Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 8/1/18
TIME: 2:05 ☐AM ☑PM BY: JH
FILE NO OPA-PA: 18-005

PART I- To be completed by OPA

In the Appeal of
TakeCare Insurance Company, Inc.
(Name of Company), APPELLANT

NOTICE OF APPEAL

Docket No. OPA-PA_____

PART II- Appellant Information

Name:	TakeCare Insurance Company, Inc.
Mailing Address:	415 Chalan San Antonio, Ste. 108 Tamuning Guam 96913
Business Address:	415 Chalan San Antonio, Ste. 108 Tamuning Guam 96913
Email Address:	jeanette.perez@takecareasia.com
Daytime Contact No:	(671) 300-7148
Fax No.:	(671) 647-3551

PART III- Appeal Information

A) Purchasing Agency: Department of Administration

B) Identification/Number of Procurement, Solicitation, or Contract: DOA/HRD-RFP-GHI-19-001

C) Decision being appealed was made on July 26 & 27, 2018 (date) by:
___ Chief Procurement Officer ___ Director of Public Works ✓ Head of Purchasing Agency

Note: You must serve the Agency checked here with a copy of this Appeal within 24 hours of filing.

D) Appeal is made from:
(Please select one and attach a copy of the Decision to this form)
✓ Decision on Protest of Method, Solicitation or Award
____ Decision on Debarment or Suspension
____ Decision on Contract or Breach of Contract Controversy
(Excluding claims of money owed to or by the government)
____ Determination on Award not Stayed Pending Protest or Appeal
(Agency decision that award pending protest or appeal was necessary to protect the substantial interests of the government of Guam)

ORIGINAL

E) Names of Competing Bidders, Offerors, or Contractors known to Appellant:

No bids yet submitted	

PART IV- Form and Filing

In addition to this form, the Rules of Procedure for Procurement Appeals require the submission together with this form of additional information, including BUT NOT LIMITED TO:

1. A concise, logically arranged, and direct statement of the grounds for appeal;
2. A statement specifying the ruling requested;
3. Supporting exhibits, evidence, or documents to substantiate any claims and the grounds for appeal unless not available within the filing time in which case the expected availability date shall be indicated.

Note: Please refer to 2 GAR § 12104 for the full text of filing requirements.

PART V- Declaration Re Court Action

Pursuant to 5 GCA Chapter 5, unless the court requests, expects, or otherwise expresses interest in a decision by the Public Auditor, the Office of Public Accountability will not take action on any appeal where action concerning the protest or appeal has commenced in any court.

The undersigned party does hereby confirm that to the best of his or her knowledge, no case or action concerning the subject of this Appeal has been commenced in court. All parties are required to and the undersigned party agrees to notify the Office of Public Accountability within 24 hours if court action commences regarding this Appeal or the underlying procurement action.

Submitted this 31 day of July, 2018.

By: _____
APPELLANT

or

By: David Mair
Appellant's Duly Authorized Representative
(Address) 238 AFC Flores Street, Hagatna, Guam 96910
(Phone No.) (671) 472-2089

APPENDIX A

NOTICE OF APPEAL
PART IV – FORM AND FILING

1. A concise, logically arranged, and direct statement of the grounds for appeal:

The grounds for the appeal are set forth in the Protest filed by Appellant with the Director of Administration, a copy of which is attached hereto.

2. A statement specifying the ruling requested:

Appellant requests that the RFP at issue be vacated and that the Negotiating Team be ordered not to require that offerors include GRMC within their networks.

3. Supporting exhibits, evidence or documents to substantiate any claims:

The documents supporting the claim are the RFP itself, the procurement record, the two protests filed by the Appellant relating to the RFP, along with the documents, evidence and oral arguments in the pending appeal before the Office of Public Accountability enumerated as OPA-PA-18-003.

TakeCare Insurance Company, Inc.
P.O. Box 6578 Tamuning, Guam 96931
Telephone: (671) 646-6956 Fax (671) 647-3551

May 30, 2018

VIA HAND DELIVERY

Mr. Edward M. Birn
Acting Director, Department of Administration;
Chairperson, Government of Guam Negotiating Team; and
Procurement Officer
GOVERNMENT OF GUAM
Suite 224, ITC Building
590 S. Marine Corps. Drive
Tamuning, Guam 96913

Re: SUPPLEMENT TO PROTEST BY TAKECARE INSURANCE COMPANY, INC. OF GOVERNMENT OF GUAM PROCUREMENT NO.: DOA/HRD-RFP-GHI-19-001

Dear Mr. Birn:

TakeCare Insurance Company, Inc. ("TakeCare") is a prospective offeror intending to respond to Government of Guam Request for Proposal DOA/HRD-RFP-GHI-19-001 (the "RFP") for the Government of Guam Group Health Insurance Program ("Group Health Program"). TakeCare filed a formal protest of the RFP on April 18, 2018, pursuant to 5 G.C.A. §5425(a) ("Protest"). As part of the Protest and pursuant to 2 G.A.R. §9101(f), TakeCare requested all documents related to the RFP, including, but not limited to: (a) the complete procurement file and all supporting documents; and (b) any audio records, minutes or notes of meetings of government officials or any member of the Negotiating Team relating to the minimum requirement that an offeror's proposal include Guam Regional Medical City (GRMC") in its provider network in order to be a qualified proposal.

Neither the Government of Guam Health Insurance Negotiating Team ("Negotiating Team") nor the Department of Administration ("DOA") complied with TakeCare's request for documents pursuant to 2 G.A.R. §9101(f). Instead Eric Birn as the Director of DOA and the Chairperson of the Negotiating Team, without producing document or even meeting with TakeCare, issued a response to TakeCare denying the Protest on May 2, 2018. TakeCare subsequently appealed the Negotiating Team's response to the Public Auditor pursuant to 5 G.C.A. §5425(e). Then as a result of an order by the Public Auditor, on May 17, 2018, the Negotiating Team produced the Procurement Record which included some of the requested documents related to the RFP.

This letter constitutes a supplement to the Protest and/or a second formal protest of the RFP by TakeCare pursuant to 5 G.C.A. §5425 and 2 G.A.R. §9101 ("Supplement). The factual information relating to this Supplement was only discovered by TakeCare when DOA and the Negotiating Team filed the Procurement Record with the Office of Public Accountability ("OPA") on May 17, 2018.

TakeCare's address is Baltej Pavilion, Suite 308, 415 Chalan San Antonio, Tamuning, Guam 96913. Arvin Lojo is TakeCare's Health Plan Administrator and the individual designated as the contact person to communicate with the Government of Guam on TakeCare's proposal in response to the RFP.

Mr. Lojo's email address is arvin.lojo@takecareasia.com and his telephone number is 300-7147. TakeCare is being represented by David Mair, Esq., whose email address is DMair@mmstlaw.com. Any communications to Mr. Lojo should also be sent to Mr. Mair. Pursuant to 2 G.A.R. §9101(c)(1), this Supplement to the Protest is being filed in duplicate.

The Factual Background and Discussion in TakeCare's initial Protest served on DOA on April 18, 2018, is hereby incorporated into this Supplement. However, this Supplement is intended to supplement, not replace, TakeCare's initial Protest. The references herein to Bates Stamp numbers refer to the numbers used by DOA when submitting the Procurement Record to the OPA in the appeal from the denial of TakeCare's initial Protest.

DISCUSSION

A. Conflicts of Interest.

On February 7, 2018, Governor Calvo appointed Roy S. Adonay as a Negotiating Team member for the Calvo/Tenorio administration. Bates Stamp # 000966. Governor Calvo should not have made this appointment but should have been disqualified from participating in the RFP process as a consequence of his family's involvement with Calvo's SelectCare, a prospective offeror. "It shall be a breach of ethical standards . . . 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. "No employee shall take any official action directly affecting . . . business or other undertaking in which the employee has a financial interest . . ." 4 G.C.A. § 15205(a)(1). "Financial interest means . . . siblings, or siblings-in-law . . ." 4 G.C.A. 15102(f).

Roy Adonay was appointed as a Negotiating Team member for the General Public. Bates Stamp # 000970. Roy Adonay had a conflict of interest because he was the CEO of Guam Radiology Consultants at the time of his appointment and also during the time frame that the RFP was considered and approved by the Negotiating Team. Guam Radiology Consultants is listed in the Directory of Participating Clinic's for Calvo's SelectCare, a prospective offeror. Hence, Mr. Adonay's employer as a subcontractor had a vested financial 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. Despite acknowledging Mr. Adonay's conflict of interest, DOA allowed him to remain on the Negotiating Team.

B. Lack of a Voting Sheet.

The Negotiating Team Rules and Regulation No. VIII states that "[u]pon casting of votes, team members shall sign off on a voting sheet to document the decision made." No such form has been provided as part of the Procurement Record produced by DOA. The decision of the Negotiating Team to approve the RFP is not official and is invalid without a voting sheet. In *DFS Guam L.P. v. GIAA*, Civil Case No. 0943-14, the Superior Court of Guam invalidated the award of a multi-million dollar contract because the Guam International Airport Authority ("GIAA") had failed to comply with its procedures relating to the RFP. Id. at Decision and Order dated February 2, 2018 at pages10-13.

C. Improper Communication with Subcontractor.

On March 22, 2018, Matt Santos sent an email to Shannon Taitano, Esq., and B. J. 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 Negotiating Team 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 the Guam Regional Medical City ("GRMC") not being part of any provider network. Bates Stamp # 000009. It is the understanding of TakeCare that Francis Santos is a representative of GRMC, which is a subcontractor of at least one (1) prospective offeror to the RFP.

These ex parte contacts violated the Negotiating Team Rules and Regulation X regarding unsolicited communications by subcontractors "about any facet of the RFP prior to negotiations." They also violated the Negotiating Team Rules and Regulation IV relating to "confidentiality" of information being divulged to "any person outside of the Negotiating Team." As noted above, the Superior Court of Guam has held that RFP must be vacated if the procurement agency fails to comply with its procedures relating to an RFP. *DFS Guam L.P. v. GIAA*, Civil Case No. 0943-14, Decision and Order dated February 2, 2018 at pages10-13.

D. Failure to Conduct Investigation.

When an improper contact or communication occurs with a person outside the Negotiating Team, the Negotiating Team is required by its rules to "request" that the Attorney General's Office "conduct an investigation." Negotiating Team Rules and Regulation X. Nothing in the Procurement Record produced by DOA indicates that the Negotiating Team met and voted to "request" that the Attorney General's Office "conduct an 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 Negotiating Team Rules and Regulation X. Nothing in the Procurement Record produced by DOA indicates that any such "recommendation" was ever made to the Negotiating Team.

E. Violation of the Automatic Stay.

"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). Guam's Supreme Court has repeatedly confirmed that a timely protest stays the procurement process. "[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. This stay remains in effect during "commencement of a civil suit within the Superior Court and continues until final resolution of the action by the Superior Court." *Teleguam Holdings LLC v. Territory of Guam*, 2015 Guam 13 ¶31. A procurement agency should refrain "from taking action" when an

automatic stay is in effect. *DFS Guam L.P. v. GIAA*, Civil Case No. 0943-14, Decision and Order dated February 2, 2018 at pages 8-9.

After TakeCare's initial Protest on April 18, 2018, DOA and the Negotiating Team repeatedly took actions in violation of the automatic stay. For instance, DOA and the Negotiating Team had government representatives execute Confidentiality Agreements on April 20, 2018, and May 7, 2018. Bates Stamp # 001123-001124 and # 001121-001122. On May 7, 2018 and May 13, 2018, when the automatic stay was already in place, DOA also prepared and executed two documents purporting to act as a "Determination Regarding the Need to Procure Health Insurance Benefits Pursuant to 4 G.C.A. § 4301(a)." Bates Stamp # 000743 - 000744 and 001116 - 001117.

F. Failure to Maintain a Complete Procurement Record.

The Superior Court has voided an RFP when the procurement agency failed to maintain "a complete procurement record." *DFS Guam L.P. v. GIAA*, Civil Case No. 0943-14, Decision and Order dated February 2, 2018 at pages 28 - 33.

Guam law requires that the procurement record "shall include . . . the requesting agency's determination of need." 5 G.C.A. §5249(e). No written "determination of need" has been produced that was made part of the Procurement Record prior to the filing of TakeCare's Protest on April 18, 2018. As noted above, the belated attempt of DOA and the Negotiating Team after TakeCare's Protest to prepare a "determination of need" was in violation of the automatic stay and 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 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 "written determination" in the Procurement Record justifying the need for off island experience or performance.

In addition to not producing the "written determinations" as required by 5 G.C.A. §§ 5249(e) and 5008(e), the Procurement Record is also incomplete in other respects. For instance, the Procurement Record does not include the following: (a) a voting sheet(s); (b) a record of who on the Negotiating Team disclosed to a third party that the gym benefit was not being included in the RFP (Bates Stamp # 001018 and 001019); (c) a record of who Francis Santos spoke to "in person" at DOA about GRMC being included as a minimum requirement in the RFP (Bates Stamp #000009); (d) a record of the complete email from Chuck Tanner to Lester Carlson on March 28, 2018 (Bates Stamp #001020); (e) a copy of the email from Aon on March 3, 2018, regarding RFP modifications and GRMC (Bates Stamp #000007); (f) a record of the 2017 emails forwarded from Matthew Santos to the Negotiating Team regarding PL 32-189 and eliminating gym benefit (Bates Stamp #000008); and, (g) a record of the "formal objection" of Chuck Tanner on March 28, 2018, to the removal of gym benefit (Bates Stamp #000009).

Simply put, the Procurement Record produced by DOA and the Negotiating Team is clearly incomplete in numerous respects. As a consequence, the RFP at issue must be voided. *DFS Guam L.P. v. GIAA*, Civil Case No. 0943-14, Decision and Order dated February 2, 2018 at pages 28 - 33.

CONCLUSION

"If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award shall be: (a) cancelled; or (b) revised to comply with the law." 5 G.C.A. § 5451. For the reasons discussed herein, as well as those in TakeCare's first protest, TakeCare respectfully submits that the RFP at issue is in violation of the law and that it must be cancelled and revised to comply with the law.

Pursuant to 2 G.A.R. §9101(f), TakeCare requests all documents related to the RFP, including, but not limited to the following: (a) the complete procurement file and all supporting documents; and (b) any audio records, minutes or notes of meetings of government officials or any member of the Negotiating Team.

Further, as provided by 2 G.A.R. §9101(c), TakeCare requests that the procurement represented by the RFP be stayed and that no award of a Group Health Program contract(s) be made until the resolution of its Protest as supplemented by this Supplement. Finally, TakeCare reserves its right to supplement and modify the grounds for this Protest, as its investigation is ongoing.

Sincerely,

JOSEPH HUSSLEIN
President and CEO
TAKECARE INSURANCE COMPANY

cc: David A. Mair, Esq.

Government of Guam
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Eddie Baza Calvo
Governor
Ray Tenorio
Lieutenant Governor

Edward M. Birn
Director
Vincent P. Arriola
Deputy Director

JUL 2 6 2018

HRD NO.:18-652

Joseph Husslein
President and CEO
TakeCare Insurance Company

Subject: Response to Supplement to Protest by TakeCare Insurance Company, Inc. of Government of Guam Procurement No. DOA/HRD-RFP-GHI-19-001

Dear Mr. Husslein:

As Chairperson of the Government of Guam Health Insurance Negotiating Team ("Negotiating Team"), I hereby inform you of the Negotiating Team's response to TakeCare's Supplement to Protest of May 30, 2018.

TakeCare's supplemental protest is in response to DOA's Procurement Record filed with the Office of Public Accountability ("OPA") on May 17, 2018 and based on the following grounds: (1) Voting member was inappropriately appointed in violation of Guam law due to conflict of interest; (2) DOA and the Negotiating team have not produced a "voting sheet" required by Guam Law; (3) Improper communications with sub-contractors occurred; (4) The required "investigation" and "recommendation" relating to the improper communications are not evidenced in the procurement record; (5) DOA and the Negotiating Team have violated the automatic stay; and, (6) DOA and the Negotiating Team have failed to maintain a complete procurement record.

DISCUSSION

A. Conflict of Interest

Although SelectCare is a current health insurance provider and is anticipated to submit a proposal to this year's RFP, a conflict or potential conflict becomes apparent or arises when potential offerors pick up the RFP or submit a proposal. This is consistent with Section V of Public Law 32-083. In this instance, proposals have not been submitted but SelectCare did pick up a proposal and register with DOA on April 9, 2018 after the appointment of the replacement general public member. Therefore, the appointment of the replacement general public member occurred prior to the alleged conflict of interest arising in this year's solicitation for health insurance coverage.

The Negotiating Team is comprised of other members appointed by Governor Calvo. Their membership is dictated by the same statute that requires a general public member to be appointed by the governor. There appears no reason to treat the general public member appointment differently from the other appointments especially since the general public member appointment, as with the other member appointments, was made prior to the initial negotiating meeting of the FY2019 RFP for the group health insurance program.

Roy Adonay was appointed on February 7, 2018. Roy S. Adonay never participated in the RFP process for the Government of Guam Group Health Insurance Program. He was replaced as a negotiating team member when it was determined that he did not qualify as a general public member. Brenda Judicpa was appointed on February 21, 2018 as the general public member. Therefore, a conflict of interest never arose because Mr. Adonay never participated in the RFP process and the potential conflict of interest was cured.

B. Voting Sheets

The voting sheets are included in the procurement record and that record contains voting sheets to approve the RFP. Based on Guam Law, DOA is prohibited from disclosing any information obtained in meetings, which includes voting sheets, to anyone who is not a member of the Negotiating Team. P.L. 32-83; Section IV.

C. Communications

Disclosure of gym benefit and communication with gym representative may not warrant cancellation of the RFP. Section X of Public Law 32-083 dictates that unsolicited communication by offerors and sub-contractors prior to negotiations is prohibited and ***may result in disqualification*** of proposals of any offending offeror. It does not provide for cancellation of the RFP.

Although disclosure of the removal of the gym benefit from the FY19 RFP appears to violate the confidentiality requirement in Section IV of Public Law 32-083, the information disclosed does not prejudice the procurement process. The disclosure did not benefit a particular vendor nor give a vendor an unfair advantage over potential offerors. Furthermore, it is not known at this stage of the procurement process, as offers have not been submitted, whether Paradise Fitness will be offered by potential carrier(s). Therefore, a contractual relationship with a health insurance provider is not known at this stage of procurement process. When proposals are submitted, the negotiating team can consider disqualification and formally request an investigation by the AG.

GRMC communication was unsolicited and does not violate Section IV as DOA did not disclose confidential information to GRMC. Furthermore, as mentioned above, the procurement process is at too early a stage to determine whether any consequence is warranted pursuant to Section X.

D. Investigation

Section X of the Rules of Procedure of the Negotiating Team and the Conduct of the Annual Solicitation of Health Insurance Coverage prohibits the unsolicited communication by offerors and subcontractors. *See P.L. 32-83:X.* The consequence of a violation is disqualification of proposal of an offending offeror. *Id.* 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 to the Negotiating Team for action. *Id.* As discussed above, we are at the preliminary phase of the RFP process. Offers have not been submitted. Furthermore, information regarding investigations are not available to the public.

E. Automatic Stay

The execution of the Confidentiality Agreements dated April 20, 2018 and the "Determination of Need" memorandums does not violate the stay provision. 5 GCA 5425(g) imposes a stay of the solicitation or with the award of the contract when there is a protest. The confidentiality agreements were signed as a requirement of the Negotiating Team's rules and not in furtherance of the solicitation or with the award of a contract. The May 16, 2018 Determination of Need was a memorialization of the determination made on March 30, 2018 and supported by an email received from DOA's HR division. These memorandums were finalized or signed by the director for the sole purpose of the OPA's requirement to submit the procurement record and not in furtherance of the solicitation or with the award of a contract.

F. Procurement Record

This is an ongoing procurement and the record is maintained contemporaneous to the process. The record contains the determinations required to date. The determination of off-island experience or past performance does not apply to this procurement. The evaluation form of the RFP does not ask offerors for their off-island experience or past performance. The procurement record also contains voting sheets and other documents that are prohibited from disclosure pursuant to Guam law. P.L. 32-83; Section IV.

Accordingly, the Negotiating Team has concluded that none of the grounds included in TakeCare's supplemental protest of May 17, 2018 justifies cancellation of RFP and will so be advising the Office of the Public Accountability.

Sincerely,

EDWARD M. BIRN
Director of Administration

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Elizabeth Barrett-Anderson
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Attorneys for the Government of Guam

IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

IN THE APPEAL OF:	DOCKET NO. **OPA-PA-18-003**
TAKECARE INSURANCE COMPANY, INC.,	
Appellant,	**DEPARTMENT OF ADMINISTRATION'S RESPONSE TO TAKECARE'S SUPPLEMENTAL PROTEST**
AND	
DEPARTMENT OF ADMINISTRATION,	
Purchasing Agency.	

Attached hereto is the Department of Administration's response to TakeCare Insurance Company, Inc.'s supplemental protest that was filed with the Office of Public Accountability on May 31, 2018.

Respectfully submitted this 27th day of July, 2018.

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

By: _____
SHANNON TAITANO
Assistant Attorney General

Government of Guam
(Gubetnomention Guahan)
Department of Administration
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Eddie Baza Calvo
Governor
Ray Tenorio
Lieutenant Governor

Edward M. Birn
Director
Vincent P. Arriola
Deputy Director

JUL 27 2018

HRD No.:18-652A

Joseph Husslein
President and CEO
TakeCare Insurance Company

Subject: Response to Supplement to Protest by TakeCare Insurance Company, Inc. of Government of Guam Procurement No. DOA/HRD-RFP-GHI-19-001

Revised 7.27.18

Dear Mr. Husslein:

As Chairperson of the Government of Guam Health Insurance Negotiating Team ("Negotiating Team"), I hereby inform you of the Negotiating Team's response to TakeCare's Supplement to Protest of May 30, 2018.

TakeCare's supplemental protest is in response to DOA's Procurement Record filed with the Office of Public Accountability ("OPA") on May 17, 2018 and based on the following grounds: (1) Voting member was inappropriately appointed in violation of Guam law due to conflict of interest; (2) DOA and the Negotiating team have not produced a "voting sheet" required by Guam Law; (3) Improper communications with sub-contractors occurred; (4) The required "investigation" and "recommendation" relating to the improper communications are not evidenced in the procurement record; (5) DOA and the Negotiating Team have violated the automatic stay; and, (6) DOA and the Negotiating Team have failed to maintain a complete procurement record.

DISCUSSION

A. Conflict of Interest

Although SelectCare is a current health insurance provider and is anticipated to submit a proposal to this year's RFP, a conflict or potential conflict becomes apparent or arises when potential offerors pick up the RFP or submit a proposal. This is consistent with Section V of Public Law 32-083. In this instance, proposals have not been submitted but SelectCare did pick up a proposal and register with DOA on April 9, 2018 after the appointment of the replacement general public member. Therefore, the appointment of the replacement general public member occurred prior to the alleged conflict of interest arising in this year's solicitation for health insurance coverage.

The Negotiating Team is comprised of other members appointed by Governor Calvo. Their membership is dictated by the same statute that requires a general public member to be appointed by the governor. There appears no reason to treat the general public member appointment differently from the other appointments especially since the general public member appointment, as with the other member appointments, was made prior to the initial negotiating meeting of the FY2019 RFP for the group health insurance program.

Roy Adonay was appointed on February 7, 2018. Roy S. Adonay never participated in the RFP process for the Government of Guam Group Health Insurance Program. He was replaced as a negotiating team member when it was determined that he did not qualify as a general public member. Brenda Judicpa was appointed on February 21, 2018 as the general public member. Therefore, a conflict of interest never arose because Mr. Adonay never participated in the RFP process and the potential conflict of interest was cured.

B. Voting Sheets

The voting sheets are included in the procurement record and that record contains voting sheets to approve the RFP. Based on Guam Law, DOA is prohibited from disclosing any information obtained in meetings, which includes voting sheets, to anyone who is not a member of the Negotiating Team. P.L. 32-83; Section IV.

C. Communications

Disclosure of gym benefit and communication with gym representative may not warrant cancellation of the RFP. Section X of Public Law 32-083 dictates that unsolicited communication by offerors and sub-contractors prior to negotiations is prohibited and ***may result in disqualification*** of proposals of any offending offeror. It does not provide for cancellation of the RFP.

Although disclosure of the removal of the gym benefit from the FY19 RFP appears to violate the confidentiality requirement in Section IV of Public Law 32-083, the information disclosed does not prejudice the procurement process. The disclosure did not benefit a particular vendor nor give a vendor an unfair advantage over potential offerors. Furthermore, it is not known at this stage of the procurement process, as offers have not been submitted, whether Paradise Fitness will be offered by potential carrier(s). Therefore, a contractual relationship with a health insurance provider is not known at this stage of procurement process. When proposals are submitted, the negotiating team can consider disqualification and formally request an investigation by the AG.

GRMC communication was unsolicited and does not violate Section IV as DOA did not disclose confidential information to GRMC. Furthermore, as mentioned above, the procurement process is at too early a stage to determine whether any consequence is warranted pursuant to Section X.

D. Investigation

Section X of the Rules of Procedure of the Negotiating Team and the Conduct of the Annual Solicitation of Health Insurance Coverage prohibits the unsolicited communication by offerors and subcontractors. *See P.L. 32-83:X.* The consequence of a violation is disqualification of proposal of an offending offeror. *Id.* 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 to the Negotiating Team for action. *Id.* As discussed above, we are at the

preliminary phase of the RFP process. Offers have not been submitted. Furthermore, information regarding investigations are not available to the public.

E. Automatic Stay

The execution of the Confidentiality Agreements dated April 20, 2018 and the "Determination of Need" memorandums does not violate the stay provision. 5 GCA 5425(g) imposes a stay of the solicitation or with the award of the contract when there is a protest. The confidentiality agreements were signed as a requirement of the Negotiating Team's rules and not in furtherance of the solicitation or with the award of a contract. The May 16, 2018 Determination of Need was a memorialization of the determination made on March 30, 2018 and supported by an email received from DOA's HR division. These memorandums were finalized or signed by the director for the sole purpose of the OPA's requirement to submit the procurement record and not in furtherance of the solicitation or with the award of a contract.

F. Procurement Record

This is an ongoing procurement and the record is maintained contemporaneous to the process. The record contains the determinations required to date. The determination of off-island experience or past performance does not apply to this procurement. The evaluation form of the RFP does not ask offerors for their off-island experience or past performance. The procurement record also contains voting sheets and other documents that are prohibited from disclosure pursuant to Guam law. P.L. 32-83; Section IV.

Accordingly, the Negotiating Team has concluded that none of the grounds included in TakeCare's supplemental protest of May 17, 2018 justifies cancellation of RFP and will so be advising the Office of the Public Accountability. **For the reasons stated above, the Negotiating Team denies TakeCare's protest. This further serves to inform you of the right to administrative and judicial review of this decision.**

Edward M. Birn, Director
Department of Administration