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**Attorneys for the Government of Guam**

**RECEIVED**  
 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS

DATE: 09-28-18  
 TIME: 2:10  AM  PM BY: [Signature]  
 FILE NO OPA-PA: 18-005

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

<b>IN THE APPEAL OF:</b>	)	<b>DOCKET NO. OPA-PA-18-005</b>
	)	
<b>TAKECARE INSURANCE COMPANY, INC.,</b>	)	
	)	
<b>Appellant,</b>	)	<b>DEPARTMENT OF ADMINISTRATION</b>
	)	<b>AGENCY REPORT</b>
<b>AND</b>	)	
	)	
<b>DEPARTMENT OF ADMINISTRATION,</b>	)	
	)	
<b>Purchasing Agency.</b>	)	

**Comes now**, the Department of Administration (DOA) by and through its counsel, and files its Agency Report and Statement pursuant to 2 GAR § 12105(g) in response to the appeal by TakeCare Insurance Company, Inc.'s (TakeCare) protest of May 30, 2018.

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**ORIGINAL**

Further, pursuant to 2 GAR § 12105 DOA's Agency Report is providing the following:

(a) **A copy of the protest**

A copy of the protest is attached as Exhibit No. 1.

A copy of the original protest is found in *DOA's Procurement Record Tab 11, Bates Stamp No. 001107-001114.*<sup>1</sup>

(b) **A copy of the bid or offer submitted by the Appellant**

No offers have been submitted.

(c) **A copy of the solicitation**

A copy of the solicitation, including the specifications or portions thereof relevant to the protest is found in *DOA's Procurement Record Tab 7, Bates Stamp No. 00751-000899.*

(d) **A copy of the abstract of bids or offers**

No offers have been submitted.

(e) **Any other documents which are relevant to the protest**

None.

(f) **The decision from which the Appeal is taken**

The decision from which the Appeal is taken is attached as Exhibit No. 2.

(g) **A statement answering the allegation of the Appeal**

This is a protest to the solicitation of the Fiscal Year 2019 Health Insurance Program. (FY19 RFP) The Request for Proposals (RFP) was published on April 6, 2018. Potential offerors have picked up the RFP but the date to submit offers or proposals has not occurred due to the protest.

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<sup>1</sup> As this supplement to TakeCare's protest stems from TakeCare's original protest dated April 18, 2018, and appealed to the OPA under OPA-PA-18-003, DOA will reference to the original Procurement Record submitted to the OPA on May 17, 2018.

(1) **Conflict of Interest**

TakeCare argues that Governor Eddie Calvo has a conflict of interest barring him from appointing a general public member. SelectCare is a current health insurance provider of the Government of Guam and is anticipated to submit a proposal to the FY19 RFP. However, 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 (“P.L. 32-83”). 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 or the replacement of the general public member. Therefore, the appointment or the replacement of the general public member occurred prior to the alleged conflict of interest arising in this year’s solicitation for health insurance coverage.

TakeCare also argues that Roy Adonay has a conflict of interest barring him from serving as a general public member. However, 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 as the general public member on February 21, 2018 the day before the first meeting of the Negotiating Team for the new FY19 RFP. Therefore, a conflict of interest never arose because Mr. Adonay never participated in the RFP process and the potential conflict of interest was cured.

(2) **Voting Sheets**

TakeCare argues the approval of the RFP is not valid without a voting sheet. The procurement record contains voting sheets to approve the RFP and are bate stamped as nos. 1472,

1474, 1476, 1478, 1480, and 1498.

**(3) Communication**

TakeCare takes issue with two communications that they argue violate the Negotiating Team Rules and Regulations.

Section X of P.L. 32-83 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.

Proposals have not been submitted at this stage of the procurement process. When proposals are submitted, the negotiating team can consider disqualification and formally request an investigation by the AG.

Although disclosure of the removal of the gym benefit from the FY19 RFP appears to violate the confidentiality requirement in Section IV of PL 32-83, 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.

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.

**(4) Investigation**

A request to investigate unsolicited communications by offerors and sub-contractors may occur at the proper time in the RFP process. 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 investigate to verify the veracity of such communication and shall provide its recommendation to the Negotiating Team for action. P.L. 32-83:X.

Again, 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. It is premature at this stage of the procurement process to determine whether disqualification or cancelation is warranted.

**(5) Automatic Stay**

The execution of the Confidentiality Agreements dated April 20, 2018 and the "Determination of Need" memorandums does not violate the stay provision. Title 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.

**(6) Procurement Record**

TakeCare claims the procurement record is incomplete and cites the DFS Guam L.P. v. GIAA, Civil Case No. 0943-14 as grounds to void the RFP. The DFS case pertains to a solicitation in which a contract was signed. As such, the procurement record should have been

complete by the time a contract is signed. This is an ongoing procurement and the record is maintained contemporaneous to the process. The agency may supplement the record during the procurement process and certify that the record is complete before the execution of the contract.

(7) **Conclusion**

It is DOA's position that none of the grounds included in TakeCare's protest of May 30, 2018 justifies cancellation of the RFP. DOA requests that the appeal of TakeCare be dismissed and that the Public Auditor award all legal and equitable remedies that DOA may be entitled to as a result.

(h) **Award made**

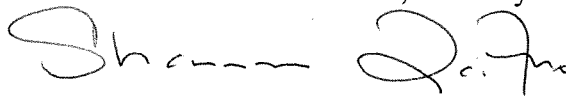
Not applicable as no award has been made.

(i) **A statement indicating whether the matter is subject of a court proceeding**

A statement indicating whether the matter is the subject of a court proceeding was filed with the Office of Public Accountability on September 18, 2018.

Submitted this 28<sup>th</sup> day of September, 2018.

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



By:

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**SHANNON TAITANO**  
Assistant Attorney General

**In the Appeal of: TakeCare Insurance Company, Inc. and Dept. of Administration**

**Docket No. OPA-PA-18-005**

**DEPARTMENT OF ADMINISTRATION  
AGENCY REPORT**

**No. 1**

TakeCare Letter dated May 30, 2018, addressed to Acting Director of DOA



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**

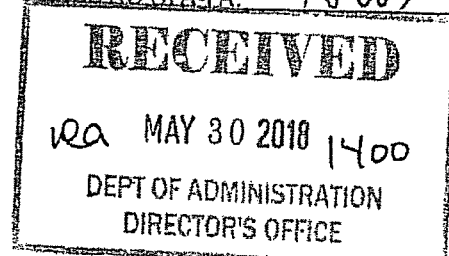
Mr. Edward M. Birn  
Acting Director, Department of Administration;  
Chairperson, Government of Guam Negotiating Team; and  
Procurement Officer  
GOVERNMENT OF GUAM  
Suite 224, ITC Building  
590 S. Marine Corps. Drive  
Tamuning, Guam 96913

**RECEIVED**  
OFFICE OF PUBLIC ACCOUNTABILITY  
PROCUREMENT APPEALS

DATE: 5/31/18

TIME: 151  AM  PM BY: Vince D

FILE NO OPA-PA: 18-003



**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 Baltěj Pavillion, 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.



## TAKECARE PROCUREMENT PROTEST (SUPPLEMENT)

Mr. Edward M. Bim  
Department of Administration  
May 30, 2018  
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Mr. Lojo's email address is [arvin.lojo@takecareasia.com](mailto: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](mailto: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 pages 10-13.

TAKECARE PROCUREMENT PROTEST (SUPPLEMENT)  
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### 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. GJAA*, Civil Case No. 0943-14, Decision and Order dated February 2, 2018 at pages 10-13.

### 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

## TAKECARE PROCUREMENT PROTEST (SUPPLEMENT)

Mr. Edward M. Bim  
Department of Administration  
May 30, 2018  
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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).

## TAKECARE PROCUREMENT PROTEST (SUPPLEMENT)

Mr. Edward M. Birn  
Department of Administration  
May 30, 2018  
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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.

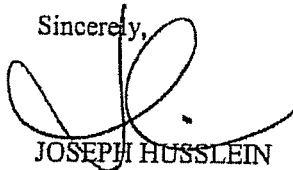
**CONCLUSION**

"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.

**In the Appeal of: TakeCare Insurance Company, Inc. and Dept. of Administration**

**Docket No. OPA-PA-18-005**

**DEPARTMENT OF ADMINISTRATION  
AGENCY REPORT**

**No. 2**

DOA Letter dated July 26, 2018, HRD No. 18-652



Eddie Baza Calvo  
Governor  
Ray Tenorio  
Lieutenant Governor

**Government of Guam**  
(*Gubetnomentlon Guahan*)  
**Department of Administration**  
(*Dipattamenton Atmenestrallon*)  
Post Office Box 884 Hagatña, Guam 96932  
Tel: (671) 475-1221/1260 \* Fax: (671) 477-3671



Edward M. Birn  
Director  
Vincent P. Arriola  
Deputy Director

JUL 26 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

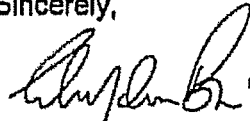
The execution of the Confidentiality Agreements dated April 20, 2018 and the "Determination of Need" memorandums does not violate the stay provision. 5 GCA 5425(g) imposes a stay of the solicitation or with the award of the contract when there is a protest. The confidentiality agreements were signed 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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**RECEIVED**  
 OFFICE OF PUBLIC ACCOUNTABILITY  
 PROCUREMENT APPEALS  
 DATE: July 27, 2018  
 TIME: 3:15  AM  PM BY: Chns  
 FILE NO OPA-PA: 18-003

TAKECARE INSURANCE CO., INC.

(W) ADMIN  
 Received By/Department  
07-27-18 3:34PM  
 Date/Time

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
AND	)	RESPONSE TO TAKECARE'S
	)	SUPPLEMENTAL PROTEST
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 27<sup>th</sup> day of July, 2018.

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

By:

Shannon Taitano  
 SHANNON TAITANO  
 Assistant Attorney General

COPY



Eddie Baza Calvo  
Governor  
Ray Tanorio  
Lieutenant Governor

HRD No.:18-652A

Joseph Husslein  
President and CEO  
TakeCare Insurance Company

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Edward M. Blm  
Director  
Vincent P. Arriola  
Deputy Director

**JUL 27 2018**

**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.

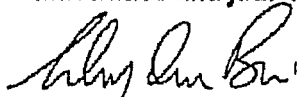
#### **E. Automatic Stay**

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