themselves in such a manner as to foster public confidence in the integrity of the territorial procurement organization.” 5 G.C.A. § 5625. It is a “breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that the employee or any member of the employee’s immediate family has a financial interest pertaining to the procurement.” 5 G.C.A. § 5628(a)(1). An immediate family member means parents and brothers. 5 G.C.A. § 5601(g).

Calvo’s SelectCare is affiliated with Calvo’s Insurance Underwriters, which, according to the website for Calvo’s Insurance, is “spearheaded by Paul Calvo, Jr.” who is the brother of Governor Calvo. *See e.g.*, <http://www.calvosinsurance.com/about-calvo-s/our-history>. As a consequence of his family’s interest in the government health insurance contract, Governor Calvo should not have participated “directly or indirectly” in the procurement process. 5 G.C.A. §§ 5601(g) and 5628(a)(1). However, instead of recusing himself from participating in the procurement process relating to government health insurance, on February 7, 2018 Governor Calvo appointed Roy S. Adonay as a NT member for the Calvo/Tenorio administration. Bates Stamp 000966.

Roy Adonay was appointed by the Governor as a NT member for the General Public and is identified as a Voting Member. Bates Stamp 000970. Roy Adonay was the Chief Operating Officer of Guam Radiology Consultants at the time of his appointment and during the time frame that the RFP was considered and approved by the NT. *See e.g.*, <https://www.ramsoft.com/about-us/news/guam-radiology-consultants-goes-100-paperless-with-ramsoft-powerserver-rispacs/>. In addition to Guam Radiology Consultants having a financial interest in providing health care to government employees, it is also listed in the

Directory of Participating Clinic's for Calvo's SelectCare. *See e.g.*, <http://calvos.net/data/Provider%20Directory%2020170516.pdf>.

A person has a financial interest in a bid if he holds a position in a business such as an officer, director or any position of management. 5 G.C.A. § Section 5601(e)(3) and 4 G.C.A. § 15205(g). Due to the interest of Mr. Adonay's employer in the providing health care to government employees, he had an interest in the award of the RFP at issue. DOA itself acknowledged in an email that "there may be a conflict with his appointment." Bates Stamp 000967.

An employee who has a financial interest in a procurement shall "disclose" that interest and it "must be placed in the official records of the agency." 4 G.C.A. § 15205(g). "Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification, and shall withdraw from further participation in the transaction involved." 5 G.C.A. § 5628(c). There are no "official records" in the Procurement Record wherein Governor Calvo or Mr. Adonay disclosed their conflicts and executed a "written statement of disqualification."

As discussed below and in TakeCare's Motion to Compel, DOA and the NT have not submitted any voting sheets or audio recordings of NT meetings to formulate and approve the RFP. TakeCare, therefore, cannot determine whether Mr. Adonay actually participated in or voted in those meetings. Nevertheless, even assuming, arguendo, that Mr. Adonay was excluded from NT meetings, that is not a defense to the failure to maintain a complete Procurement Record. It would also be a violation of the NT Rules and Regulations, a copy of which is attached to TakeCare's Motion to Compel filed simultaneously herewith and marked as Tab 1.

For example, as a consequence of Mr. Adonay's a conflict of interest (which appears to have been acknowledged in Bates Stamp 000967), a "written statement of disqualification" should have been made a part of the "official record." 5 G.C.A. § 5628(c) and 4 G.C.A. § 15205(g). There is no such conflict statement in the Procurement Record produced DOA and the NT.

Furthermore, as noted above, Mr. Adonay was the NT member for the General Public. Bates Stamp 000970. Unlike some NT members, the participation and vote of a NT member of the General Public in "Negotiating team activities" is required and his/her vote cannot be delegated to another for the purpose of participating in NT activities. NT Rule No. II(D)(5). However, according to the Procurement Record, there was never a qualified NT member appointed because Mr. Adonay had an incurable conflict of interest and there is nothing in the Procurement Record to indicate he was ever properly replaced.

II. Lack of a Voting Sheet to Approve RFP.

The NT Rules and Regulation No. VIII state that "[u]pon casting of votes, team members shall sign off on a voting sheet to document the decision made." No voting sheet(s) have been provided as part of the Procurement Record. By definition there is no "decision" of the NT without a voting sheet prepared, signed and executed "upon casting of votes." *See e.g.*, NT Rule No. VIII.

As already noted, in the DFS Guam litigation, the Superior Court of Guam 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). However, the failure to prepare and execute a voting sheet is not merely evidence of an incomplete procurement

record. It is also a violation of the NT Rules of Procedure. In DFS Guam L.P. v. GIAA, the Superior Court of Guam also invalidated the RFP because the Guam International Airport Authority (“GIAA”) had failed to comply with its procedures relating to the RFP. *Id.*, pp. 10-13.

III. Lack of Voting Sheet to Request Investigation.

On March 22, 2018, Matt Santos sent an email to Shannon Taitano, Esq., and BJ Cruz noting that the Speaker had told him that a representative of a gym had complained that Mr. Santos had recommended that the gym benefit be removed. Mr. Santos noted in the email that someone on the NT had “obviously” spoken with a “party of interest” regarding the removal of that benefit. Bates Stamp 001018 and 001019.

On March 30, 2018 Francis Santos expressed concern “in person” to DOA about GRMC not being part of any provider network. Bates Stamp 000009. It is the understanding of TakeCare that Francis Santos is a representative of the Guam Regional Medical City, which is a sub-contractor of potential offerors to the RFP.

These ex parte contacts violated the NT Rules and Regulation No. X regarding 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. In order to make a “decision” to “request” an “investigation,” the NT must meet and make a “decision” to do so. That “decision” must be confirmed by a voting sheet. NT Rule and Regulation No. X. There is no “voting sheet” to indicate that the NT ever met and voted to “request” that the Attorney General’s Office “conduct and investigation.”

Once a “request” is made to the Attorney General’s Office to “conduct an investigation,” the Attorney General’s Office is required to make a “recommendation to the negotiating team for action” as required by NT Rules and Regulation No. X. Nothing in the Procurement Record produced by DOA indicates that any such “recommendation” was ever made to the NT.

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). There is no “determination of need” in the Procurement Record **prior to** the filing of TakeCare’s protest on April 18, 2018. The only “determinations of need” were made and executed by DOA on May 7, 2018 and May 16, 2018, which was **after** TakeCare’s protest had already been filed on April 18, 2018. *See e.g.*, Bates Stamp 000743-000744 and 001116-001117.

“[T]he Guam Procurement Law . . . contain[s] automatic stay provisions that are triggered by timely protests.” Guam Image Consultants Inc. v. Guam Mem’l Hosp. Auth., 2004 Guam 15, ¶ 23. A procurement agency should refrain “from taking action” when an automatic stay is in effect. DFS Guam L.P. v. GIAA, Superior Court of Guam Civil Case No. CV0943-14, Decision and Order, pp. 8-9 (Feb. 2, 2018). “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). The tardy determinations of need **after** TakeCare’s protest were in violation of the automatic stay and are “void” as a matter of law.

Guam law also requires that no specification, term, condition or qualification of a solicitation “shall” require off-island experience or past performance unless there is a

“written determination” of the head of the government of Guam branch conducting the solicitation which justifies the need for such experience or performance, and such written determination is made part of the solicitation documents. 5 G.C.A. § 5008(e).

The RFP at issue repeatedly requested information about off-island experience and performance of the potential offerors. *See, e.g.*, repeated references in the RFP to “off island referrals,” “off island emergencies,” “off island services,” “off island facility,” and “off island” medical costs. Bates Stamp 000101, 000109, 000152, 000183, 000190, 000202, 000225, 000232, 000244, 000307, 000344, 000370, 000424, 000448, 000455, 000467, 000528, 000565, 000603, 000662, 000700, 000738, 000774, 000885, 000888, and 001056. Yet there is no determination of need in the Procurement Record relating to off-island experience or past performance.

V. Lack of Prejudice to GovGuam or its Employees.

As discussed above, mandatory provisions of Guam law have been violated, which require that the current RFP “shall be” cancelled. The RFP must be cancelled regardless of consequences. That being said, it should be noted that the government employees will suffer 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.

First of all, the current health care contracts do not expire until September 30, 2018. There is plenty of time between now and September 30, 2018 for the NT and DOA to properly prepare and approve a new RFP consistent with Guam law.

Second, and more importantly, should DOA and the NT be unable to prepare a new RFP and complete negotiations by September 30, 2018, there will still be no lapse in health insurance coverage for government employees because all of the existing health care

contracts contain a provision which requires that health insurance coverage be renewed should a new contract not be agreed upon by September 30, 2018:

“In the event that GovGuam invokes the protection afforded by the Health Insurance Portability and Accountability Act of 1996, as amended, found at Section 2712 of the Public Health Services Act, and its regulations, for the guaranteed renewability of health insurance coverage **the parties agree that coverage would be continued until a new contract is in place** with the first ninety (90) days of coverage guaranteed at the same rate and plan designs.” GovGuam Health Care Contract Section 2.2 (Emphasis added).

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 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).

Respectfully submitted this 15th day of June, 2018.

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By: 
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