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 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS  
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 FILE NO OPA-PA: 18-003

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

<b>IN THE APPEAL OF:</b>	)	<b>DOCKET NO. OPA-PA-18-003</b>
	)	
<b>TAKECARE INSURANCE COMPANY, INC.,</b>	)	
	)	
Appellant,	)	
	)	
<b>and</b>	)	<b>DOA'S RESPONSE TO</b>
	)	<b>MOTION TO COMPEL PRODUCTION</b>
<b>DEPARTMENT OF ADMINISTRATION,</b>	)	<b>OF DOCUMENTS</b>
	)	
Purchasing Agency.	)	
	)	

The Government of Guam, Department of Administration (“DOA”), hereby submits its Response to TakeCare’s Insurance Company, Inc. (“TakeCare”) Motion to Compel Production of Documents.

**INTRODUCTION**

DOA is not concealing information but obeying the nondisclosure requirement in Guam law. On May 17 2018, DOA filed the procurement record. No. 14 of the record states meeting information

**ORIGINAL**

not submitted pursuant to the prohibition in Public Law 32-083. This includes audio recordings of meetings, committee meeting sign-in sheets, minutes, voting sheets, and emails containing meeting information. With the proper order, DOA can disclose the information obtained in meetings within the parameters of the Guam Procurement Law.

## DISCUSSION

### **I. Confidential Information and Public Law 32-83**

Section IV of Public Law 32-83 provides that “no information contained in proposals, meetings or negotiations can be divulged to any person outside of the Negotiating Team.” As such, DOA has not provided such information until an order finding that disclosure would not violate the law and therefore ordered to submit such documents is issued.

Even TakeCare recognized the strict confidentiality requirement in its supplemental or second protest, a copy of which was filed with the OPA on May 31, 2018. In its second protest, TakeCare argued that the confidentiality requirement in Section IV was violated when the removal of the gym benefit from the RFP was disclosed outside of the Negotiating Team and GRMC communicated with DOA.

TakeCare also argued in its motion to compel production of documents that the confidentiality requirement only applies to meetings regarding proposals and negotiations which contradicts its second protest. At this stage of the procurement process, proposals have not been submitted. The communications occurred prior to the date of submission of proposals.

The apparent ambiguity in the application of the law therefore requires an order to disclose the information. DOA will file information obtained in Negotiating Team meetings with the OPA upon a proper order to disclose and that disclosure would not violate law. DOA requests that a proper order permit DOA to file confidential information, such as actuarial consultant materials, meeting minutes,

sound recordings of the meetings and draft responses to registered offerors questions on the RFP, with the OPA under seal pursuant to 2 GAR, Div. 4 § 12106 as this is an ongoing procurement.

## **II. Guam Procurement Law and Confidentiality**

One of the underlying purposes and policies of the Guam Procurement Law is to require public access to all aspects of procurement consistent with the sealed bid procedure and the integrity of the procurement process. *See 5 G.C.A. § 5001(b)(8)*. The public policy to protect the integrity of the procurement process is again emphasized in 5 G.C.A. § 5252.

The RFP has not been canceled but is stayed pending a final resolution of TakeCare's protest or appeal. Some of the information or materials in the procurement record could be used to determine and form the basis of award. The Guam Procurement Law provides that documents used to determine and form the basis of award can become available for public inspection at the conclusion of negotiations resulting in the award of the contract. *See 2 GAR, Div. 4 § 3114(m)*. Therefore, DOA asks that documents filed under seal or materials identified by DOA as confidential to be filed under seal pursuant to 2 GAR, Div. 4 § 12106 not be released at this time as the disclosure may prejudice the government or other potential offerors at this stage of the procurement process.

Ultimately, the procurement record, not including information protected by law such as proprietary data or trade secrets and unsuccessful proposals, will become available for public disclosure upon award of the contract. The documents will be available to TakeCare at that time and TakeCare will not be prejudiced or denied due process as the law allows 14 days from when they discover or should have discovered grounds to protest. *See 5 G.C.A. § 5425(a)*.

## **III. Confidentiality and Non-Disclosure Affidavit**

The Confidentiality and Non-Disclosure Affidavit signed by members of the Negotiating Team obligates the member to maintain all information received in regard to this procurement confidential

and to not disclose the information to any person except as authorized. *See Tab 13 of the Procurement Record*, Bates Stamp # 1120-1165. “Confidential and privileged information” also pertains to the process undertaken in the development of the solicitation, or which pertains to legal advice or legal memoranda in any form (oral, hard copy or electronic) provided by the Office of the Attorney General, or which pertains to advice and information in any form (oral, hard copy or electronic) provided by the actuarial consultant to the Negotiating Team.

The Negotiating Team member, delegate, consultant or attorney of the Negotiating Team affirmed they will not disclose, discuss or share with any unauthorized person or group any confidential and privileged information, in any form, except to the extent that such disclosure, discussion or sharing is expressly authorized by law, or as required by a court of competent jurisdiction. Furthermore, materials containing confidential and privileged information will not be distributed, duplicated, used, or disclosed except as absolutely necessary to fulfill the obligations as a member of the Negotiating Team. Any uncertainties will be resolved in favor of preserving the confidentiality of the information.

The Negotiating Team is not opposed to disclosing information in the interest of resolving the protest or appeal but does not want to violate Public Law 32-83, Guam Procurement Law, or the Affidavit, thereby requiring a proper order to disclose confidential information to the Public Auditor.

#### **IV. Aon Email**

The emails between Aon and the undersigned counsel were filed sealed as attorney-client privileged communication. Section II. C. of Public Law 32-83 requires the Attorney General or her designee to serve as legal advisor during all phases of the procurement process for group health insurance benefits. The Attorney General designated the undersigned counsel as the legal advisor. Bates Stamp # 00928. Aon is the actuary authorized in 4 G.C.A. § 4302(c)(7) to also advise the

Negotiating Team on the procurement of group health insurance. Therefore, communications between Aon and the legal advisor on the procurement of group health insurance benefits is privileged or confidential communication either as attorney-client communication, Guam Procurement Law or the Confidentiality and Non-Disclosure Affidavit signed by counsel, DOA and Aon. Bates Stamp # 1121-1124, 1129-1132, & 1153-63.

TakeCare claims that DOA has not produced a copy of the March 3, 2018 email to Aon regarding RFP modifications regarding GRMC. The email was filed with the Public Auditor on May 17, 2018. Bates Stamp # 1272-74. The March 3, 2018 email is in response to Aon's questions to Leo Candaso and the undersigned counsel on the RFP and the current legislation to require the lowest cost option.

**V. GRMC Communication**

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 asked 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.

**VI. Public Auditor's Authority to Compel Production**

5 G.C.A. 5703 empowers the Public Auditor to compel the production of documents by any employee of the government of Guam. 2 GAR, Div. 4 § 12109 authorizes the hearing officer to require parties to produce for examination those relevant documents under their control and compel the production of documents of the government of Guam. Section 12106 of 2 GAR, Div. 4 allows information submitted by a party be kept confidential. If the hearing officer finds that he or the Public Auditor has the legal authority to require DOA to produce the materials identified in Tab 14, meeting

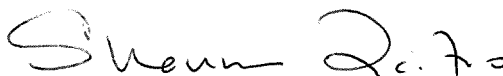
information, of the procurement record, then DOA requests that confidential materials be submitted to the OPA under seal as permitted in Section 12106.

**CONCLUSION**

For the reasons discussed herein, DOA requests that confidential materials such as audio recordings, actuarial consultant materials and other information that could be used to determine and form the basis of award be submitted under seal if ordered to produce the meeting materials.

Submitted this 29<sup>th</sup> day of June, 2018.

OFFICE OF THE ATTORNEY GENERAL  
**Elizabeth Barrett-Anderson**, Attorney General



By:

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**SHANNON TAITANO**  
Assistant Attorney General