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 PROCUREMENT APPEALS

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FILE NO OPA-PA: 18-003

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

IN THE APPEAL OF:)	DOCKET NO. OPA-PA-18-003
)	
TAKECARE INSURANCE COMPANY, INC.,)	
)	
Appellant,)	OPPOSITION TO TAKECARE'S
)	MOTION TO
and)	CANCEL THE RFP
)	
DEPARTMENT OF ADMINISTRATION,)	
)	
Purchasing Agency.)	

The Government of Guam, Department of Administration (“DOA”), hereby submits its Opposition to TakeCare’s Motion to Cancel the RFP.

INTRODUCTION

Guam law provides that a solicitation shall be cancelled or revised to comply with the law if prior to award it is determined that a solicitation or proposed award of a contract is in violation of law.

See 5 G.C.A. § 5451 and 2 GAR, Div. 4 § 9105. TakeCare’s Motion to Cancel the RFP should be

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denied as the arguments raised in TakeCare's motion do not demonstrate a violation of law to warrant a cancellation of the solicitation.

I. Public Member

Governor Calvo appointed Roy S. Adonay as the public member of the Negotiating Team on February 7, 2018. Bates Stamp # 000966. On February 13, 2018, DOA was informed that Mr. Adonay could not serve as the general public member if he is an employee of a medical provider. Bates Stamp # 001266.

The Government of Guam Health Insurance Negotiating Team ("Negotiating Team") shall include "one (1) member of the general public, appointed by *I Maga'lahaen Guåhan*, who is not an employee of the government of Guam, not an employee of a health insurance company, hospital, or medical provider, or not an appointee by *I Maga'lahi* (the Governor) to any government agency, board or commission, and who shall affirm by affidavit that he or she agrees to comply with all provisions in Chapter 15 of Title 4 of the Guam Code Annotated, also known as the Standard of Conduct for Elected Officers, Appointed Officers, and Public Employees of the government of Guam." *4 G.C.A. § 4302(c)(1)(I)*.

Since Mr. Adonay was disqualified from serving as a member of the Negotiating Team, he was replaced by Brenda Judicpa as the general public member on the Negotiating Team. *See Appointment Letter dated February 21, 2018*, Bates Stamp # 00979. The first meeting of the Negotiating Team for the new FY19 RFP was on February 22, 2018; the day after Ms. Judicpa was appointed by the Governor in place of Mr. Adonay. Therefore, Roy Adonay never participated in the RFP process for the Government of Guam Group Health Insurance Program. Since Mr. Adonay never attended and participated at the Negotiating Team meetings because his appointment was invalid, he was not required to submit a conflict disclosure in the procurement record

II. Voting Sheets

The procurement record includes the voting sheets. Section IV of Public Law No. 32-083 prohibits the disclosure of information contained in the proposals, meetings or negotiations to any person outside of the Negotiating Team. Because Guam law prohibits the disclosure of information obtained in meetings of the Negotiating Team, the voting sheets cannot be disclosed as they contain information obtained in a meeting of the Negotiating Team.

III. Investigate

A request to investigate unsolicited communications by offerors and sub-contractors may occur at the proper time in the RFP process. TakeCare argues that Section X of Public Law No. 32-83 required the Negotiating Team to request that the Attorney General's Office conduct an investigation into Matt Santos' claim of improper disclosure of gym benefit outside the Negotiating Team and Francis Santos of GRMC communication to DOA.

Section X prohibits unsolicited communications by offerors and sub-contractors about any facet of the RFP prior to negotiations and may result in disqualification. Prior to disqualification, the Negotiating Team shall request the AG's office to conduct an investigation to verify the veracity of such communication and shall provide its recommendation to the Negotiating Team for action. *PL32-83:X*.

The RFP for group health insurance is at the preliminary phase of the procurement process when potential offerors can submit questions regarding the RFP. Offers or proposals have not been submitted to DOA. Offerors and sub-contractors, if any, are not known at this stage of the RFP process.

Although information regarding the removal of the gym benefit from this year's RFP appears to have been disclosed to non-Negotiating Team members, there has been no determination that there is

a violation of law at this stage of the process. To date no member of the Negotiating Team has admitted to such disclosure and the Gym representative did not indicate whether he spoke to any Negotiating Team member. Determination of a violation of law as provided in 5 G.C.A. §5451 is still pending.

TakeCare also takes issue with GRMC's communication to DOA. On March 30, Francis Santos of GRMC stopped by the Employee Benefits Branch of the Department of Administration. He told Leo Candaso of DOA that he came by to say hello. He then brought up the new law requiring lowest cost option and said what if an exclusive carrier is selected and the carrier does not have GRMC in network. Ms. Candaso told Mr. Santos the information is confidential and he would have to wait until the RFP is issued.

The consequence of unsolicited communications by offerors and sub-contractors may result in disqualification of an offeror and may not require cancelation of the RFP. Section X of the Rules of Procedures provides that prior to disqualification of an offeror, the Negotiating Team shall request the Office of the Attorney General to conduct an investigation and provide a recommendation. *PL 32-83:X*. It is premature at this stage of the procurement process, to determine whether disqualification or cancelation is warranted.

IV. Determination of Need

The May 16, 2018 Determination of Need was a memorialization of the determination made prior to the publication of the RFP. The final component to the determination was confirmed by DOA on March 30, 2018 from the personnel services division that the government does not have the positions to perform the services required under the RFP. Bates Stamp # 001116-001117. The memorandum was finalized or signed by the director for the purpose of the OPA's requirement

to submit the procurement record and not in furtherance of the solicitation. Therefore, there was no violation of the stay to void the Determination of Need.

V. Determination of off-island experience or past performance

Section 5008(e) is intended to promote participation in the solicitation by local offerors. *See 5 G.C.A. § 5008.* TakeCare cites examples of “off island referrals,” “off island emergencies,” “off island services,” “off island facility,” and “off island” medical costs. Some of these references are in drafts, rules or sample contracts.

A written determination to justify off-island experience or performance was not required for this RFP as the RFP does not specifically ask for off-island experience or past performance of an offeror. The RFP does require that all offerors submit a Guam business license. Bates Stamp # 00758.

Furthermore, the specific authorization to procure group health insurance requires that the RFP be published in Guam, in top publications nationally and in leading publications internationally, notwithstanding any other provision of law. *See 4 G.C.A. § 4302(8)(B).* As the law requires the RFP to be published off-island, Section 5008 written determination does not apply to this RFP.

VI. Supplemental Protest


The matters raised in TakeCare’s Motion to Cancel the RFP are in TakeCare’s second protest of which a copy was filed with the OPA on May 31, 2018. The Negotiating Team has not made a decision on the protest. The parties participated in a conference call on June 26, 2018 to seek clarification on TakeCare’s protest and hopefully come to a resolution. The Chair will convene a meeting of the Negotiating Team to decide on the protest. These matters will be addressed administratively.

CONCLUSION

Based on the foregoing argument, DOA respectfully requests that the Public Auditor deny TakeCare's Motion to Cancel the RFP.

Submitted this 29th day of June, 2018.

OFFICE OF THE ATTORNEY GENERAL
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By: 

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