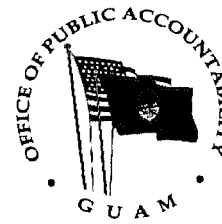


vSuite 401 DNA Building
 238 Archbishop Flores St.
 Hagåtña, Guam 96910



FAX

To:	Mr. Edward Birn Director Department of Administration P.O. Box 884 Hagåtña, Guam 96932 Fax: (671) 477-6788	From:	Yuka Hechanova Guam Deputy Public Auditor Office of Public Accountability
		Pages:	6 (including cover page)
CC:	Arvin Lojo TakeCare Insurance Company, Inc. Baltej Pavilion, Suite 308 415 Chalan San Antonio Tamuning, Guam 96913 Fax: (671) 647-3559 arvin.lojo@takecareasia.com	Date:	May 10, 2018
		David Mair (Authorized Representative for Appellant TakeCare) 238 Archbishop Flores Street Hagåtña, Guam 96910 dmair@mmstlaw.com	Phone: Fax:

Re: OPA-PA-18-003 Notice of Receipt of Appeal

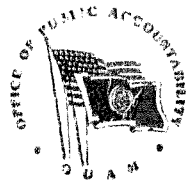
Urgent
 For Review
 Please Comment
 Please Reply
 Please Recycle

Comments:

Please acknowledge receipt of this transmittal by re-sending this cover page along with your firm or agency's receipt stamp, date, and initials of receiver. The entire notice of appeal can be found on our website at www.opaguam.org.

Thank you,
 Vincent Duenas
 Auditor
 vduenas@guamopa.com

This facsimile transmission and accompanying documents may contain confidential or privileged information. If you are not the intended recipient of this fax transmission, please call our office and notify us immediately. Do not distribute or disclose the contents to anyone. Thank you.



OFFICE OF PUBLIC ACCOUNTABILITY
Doris Flores Brooks, CPA, CGFM
Public Auditor

May 10, 2018

Mr. Edward M. Birn
Director
Department of Administration
P.O. Box 884
Hagåtña, Guam 96932

VIA FACSIMILE: (671) 477-3671

Re: Notice of Receipt of Appeal – OPA-PA-18-003

Dear Mr. Birn,

Please be advised that TakeCare Insurance Company, Inc. (TakeCare) filed an appeal with the Office of Public Accountability (OPA) on May 4, 2018 regarding the Department of Administration's (DOA) denial of TakeCare's protest related to the procurement to provide health insurance services to the Government of Guam's Group Health Insurance Program (Procurement No. DOA/HRD-RFP-GHI-19-001). OPA has assigned this appeal case number OPA-PA-18-003.

Immediate action is required of DOA pursuant to the Rules of Procedure for Procurement Appeals, found in Chapter 12 of the Guam Administrative Regulations (GAR). Copies of the rules, the appeal, and all filing deadlines are available at OPA's office and on its website at www.opaguam.org. The notice of appeal filed with OPA is enclosed for your reference.

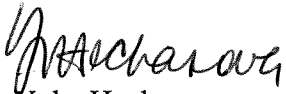
Please provide the required notice of this appeal to the relative parties with instructions that they should communicate directly with OPA regarding the appeals. You are also responsible for giving notice to the Attorney General or other legal counsel for your agency. Promptly provide OPA with the identities and addresses of interested parties and a formal entry of appearance by your legal counsel.

Pursuant to 2 GAR, Div. 4, Ch. 12, §12104(3), please submit one complete copy of the procurement record for the procurement solicitation above, as outlined in Title 5, Chapter 5, §5249 of the Guam Code Annotated, to OPA by **Thursday, May 17, 2018**, five work days following receipt of this notice of appeal; and one copy of the Agency Report for each of the procurement solicitations cited above, as outlined in 2 GAR, Div. 4, Chap. 12, §12105, by **Thursday, May 24, 2018**, ten work days following receipt of this notice of appeal.

When filing all other required documents with our office, please provide one original and two copies to OPA, and serve a copy to TakeCare. In addition, OPA respectfully asks that DOA provide one original and two copies of the procurement record and agency report as the Guam Procurement Law and Regulations require only one copy. The three procurement record copies requested by OPA are distributed as follows: Copy-1: Master File; Copy-2: Public Auditor; and Copy-3: Hearing Officer.

Thank you for your prompt attention to this matter. Please contact Vincent Duenas at 475-0390 ext. 206, or vduenas@guamopa.com, should you have any questions regarding this notice.

Sincerely,


Yuka Hechanova
Deputy Public Auditor

Enclosure: Notice of Appeal – OPA-PA-18-003

Cc: David Mair, Attorney for TakeCare



RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

**Appendix A: Notice of Appeal Form
PROCUREMENT APPEAL**

DATE: 05-04-18
TIME: 2:35 AM PM BY: JMO
FILE NO OPA-PA: 18-003

PART I- To be completed by OPA

In the Appeal of)
TakeCare Insurance Company, Inc.) **NOTICE OF APPEAL**
_____))
(Name of Company), APPELLANT)
_____))
_____)
_____)
_____)
_____)
_____)
_____)
_____)
_____)

PART II- Appellant Information

Name: TakeCare Insurance Company, Inc.
Mailing Address: Baltej Pavilion, Suite 308
415 Chalan San Antonio
Business Address: Tamuning, Guam 96913

Email Address: arvin.lojo@takecareasia.com
Daytime Contact No: (671) 300-7147
Fax No.: (671) 647-3559

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 May 2, 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)

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

<u>No responses yet submitted.</u>	_____
_____	_____
_____	_____
_____	_____

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 4 day of May, 2018.

By: Joseph Husslein, President and CEO
APPELLANT

or

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

**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 generally set forth in the Protest filed by TakeCare on April 18, 2018, as well as in the supporting documents attached hereto. Additionally, Guam law contemplates that the Purchasing Agency attempt to settle and resolve a bid protest. 5 GCA Section 5427(b) and (c). Prior to denying the protest of TakeCare, the Purchasing Agency made no effort whatsoever to meet with TakeCare to attempt to settle and resolve the protest.

2. A statement specifying the ruling requested:

Appellant requests that the RFP procurement process remain stayed pending final resolution of the protest and that the RFP at issue be cancelled or amended to remove the minimum requirement that offerors include GRMC in their provider networks.

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

The documents supporting the Appeal are the RFP itself, the protest filed by the Appellant, along with the legislative history of Public Law 34-83 and Bill No. 21-34. Copies of the relevant pages of the RFP are attached hereto, as well as TakeCare's protest and copies of documents relating to the Legislative History of Public Law 34-83 and Bill No. 21-34. The entire RFP can be located in the Human Resources section of the Department of Administration website at <http://hr.doa.guam.gov/>.

The Legislative History of Public Law 34-83 and Bill No. 21-34, in addition to other Guam statutes, plainly indicate that:

(a) Guam's Legislature expressly elected not to pass Bill No. 21-34, which required that GRMC be included within the networks of potential offerors willing to provide health insurance coverage to government employees;

(b) The Director of the Department of Administration agreed that requiring GRMC to be included in the network of potential offerors "violates the spirit and intent of the law as it would provide special recognition and treatment to the private hospital on Guam"; and,

(c) Calvo's SelectCare opposed requiring that GRMC be included in the network of potential providers because it "discriminates against other medical providers that have also made large investments on Guam but are not given the same type of advantages" and it would give GRMC "a significant advantage against insurers knowing that the insurers MUST have an agreement with them and possibly demand rates that may not be feasible in our market place."

**RELEVANT PAGES FROM RFP
DOA/HRD/RFP/GHI/19-001**



Eddie Baza Calvo
Governor
Ray Tenorio
Lieutenant Governor

Government of Guam
(Gubetnomenton Guahan)
Department of Administration
(Dipattamenton Atmenestration)
Post Office Box 884 Hagatña, Guam 96932
Tel: (671) 475-1221/1250 * Fax: (671) 477-3671



Edward M. Birm
Acting Director
Vincent P. Arriola
Deputy Director

Procurement No. DOA/HRD-RFP-GHI-19-001

Dear Prospective Offeror:

Buenas yan Hafa Adail

April 6, 2018

We would like to thank you for your interest in submitting a proposal to provide health insurance services to the Government of Guam's Group Health Insurance Program.

On an annual basis, the Government of Guam issues a Request for Proposal (RFP) to interested health insurance companies licensed to do business on Guam under the laws of Guam, to provide group health insurance coverage to Government of Guam employees, retirees, survivors, their covered dependents and foster children under the legal custody of the Child Protective Services Division of the Department of Public Health and Social Services. Therefore, this is to invite your company to submit a proposal to this RFP. Negotiations are tentatively scheduled for the week of June 11, 2018.

To register as an interested company, you must complete and email the "Acknowledgement of Receipt of RFP" form to leonora.candaso@doa.guam.gov, leiah.acfalle@doa.guam.gov, and suzanne.kohlmann@aon.com. In the event any amendments to the RFP are issued, the acknowledgement will ensure that all interested parties are informed of such change(s). The Government of Guam and the Department of Administration shall not be liable for failure to provide notice to any party who did not register contact information.

Thank you in advance for your response and we look forward to working with your company.

Edward M. Birm, Acting Director
Department of Administration

Notice to Bidders:

Please pay attention to how scoring has been modified as a result of PL 34-83: an Act that amends 4301(a) and 4302(c)(2) of Article 3, Chapter 4, Title 4, Guam Code Annotated, relative to ensuring that **only the most economical and beneficial healthcare insurance** proposal plan for Government of Guam employees, retirees, and foster children is forwarded by the Government of Guam Health Insurance Negotiating Team to the Governor for consideration

- Clarified requirements in Phase I scoring in order to be deemed a qualified bidder
- Qualified bidders will be ranked based upon Exclusive bid total annual cost
- Only the top 3 ranked bidders will be invited to negotiate

30		State "Confirmed" if you are not changing any dental exclusions between the current contract and your proposed contract. If you do not have a current contract with GovGuam, please attach your medical exclusions listing and label it as "Carrier Name_Dental Exclusions".		
31		Very satisfied references of three other employers for whom services similar in scope, size or discipline to the required services have been provided by the offeror. The name, address, contact person, and telephone number(s) should be provided.		
32		By stating "Confirmed" and "Agreed", confirm that you understand "Section K - Time is of the essence" in the RFP and that you will meet the requirement to have your policy and your rates filed with the Insurance Commissioner, no later than 45 days before October 1, 2018. (Earlier, especially with the rates, is preferred.) Note: Non-compliance is a crime. See Section K for details.		
33		Will you agree to process and pay claims within 90-days of receipt from the provider?		
34		To be considered as the Exclusive provider, Offeror must have both Guam Regional Medical City (GRMC) and Guam Memorial Hospital (GMH) in your provider network. Note: the law requires that a bidder have both a valid exclusive and non-exclusive bid in order to be a qualified bidder. Please state "Confirmed" that both of these on-island hospitals are in your proposed network for your exclusive proposal. Also, if the proposed network is different for non-exclusive bids, please explain.		
35		State "Confirmed" that you are offering the government required "ALL OR NONE" proposals. All carriers are notified that the Government is requesting that any quote or proposal include all plans (i.e. 1500, 2000, Foster, RSP, and dental) and items, or none at all. Except in the event the Government subscribes with one insurance carrier for insurance coverage for qualified foster children, the Government will not award on an itemized basis.		
36		Performance Guarantees: Confirm your agreement with the performance guarantees outlined in Exhibit E.		
37		The offeror must provide a fully-insured but participating contract rate quote for the current plans and the individually requested benefits in Exhibit D. Confirm you are willing to comply with the requirements outlined in Section I.Q. of the RFP, and provide the maximum experience participation ratio you are willing to guarantee above the required 86%.		
38		In order to be an exclusive bidder, you must meet NAIC capital requirements. Offeror must provide: - income statement for fiscal 2017 - balance sheet for fiscal 2017 - required Risk Based Capital (RBC), assuming exclusive contract - Provide detailed calculation of RBC requirements - source of unallocated capital to support RBC requirement - Target Capital ratios at 250% or greater of the NAIC capital requirements		

**LEGISLATIVE HISTORY
PUBLIC LAW 34-83**

SESSION DATE	TITLE	DATE PASSED	TRANSMITTED	COMMITTEE ON APPROPRIATIONS AND ADJUDICATION	2/10/17 2:00 P.M.	2/28/17 6:17 p.m.	Fiscal Note Request 1/25/17 Fiscal Note 2/13/17	NOTES
3-34 (COR)	AN ACT TO AMEND §§ 4301(a) AND 4302(c)(2), BOTH OF ARTICLE 3, CHAPTER 4, GUAM CODE ANNOTATED, RELATIVE TO ENSURING THAT ONLY THE MOST ECONOMICAL AND BENEFICIAL HEALTHCARE INSURANCE PROPOSAL PLAN FOR GOVERNMENT OF GUAM EMPLOYEES AND RETIREES AND FOSTER CHILDREN IS FORWARDED BY THE GOVERNMENT OF GUAM HEALTH INSURANCE NEGOTIATING TEAM TO I MAGA'LÁHEN GUÁHAN FOR CONSIDERATION; AND TO DIVESTING THE LEGISLATURE OF FINAL APPROVAL AUTHORITY OVER ANY CONTRACT ENTERED INTO BY I MAGA'LÁHEN GUÁHAN FOR THE SAME.	3/9/17	3/10/17 12:09 P.M.					Received: 03/22/17 Mess and Comm Doc. No. 3461-17-0323
3/7/17	AN ACT TO AMEND §§ 4301(a) AND 4302(c)(2) OF ARTICLE 3, CHAPTER 4, GUAM CODE ANNOTATED, RELATIVE TO ENSURING THAT ONLY THE MOST ECONOMICAL AND BENEFICIAL HEALTHCARE INSURANCE PROPOSAL PLAN FOR GOVERNMENT OF GUAM EMPLOYEES, RETIREES, AND FOSTER CHILDREN IS FORWARDED BY THE GOVERNMENT OF GUAM HEALTH INSURANCE NEGOTIATING TEAM TO I MAGA'LÁHEN GUÁHAN FOR CONSIDERATION; AND TO DIVESTING I LHEKSLATURAN GUÁHAN OF FINAL APPROVAL AUTHORITY OVER ANY CONTRACT ENTERED INTO BY I MAGA'LÁHEN GUÁHAN FOR THE SAME.	3/9/17	3/10/17 12:09 P.M.					
2/19/18		DATE PASSED OVERIDDEN 2/19/18	TRANSMITTED 2/20/18 3:44 p.m.					

I MINA'TRENTAI KUÁTRO NA LIHESLATURAN GUÁHAN
2017 (FIRST) Regular Session

Bill No. 3-34 (COR)

Introduced by:

B. J. F. Cruz

AN ACT TO *AMEND* §§ 4301(a) AND 4302(c)(2), BOTH OF ARTICLE 3, CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO ENSURING THAT *ONLY* THE MOST ECONOMICAL AND BENEFICIAL HEALTHCARE INSURANCE PROPOSAL PLAN FOR GOVERNMENT OF GUAM EMPLOYEES AND RETIREES AND FOSTER CHILDREN IS FORWARDED BY THE GOVERNMENT OF GUAM HEALTH INSURANCE NEGOTIATING TEAM TO *I MAGA'LÁHEN GUÁHAN* FOR CONSIDERATION; AND TO DIVESTING THE LEGISLATURE OF FINAL APPROVAL AUTHORITY OVER ANY CONTRACT ENTERED INTO BY *I MAGA'LÁHEN GUÁHAN* FOR THE SAME.

1 **BE IT ENACTED BY THE PEOPLE OF GUAM:**

2 **Section 1.** Subsection 4301(a) of Article 3, Chapter 4, Title 4, Guam Code
3 Annotated, is hereby *amended* to read:

4 “(a) *I Maga'lahi* (the Governor) is authorized to enter contracts and reject
5 proposals, with the written concurrence of the Speaker of *I Liheslaturan Guáhan*
6 (the Guam Legislature) or the Chief Justice of the Supreme Court of Guam whose
7 consents may be withheld in their sole discretion, with one (1) or more insurance
8 companies, authorized to do business in Guam, for group insurance, including, but
9 *not* limited to, hospitalization, medical care, life, and accident, for all employees or
10 separate groups of employees, and foster children, of the government of Guam. If
11 the Legislative or Judicial Branches of government elect to enter into separate
12 contracts for their employees as authorized in § 4301(c), *I Maga'lahi shall* obtain

1 the written concurrence of the Branch electing to remain with the Executive Branch
2 before the group insurance contract is entered into or a proposal rejected. The
3 government *shall not* be construed as an agent of any insurance company in
4 negotiating or administering this group insurance program. Health benefits provided
5 under this authority may be self-funded and administered by a third party if it is
6 determined to be cost-effective. No government funds shall be authorized or
7 expended and no contract shall be executed with any healthcare respondent/provider
8 for group insurance for all employees or separate groups of employees, and foster
9 children, of the government of Guam, whose proposal does not represent the most
10 economical and beneficial healthcare insurance proposal plan, as defined in §
11 4302(c)(2) of this Article, as determined by the negotiating team, as defined in §
12 4302(c) of this Article.”

13 **Section 2.** Subsection 4302(c)(2) of Article 3, Chapter 4, Title 4, Guam Code
14 Annotated, is hereby *amended* to read:

15 “(2) The negotiating team upon selection and review of the single best
16 available proposals by participating healthcare respondent(s)/provider(s), which
17 reflect shall be the most economical and beneficial healthcare insurance proposal
18 plan for government of Guam employees and retirees, and foster children, shall
19 forward said the accepted proposals to I Maga’låhen Guåhan for consideration, and
20 to I Liheslaturan Guåhan for its review final approval no later than July 31, and prior
21 to the annual legislative sessions wherein the upcoming fiscal year budget for the
22 government of Guam is before I Liheslaturan Guåhan for consideration.
23 Notwithstanding any other provision of law, rule, or regulation, the most economical
24 and beneficial healthcare insurance proposal plan for government of Guam
25 employees and retirees, and foster children, shall be defined as the lowest cost option
26 of either the exclusive or non-exclusive proposal.

1 The negotiating team shall forward only the single most economical and
2 beneficial healthcare insurance proposal plan for government of Guam employees
3 and retirees, and foster children, to I Maga'låhen Guåhan, and shall not forward
4 both an exclusive and a non-exclusive proposal to I Maga'låhen Guåhan."

5 **Section 3. Effective Date.** This Act shall become effective upon enactment.

6 **Section 4. Severability.** *If* any provision of this Act or its application to any
7 person or circumstance is held invalid, the invalidity shall not affect other provisions
8 or applications of this Act that can be given effect without the invalid provision or
9 application and to this end the provisions of this Act is severable.



COMMITTEE REPORT DIGEST

Bill No. 3-34 (COR), As Introduced - B. J.F. Cruz - "An act to amend §§ 4301(a) and 4302(c)(2), both of Article 3, Chapter 4, Title 4, Guam Code Annotated, relative to ensuring that only the most economical and beneficial healthcare insurance proposal plan for government of Guam employees and retirees and foster children is forwarded by the government of Guam Health Insurance Negotiating Team to *I Maga'lahren Guahan* for consideration; and to divesting the Legislature of final approval authority over any contract entered into by *I Maga'lahren Guahan* for the same."

I. OVERVIEW

Bill No. 3-34 (COR) was introduced by Speaker Benjamin J.F. Cruz on January 4, 2017, and referred to the Committee on Appropriations and Adjudication on January 24, 2017.

The Committee on Appropriations and Adjudication convened a public hearing on Friday, February 10, 2017, beginning at 2:00PM in the Guam Legislature Public Hearing Room. The hearing for Bill No. 3-34 (COR) began at 2:04PM and ended at 3:42PM. ✓

Public Notice Requirements

All legal requirements for public notices were met, with requests for publication sent to all media and all Senators on February 2, 2017, and February 8, 2017, via email. Copies of the hearing notices are appended to the report.

Senators Present

Speaker Benjamin J.F. Cruz, *Chairperson*
Vice Speaker Therese M. Terlaje, *Member*
Senator Régine Biscoe Lee, *Member*
Senator Telena C. Nelson, *Member*
Senator Joseph S. San Agustin, *Member*
Senator James V. Espaldon, *Member*
Senator Thomas A. Morrison, *Member*
Senator Louise Borja Muna

Appeared Before the Committee

Ms. Christine W. Baleto, *Director, Department of Administration*
Attorney Shannon J. Taitano, *Legal Counsel, GovGuam Health Insurance Negotiating Team*
Mr. Frank Campillo, *Health Plan Administrator, Calvo's SelectCare Insurance*
Mr. Eric L. Plinske, *Director of Corporate Affairs, Guam Regional Medical City*

Vice Speaker Terlaje:

"Does our RFP require coverage at both hospitals or is it certain hospitals?"

Ms. Taitano:

"I believe it is just for hospitalization. I don't recall..."

Director Baletto:

"And that's why I think we would need to research because I don't believe you can name all the clinics and say, you must provide access to all of these hospitals, to all of the clinics, to all of these pharmacies. I don't know if we are able to do that."

Vice Speaker Terlaje:

"Do you - I was going to ask the carriers this question, but I'll ask. Can you list the difference in services in the different hospitals that we have? Or difference in services that employees are getting at off-island hospitals. What makes them different? When they say they want choice, is it that they want a certain service that another hospital does not provide. Or is it really just choice that is not a critical item?"

Ms. Taitano:

"I've been told by some employees when they like the option to choose the different carriers, it's the rates they compare because the plans are the same. I've been told, too that it's the service they receive from the different carriers. Some prefer one carrier over the other. That's what has been conveyed to me."

Vice Speaker Terlaje:

"Customer service?"

Ms. Taitano:

"Yes."

Director Baletto:

"Responsiveness, especially when it comes to claims, any paper work, or coordination of services, if you need to fly off-island - we hear some of those comments as well. There are some carriers who are more responsive or quicker to set those things up as opposed to maybe someone else that they might have had experience with."

Vice Speaker Terlaje:

"I would be interested if the government of Guam is going to require an exclusive contract because of cost or find ways to save on cost. Would you be

Unfortunately we are not the ones to determine the splits, unless we grab it back."

Mr. Campillo:

"But you could legislate that."

Chairman Cruz:

"We may have to take that back. Thank you for being the one suggesting it."

Vice Speaker Therese Terlaje:

"I'm sorry I am not familiar with this but, [quoting from Mr. Campillo's testimony] "... whereby [the Guam Memorial Hospital Authority] limits its charges to the Medicare rates for the GovGuam population". Do they have one set of rates for Medicare and then another set of rates for insurance companies? Is that how it works?"

Mr. Campillo:

"So, GMH is paid by Medicaid, Medicare and [Medicaid Integrity Program], a set of rates that are basically based on the Medicare reimbursement factor. The rest of us have to pay a different rate. It is based on their published rate schedule. We used to get a prompt payment discount if we paid in thirty (30) days. That was eliminated. So, that's the schedule that applies to third-party payers. I'm suggesting, why charge your population more? After all, it is GovGuam taking care of GovGuam employees so allow us to pay GovGuam based on the Medicare fee schedule."

Vice Speaker Terlaje:

"Do you think the government could make an agreement for GovGuam subscribers? We set a rate like that?"

Mr. Campillo:

"It's your hospital. You can do whatever you want."

Vice Speaker Terlaje:

I'll ask the Attorney General.

Mr. Campillo:

"You are already paying Medicaid based on Medicare. Thank you very much."

Mr. Eric Plinske greeted members of the Committee and introduced himself as Director of Corporate Affairs for the Guam Regional Medical City. He then proceeded to read his written testimony (*appended to this report*). The written testimony – while expressing

support for the measure's intent—sought amendments that would require all qualified insurers participating in the GovGuam Health Insurance Program to include both private and public hospitals as in-network providers.

Mr. Plinske further noted:

"Mr. Speaker, I appreciate the time. One of the things we mentioned [was] choice and I know [we've] talked about economies of scale and bargaining power and that's what insurance companies have when they deal with providers and they will negotiate rate discounts because of their bargaining power and their economies of scale. But when they don't sign a contract with a provider those rates remain at the list rate and they go on to the customer. As a non-participating provider, the biggest thing that people don't understand and I would assume you may have a difficult time understanding what non-participating provider means and the famous quote, eligible charges. What that means and I can explain in detail right now, for instance the one plan who has not put us in their network, it doesn't mean that there's necessarily savings anywhere it just means those costs are going to have to go to someone else. We are holding over five million dollars (\$5 million) of claims for that provider. We have not sent those to the customer—your GovGuam employees, retirees, federal workers—because we are in negotiations to try and work out an agreement. We're not really that close right now, unfortunately.

"The three (3) other plans on-island have all signed with us a long time ago. So, if we were to release those bills to those patients, we are going to have to eventually, if those good faith efforts don't work. Imagine the bankruptcies that people will face if they have to pay these full bills under eligible charges. And it's not just the one plan, all health plans have this clause. If you are non-participating provider they only pay directly for emergency services under the... it's called [the Emergency Medical Treatment and Labor Act (EMTALA)]. No hospital can turn away a patient due to money issues. You accept them and you must stabilize them. Many times that emergency visit results in an admission. As a non-participating provider there are many hoops that are followed. First, they come into the emergency room, you have no agreement with this health plan but you are supposed to within twenty four (24) hours or twelve (12) hours notify the non-participating, the plan that you are not a network provider in of the emergency room visit in order for any payment whatsoever to be paid.

"Then, if there is an admission, require another notice with pre-authorization approval to be provided to the hospital for what would be called, pre-authorization to admit to a non-participating provider. Now, even if you got

that, it doesn't mean the plan is going to pay anything to the hospital. The whole bill is going to the patient, that full price and the only way that patient is going to get any money back is if they first, pay the full bill with no discounts because they don't get the benefit of a negotiated agreement and those negotiated rates.

"Now, if a miracle happens and they end up finding the money to pay that bill then they get to go to the health plan and seek reimbursement generally at seventy percent (70%) of eligible charges. What does that mean? That means usually the lowest of the low of any rate they can look at: Medicare rate, the lowest network rate—GMH likely and a range of other ones, some physician fees. There's about three to four (3-4) different ones they could refer to; usually it'll be the lowest of the low.

"As an example of that is a private room at GRMC at list price, the lowest and we're a private room hospital where GMH is a semi-private room hospital with some private rooms. A surgical room for instance is twenty four hundred dollars (\$2400). It's about six hundred dollars (\$600) semi-private at GMH. Now, just that one service you went to the hospital at GRMC, and many times you have no choice. If you are in an ambulance, you are going to be taken to the nearest hospital whether that hospital is in your network or not and if you are not stable and you need to be admitted, it's going to be done. You really don't have a choice there. We are going to treat you no matter what. And we are not going to ask you during that process what plan you've got or if you have any money.

"So, now you go twenty four hundred dollars (\$2400) just for the room. Somehow you find the money to pay for that. And believe me there are surgeries and many other expenses going to be—we are just looking at the room. If you heard seventy percent (70%) of eligible charges you might think, well that's not bad. Some plans have eighty percent (80%) of charges if you are in network, seventy percent (70%) of eligible charges—that doesn't sound too bad. The bill goes through and you pay for the whole twenty four hundred (\$2400). Now, you go to the plan to seek reimbursement. Now, you'll find out likely the reference rate is the six hundred dollar (\$600) room rate at GMH. That's a semi-private room, seventy percent (70%) of that room rate. That's about four hundred and twenty dollars (\$420). The rest you eat—over two thousand dollars (\$2000). What was the real result? About seventeen percent (17%) of the bill was reimbursed but that's only if the person had the money to pay the hospital up front. Rarely do they have that. Who would? If you have a major set of surgeries: tens of thousands of dollars for sure, and who's got that money laying around? Seventeen percent (17%) if you can even find the money to pay up front that you might be eligible to get paid and reimbursed back to you while you eat the eighty

Mr. Campillo:

"Let me tell you the other side of that coin. If the government of Guam obligates the health insurance plans to include everybody, then you take the ability for the health insurance plans to negotiate. You have to balance it. I can see the perspective of a company and a hospital that has invested a significant amount of dollars to be included in our plans. I can see their perspective. But on the other hand, I think that we live in a free enterprise world, you need to allow health insurance plans to be able to negotiate accordingly."

Mr. Francis Santos approached the Committee and proceeded to testify.

"Thank you Mr. Speaker and colleagues. Then, I would argue that you have an issue with the [Qualifying Certificates (QCs)] that we all benefit as insurance carriers and as a hospital. Because my understanding with the QC benefit is that we as the residents of Guam will get a benefit from the hospital and the insurance carriers. So, if you are going to allow this system to not choose this hospital verses this hospital then we should really look at why we are giving QCs. Because the promise was no, I'm going to allow this hospital to come to our island, offer this benefit and offer more importantly to the residents that cannot afford to come to the hospital. Again, I caution you to examine that closely. I'll speak on behalf of GRMC, you [wanted] us to be on this island and provide this service. So, we are here today. All we are asking is that give the residents of Guam the chance to choose the hospital and just put us in the network, is all we are saying. We'll negotiate. That's our challenge to negotiate with the carriers. I will say I don't want to comment at this point because we recently transmitted the bill on behalf of the GPA and GWA employees to ask the Legislature to consider separating us out of the group health insurance and at that time I'll submit my testimony recognizing both bills and how they address group health insurance in total. Thank you very much."

Chairman Cruz:

"When you were just speaking, were you speaking as a taxpayer or an official from GRMC?"

Mr. Santos:

"I have this crazy hat; sometimes three (3) hats actually. I can speak on behalf of the industry if they allow me at times and sometimes they do. I have to speak on behalf of GRMC because of the value it brings to this community and just as a resident taxpayer who at times questions why we do QCs. This issue at this point is that it is a done deal. We've given QCs to insurance carriers because that's the benefit for the risk they take and then you asked GRMC to invest two hundred and fifty million dollars (\$250 million). So, we are here today asking that all the residents of Guam be afforded to come to this hospital."

Mr. Campillo:

"I gave you my perspective that I don't feel the need to mandate that."

Senator James V. Espaldon:

"Mr. Speaker, if I may? What [Mr. Plinske] had testified to...I guess the implication as it is relative to this particular bill is that if we were to go down this road and entertain this in session that only the lowest price carrier then it kicks in and the testimony that if we're going to go down that road then at least include the other hospital. Otherwise, any carrier who does not include would probably be able to bid the lowest price. I just want to make sure. Is that what really is being said the past ten (10) minutes just to make it clear in my mind?"

Mr. Campillo:

"I think [Mr. Plinske] said it clear and that is that it is a fact that the new hospital has a higher price cost than GMH. And you are right. If you are going to look at the least expensive hospital, it's the same way when we go to the Philippines and go to Green Hills to buy stuff. Cheap does not clearly bring quality and I think that if you are going to mandate and you go with the lowest cost possible, health plans as very well explained by [Director Baletto], you are going to find ways to carve out the least expensive items of the health plan. That's going to create that. But if you mandate that a health plan needs to contract with someone then you also take away the ability for health plans to really work on behalf...at the end of the day, you are going to sign up and you are going to be able...the health plan will be able to sign up the networks that they feel are going to be best for the individual members that are going to sign up with them and the health plans either work with the provider and provides what is good quality or not. That's why it allows choice for members to differentiate between a quality health plan and one that may not be quality."

Senator Espaldon:

"I just wanted to clarify and make sure that I understood exactly what's being said. [Mr. Plinske], if you would like to join us again, I'd love to have him come back up."

Mr. Plinske:

"We actually work very well with all the health plans. Take Care is a strong provider of health plans and we look forward with working with them and come to an agreement. Jeff and the team at Take Care, we have no animosity. What happens if you don't...and I think we're talking about a hospital and we're talking about clinics. There's a little bit of a difference I think to say a specialty hospital where there is no...[Mr. Campillo] mentioned that there was one entity no one else paid those rates."


LEGISLATIVE HISTORY
BILL NO. 21-34

I MINA'TRENTAI KUÁTRO NA LIHESLATURAN GUÁHAN


2017 (FIRST) Regular Session

Bill No. 2434 (COR)

Introduced by:

B. J. F. Cruz 

AN ACT TO ADD § 4302(f)(1) OF CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO REQUIRING THAT ALL PRIVATE HOSPITALS BE COVERED UNDER THE GOVERNMENT OF GUAM HEALTH INSURANCE CONTRACT.

2017 FEB 14 PM 5:01 

1 BE IT ENACTED BY THE PEOPLE OF GUAM:

2 Section 1. §§ 4302(f)(1) of Chapter 4, Title 4, Guam Code Annotated, is
3 hereby *added* to read:

4 “(1) All companies, or other legal entities providing or applying to
5 provide health insurance or the provision of health care, shall have contracts
6 for services with all private hospitals operating on Guam that are providing
7 health care services to any and all of their subscribers.”

8 Section 2. **Effective Date.** This Act *shall* become effective upon enactment.

9 Section 3. **Severability.** *If* any provision of this Act or its application to any
10 person or circumstance is held invalid, the invalidity *shall not* affect other
11 provisions or applications of this Act which can be given effect without the invalid
12 provision or application and to this end the provisions of this Act is severable.



Eddie Baza Calvo
Governor
Ray Tenorio
Lieutenant Governor

DEPARTMENT OF ADMINISTRATION
(DIPATTAMENTON ATMENESTRASION)
DIRECTOR'S OFFICE

(Ufisinan Direktot)
590 South Marine Corps Drive
Suite 224, GITC Building, Tamuning, Guam 96913
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TEL: (671) 475-1101/1221/1250 * FAX: (671) 477-6788



Christine W. P. Baleto
Director
Vincent P. Arriola
Deputy Director

March 15, 2017

The Honorable Benjamin J.F. Cruz, Speaker
Chairman, Committee on Appropriations and Adjudication
I Mina' Trentai Kuáttro Na Liheslaturan Guáhan
Suite 107, 155 Hesler Place.
Hagåtña, Guam 96910

RE: Written Testimony on Bill 21-34 (COR)

Buenas yan Háfa Adai Mr. Chairman and members of the Committee,

Thank you for the opportunity to provide comments on Bill 21-34 (COR):

AN ACT TO ADD §4302(f)(1) OF CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO REQUIRING THAT ALL PRIVATE HOSPITALS BE COVERED UNDER THE GOVERNMENT OF GUAM HEALTH INSURANCE CONTRACT.

The Department of Administration recognizes the need for the government of Guam to provide equal access to all duly qualified providers as well as an employee's right to choose services among them. However, we are concerned with any measure that mandates inclusion of any particular provider.

5 GCA, Chapter 5, §5001(b) relative to the underlying purposes and policies of the Guam Procurement Law identifies the following purposes and policies of procurement: "(4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory; (5) to provide increased economy in territorial activities and to maximize the fullest extent practicable the purchasing value of public funds of the Territory; (6) to foster effective broad-based competition within the free enterprise system."

The proposed bill violates the spirit and intent of the law as it would provide special recognition and treatment to the private hospital on Guam. Although not specifically named, there is only 1 private hospital on Guam. Therefore, it's statutorily mandated inclusion violates the intent of fair and equitable treatment. It is also noted, that this requirement would only extend to privately owned entities and not to public hospitals. Further to this, other providers on island could petition the Government to also ensure special inclusion in future health insurance benefits.

Another concern is the disparity in prices as demonstrated in the attached fee schedule. As you will note, the difference in cost for services does not allow the Government to maximize to the fullest extent practicable the purchasing value of public funds of the Territory. Instead, it forces carriers to accept whatever fees are established by the private entity. Carriers who refuse to accept any proposed fees would be disqualified from bidding on the Government's health insurance contract since they would not have the private hospital as one of their providers. This in essence violates the spirit of Procurement Law which is to foster competition within a free enterprise system. Carriers would have no leverage to negotiate their terms, prices, or any other matter relative to their business relationship as they would have to accept them or otherwise be disqualified from bidding.

If Carriers were forced to accept the higher fee structure, costs would surely rise. This will equate to higher premiums and would not maximize the value of purchases with public funds.

The current law requires the Health Insurance negotiating committee to look at all aspects of the Carriers proposals such as capability to deliver services, network options, personnel qualifications, system/organizational capability to support the large numbers of enrollees, etc. The committee is in discussions on how to improve our rating of proposals to ensure equal access; and the employee's right to choose from all duly qualified providers is factored into scoring. It is the Department of Administration's position that this is the best way to deal with disparities in a carrier's provider network rather than making inclusion of a select group a matter of law. It is also of great concern that the current bill may set precedent for all providers to demand equal treatment relative to inclusion.

It is for these reasons that the Department of Administration does not support Bill 21-34 as written.

Senseramente,



Christine W. Baletto
Director, DOA

COMPARISON OF FEE SCHEDULE

Service	CPT code	PRIVATE	PUBLIC
EKG Tracing		\$ 106.68	\$ 82.39
Urinalysis auto w/ scope	81001	\$ 14.37	\$ 8.20
MRI Chest w/wo contrast	71552	\$ 5,598.30	\$ 979.48
MRA Head w/wo contrast	70549	\$ 4,630.49	\$ 1,833.68
X-Ray Chest	71010	\$ 178.13	\$ 77.16
CBC	85027	\$ 26.43	\$ 16.44
Magnesium	83735	\$ 59.15	\$ 25.70
US Ext carotids Bilateral	93880	\$ 618.96	\$ 199.10
Infusion IV hydration each add hr.	96361	\$ 464.05	\$ 31.91
Gauze dressing 4 x 4		\$ 5.00	\$ 1.12
Hemodialysis		\$ 1,985.28	\$ 418.85
EEG	95819	\$ 1,752.99	\$ 317.19
ICU		\$ 3,257.55	\$ 1,473.47
Telemetry		\$ 2,600.00	\$ 827.63
Nursery Room and Board		\$ 1,600.00	\$ 420.13
Surgical Room and Board		\$ 2,456.25	\$ 605.68
Pediatric Room and Board		\$ 2,456.25	\$ 789.73
OB/GYN Room and Board		\$ 2,456.25	\$ 637.41
ICU Regular Room		\$ 3,257.55	1473.47
Pediatric ICU		\$ 3,257.55	\$ 1,271.89
NICU Room and Board		\$ 3,750.00	\$ 955.37
NICU Isolation Room		\$ 6,075.00	\$ 1,271.89
Medical Room and Board Isolation Room		\$ 4,324.50	\$ 630.69
Delivery Vaginal Routine		\$ 9,822.00	\$ 820.53
Delivery Vaginal High Risk		\$ 12,275.00	\$ 820.53
Surgery first 30 mins.		\$ 4,096.80	\$ 1,418.74
Surgery each additional 15 mins.		\$ 1,024.20	\$ 236.45
OR level II 30 min		\$ 6,145.20	\$ 1,418.74
OR level II additional 15 min		\$ 2,765.34	\$ 236.45
OR level III 30 min		\$ 8,603.28	\$ 1,418.74
OR level III additional 15 min		\$ 3,871.47	\$ 236.45
OR level IV 30 min		\$ 11,614.42	\$ 1,418.74
OR level IV additional 15 min		\$ 5,226.49	\$ 236.45
OR level V 30 min		\$ 15,679.47	\$ 1,418.74
OR level V additional 15 min		\$ 7,055.76	\$ 236.45
OR level VI 30 min		\$ 20,383.32	\$ 1,418.74
OR level VI additional 15 min		\$ 9,172.49	\$ 236.45
Outpatient Surgery 30 mins		\$ 1,884.53	\$ 654.51
Outpatient Surgery additional 15 mins		\$ 471.13	\$ 109.10
Vancomycin		\$ 116.00	\$ 19.41
Amikacin 250 mg		\$ 94.00	\$ 34.23

Fee is for Major surgery 1st hr. for GMHA

Fee is for Major surgery each additional 15 mins. after 1 hr.

Dextrose 5% 500 ml		\$ 67.00	\$ 13.91
Albuterol 1.25 mg/3ml inh soln		\$ 5.00	\$ 1.31
Emergency Dept Level I		\$ 431.25	\$ 78.11
Emergency Dept Level II		\$ 697.88	\$ 78.11
Emergency Dept Level III		\$ 1,285.01	\$ 78.11
Emergency Dept Level IV		\$ 1,889.85	\$ 78.11
Emergency Dept Level V		\$ 2,302.87	\$ 78.11
Observation Room per hr Pediatrics		\$ 143.75	\$ 32.90
Observation Room per hr surgical		\$ 143.75	\$ 25.23
Observation Room per hr Medical		\$ 143.50	\$ 25.95
Blood Transfusion Inpatient	36430	\$ 1,041.76	\$ 312.17
ER transfusion Blood/Blood components 1 hr	36430	\$ 1,457.57	\$ 312.17
Pregnancy Test Urine	81025	\$ 77.43	\$ 34.93
Sleep study	95807	\$ 3,224.52	\$ 1,157.94
Multiple Sleep Latency Test	95805	\$ 2,141.26	\$ 749.26
Spirometry/PFT	94060	\$ 436.17	\$ 248.70
Pulmonary Stress Test	94620	\$ 555.32	\$ 138.27
Routine venipuncture	36415	\$ 80.63	\$ 10.64
Ammonia Assay	82140	\$ 179.51	\$ 102.44
Amylase	82150	\$ 54.06	\$ 30.85
Chromosomal analysis	88267	\$ 1,252.64	\$ 714.82
NM-Myocardial Perfusion Spect.	78452	\$ 1,179.18	\$ 650.02
NM-Myocardial Imaging, infarct	78468	\$ 704.20	\$ 256.45
Chest Tube placement	32551	\$ 1,649.56	\$ 513.82
Ventilator Management initial day	94002	\$ 4,562.49	\$ 555.82
Delivery of Placenta only	59414	\$ 5,536.41	\$ 820.53
Fetal Biophysical profile with nonstress test	76818	\$ 519.44	\$ 286.35
Fetal Non-stress test	59025	\$ 304.02	\$ 149.29
Echo Fetal Cardiovascular	76826	\$ 686.08	\$ 443.89
Total		\$175,896.86	\$ 25,049.07

None for Placenta
only - GMHA
Delivery Room



115 Chalan Santo Papa Hagåtña • P.O. Box FJ Hagåtña, Guam 96932 • Phone: (671) 477-9808 • Fax: (671) 477-4141

March 16, 2017

The Honorable Speaker Benjamin J.F. Cruz
34th Guam Legislature
155 Hesler Place, Suite 107
Hagatna, Guam 96910

Hand Delivered

RE: Bill No. 21-34 (COR) - B.J.F. Cruz - An act to ADD § 4302(f)(1) of Chapter 4, Title 4, Guam Code Annotated, relative to requiring that all private hospitals be covered under the Government of Guam health insurance contract.

Dear Speaker Cruz:

Thank you for inviting us to testify on the aforementioned bill. At the onset, we would like to share with you and the committee members that our company currently contracts with Guam's only privately owned and operated hospital, and that we support all efforts to ensure that the new hospital remains a viable and successful entity in our community.

Nonetheless, we must oppose bill 21-34 on the basis that private enterprises such as hospitals, clinics, and insurance companies should be allowed to negotiate agreements without government interventions or mandates. This bill infringes on free commerce and takes away the ability for insurance companies to negotiate with a provider. Also, it discriminates against other medical providers that have also made large investments on Guam but are not given the same type of advantages.

There are existing federal laws requiring insurance companies to pay for emergencies at non-participating hospital providers with certain allowances, and we believe this is a sufficient protection for hospitals. The possible consequences of this bill are that the private hospital provider will have a significant advantage against insurers knowing that insurers MUST have an agreement with them, and possibly demand rates that may not be feasible in our market place. Again, we oppose the bill on the basis that private agreements, free enterprise, and commerce should not be legislated.

Respectfully yours,

Frank Campillo
Health Plan Administrator

Cc: All Senators

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

Speaker Benjamin J.F. Cruz

March 15, 2017

MAR 15 2017
Time: 10:39 AM [] PM File No. _____
Received By: DM

VIA Email: senator@senatorbjcruz.com
VIA HAND DELIVERY

Office of the Speaker Benjamin J. F. Cruz
34th Guam Legislature
Guam Congress Building
163 Chalan Santo Papa
Hagåtña, Guam 96910

Re: Written Testimony for in Opposition to Bill No. 21-34

Dear Speaker Cruz and Members of the Committee on Appropriations and Adjudication:

Thank you for the opportunity to submit written testimony for Bill No. 21-34, "*An Act To ADD § 4302(F)(1) Of Chapter 4, Title 4 Guam Code Annotated, Relative To Requiring That All Private Hospitals Be Covered Under The Government Of Guam Health Insurance Contract.*" I am the CEO and current Health Plan Administrator of TakeCare Insurance Company, Inc. ("TakeCare") and provide these comments in that capacity.

1. Bill No. 21-34 Impedes the Governor's Ability to Maintain GMH as required by the Organic Act.

The Organic Act of Guam makes the Governor responsible to maintain and operate public health services in Guam. 48 U.S.C. Section 1421g. Bill. No. 21-34 will result in numerous Government of Guam employees and dependents using GRMC instead of GMH, and thereby substantially reducing the revenues of GMH. A reduction of revenue to GMH will substantially impair the Governor's ability to "establish, maintain and operate public health services in Guam, including hospitals . . .". 48 U.S.C. Section 1421g. It is self-evident that the Governor cannot perform his Organic duties if there are inadequate revenues to "maintain and operate" GMH.

2. Bill No. 21-34 Violates The Equal Protection Rights of Guam Taxpayers.

Bill No. 21-34 also violates the Equal Protection Clause because the loss of GMH revenues will result in additional Legislative appropriations, and thereby place a substantial tax burden on Guam citizens. In *Guam Power Authority v. Bishop of Guam*, 383 F. Supp. 476 (D.C. Guam 1974), the Guam Legislature had passed a law requiring that the Guam Power Authority ("GPA") charge less for services to non-profit entities. The District Court of Guam ruled that the law violated equal protection because a lower rate to non-profit entities resulted in additional costs to ordinary consumers. 383 F. Supp. at 481-482. In other words, the taxpayers had to make up the difference.

Bill No. 21-34 is likewise inorganic because it will place an additional tax burden on Guam citizens to make up for the loss of GMH revenues. For every dollar that is paid to GRMC under the Government of Guam Health Plan, that is a dollar that does not go to GMH from the Government Health Plan. Furthermore, it is the taxpayers of Guam that will have to make up the lost revenues to GMH in order to keep it operational.

3. Bill No. 21-34 Violates the Due Process Rights of Health Insurers.

Under Bill No. 21-34, health insurers will be compelled to enter into a contract with GRMC and pay rates that they would otherwise reject, or not participate in the Government of Guam Health Plan. Compelling health insurers to pay increased rates with GRMC violates the Organic Act provision providing that “[n]o person shall be deprived of . . . property without due process of law.” 48 U.S.C 1421b(e).

4. Bill No. 21-34 Is An Improper Delegation of Power.

Bill No. 21-34 requires that health insurers have a contract with GRMC in order to bid on the Government of Guam Health Plan. However, the Legislature cannot compel GRMC to have a contract with any particular health insurer. Similarly, the Legislature cannot control the rates that GRMC charges to any particular health insurer. GRMC, therefore, could decide to have a contract with only one health insurer, and thereby effectively decide who would be the exclusive provider of Government of Guam health care. In simple terms, GRMC (not the Executive or Legislative Branches) would be deciding the health insurer to be awarded the Government of Guam Health Contract. This is a textbook example of an improper delegation of both Legislative and Executive Authority to a private entity.

5. Bill No. 21-34 Impairs Health Insurers' Right to Contract.

The Organic Act provides that there can be no “law impairing the obligation of contracts.” 48 U.S.C. 1421b(j). By requiring that health insurers have a contract with GRMC, the Legislature is prohibiting health insurers from having exclusive contracts with other hospitals, such as GMH. This is a clear impairment of a health insurer’s right to contract. Furthermore, an exclusive contract with GMH would very likely result in a lower cost than a non-exclusive contract, and thereby reduce the cost of health care to Government of Guam employees.

6. Bill No. 21-34 Is An *Ex Post Facto* Violation.

Prior to Bill No. 21-34, health insurers had the contractual right to have a contract with a single hospital. The Organic Act provides that Guam’s Legislature cannot pass legislation that makes improper an act that was proper when committed. 48 U.S.C. 1421b(j). However, Bill No. 21-34 becomes “effective upon enactment,” and will thereby make improper that which was perfectly legal before its enactment.

7. Bill No. 21-34 is Special Legislation for GRMC.

While Bill No. 21-34 does not mention GRMC, but instead refers to “private hospitals operating on Guam,” GRMC is the only private hospital on Guam. Therefore, Bill No. 21-34 is special legislation for GRMC. What about other private health care facilities, such as Clinics? Why have they been excluded from the contractual mandate? Are they not worthy of consideration or is the discrimination against them legal?

8. Bill No. 21-34 Will Cause the Government of Guam Health Care Costs to Skyrocket!

According to Eric Plinske, GRMC's Director of Corporate Affairs, in a news release dated February 13, 2017, "the going rate for a private room at GRMC is \$2,400.00 compared to \$600 for a semi private room at Guam Memorial Hospital ("GMH")." *Pacific News Center*, February 17, 2017. See also, *Guam Daily Post*, February 14, 2017. Incidentally, all of GRMC's rooms are private rooms. There are no semi-private room rates at GRMC. Mathematically it is simple to determine that health insurance premiums will rise just from the difference in cost of hospital room rates. And, unlike the rates at GMH, GRMC may raise its rates at any time without the benefit of a public hearing or legislative approval as would be required for an increase in rate at GMH.

Public Health conducted a cost analysis for fiscal year 2017 that shows GRMC's new per diem rate of \$5,075 will cost the government agency an additional \$23 million. If the rate were to be based on GMH's \$1,123 per diem rate, it would only cost about \$10 million. Multiply those costs over the entire population of covered lives for the Hof Guam health Plan and its yet another example of rising healthcare costs that cannot be ignored if GRMC is to be a required provider under the Government's Health Contract.

Because GRMC is a private for profit hospital it is not bound to any fee schedule or public oversight as it relates to pricing their services. With a guarantee of inclusion into the Government of Guam Health Plan, this Bill provides GRMC an unfair advantage in what should be a competitive healthcare marketplace. In an anti-competitive environment prices will skyrocket, patient care and quality will be compromised and the Government of Guam its employees, and retirees will be left holding the bag. Simply said, if this Bill passes into law GRMC will have no reason to negotiate or address what is significantly higher costs compared to GMH or other on-island providers.

In addition to practically killing GMH, the Government's attempt to force a private company to contract with another private entity as part of competitive RFP process such as the Government of Guam Health Plan creates an anti-competitive environment and is not sound public policy. What will undoubtedly result is an absolute unwillingness on GRMC's part to negotiate rates or fees with health plan providers in a captured healthcare market.

9. TakeCare's Perspective.

TakeCare has been a health plan provider for the Government of Guam Health Plan since FY2013. As a health plan provider for the Government of Guam, TakeCare has partnered with the Government during times of financial hardship and has continued to provide health insurance coverage to retirees even though premiums were not paid under the terms of TakeCare's contract with the Government. Those financial hardship conditions still exist and to this day TakeCare is still not receiving the full contribution of the Government of Guam share of premiums for retirees.

As we already know from past experience, the Government of Guam has been unable to meet its existing obligations for retiree health insurance premium payment and if this bill passes it will create even more dire financial conditions for the Government.

For the past three fiscal years TakeCare has provided the Government of Guam with numerous exclusive and non-exclusive proposals that would have saved the Government of Guam, its employees and retirees tens of millions of dollars in healthcare costs. To be clear, those savings were realized largely due to the fact that Guam Regional Medical City ("GRMC") was **not** part of TakeCare's health insurance offerings. If this Bill passes, TakeCare would be forced to include GRMC into its health insurance proposal causing any real or potential savings over existing rates to completely evaporate. Requiring that GRMC be a participating network provider for the Government of Guam Health Plan will cause rates to rise exponentially.

Bill No. 21-34 is a significant step in the **wrong direction** and will only serve to drive health insurance premiums upward for the Government of Guam, its employees, and retirees. It will certainly jeopardize the viability of GMH. This bill is **not in the Government's best interests** and is contrary to the aim and objective of the recently passed legislation in Bill No. 3-34. If the Government seeks to control the inflationary rates of healthcare spending under its health plan benefits, this Bill should not be passed.

For all the reasons outlined above TakeCare asks you to consider the impact this legislation will have on Government of Guam taxpayers, employees and retirees who rely on the Government of Guam for health insurance, and prevent this Bill from being enacted into law.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph E. Husstein", with a long horizontal flourish extending to the right.

Joseph E. Husstein,
CEO and Health Plan Administrator

cc: TakeCare Representatives

I Mina' Tventai Kua'ito Na Liheslaturan
BILL STATUS

21-34 (COR)	B. J.F. Cruz	AN ACT TO ADD § 4302(I)(1) OF CHAPTER 4, TITLE 4, GUAM CODE ANNOTATED, RELATIVE TO REQUIRING THAT ALL PRIVATE HOSPITALS BE COVERED UNDER THE GOVERNMENT OF GUAM HEALTH INSURANCE CONTRACT.	2/14/17 5:01 p.m.	02/17/17	Committee on Appropriations and Adjudication	3/16/17 2:00 p.m.	Fiscal Note Request 2/17/17 Fiscal Note 3/10/17	WITHDRAWN 3/23/17
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**TAKECARE PROTEST
OF RFP**

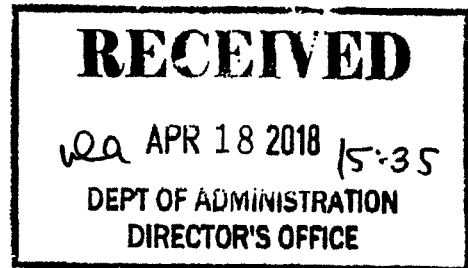


TakeCare Insurance Company, Inc.
P.O. Box 6578 Tamuning, Guam 96931
Telephone: (671) 646-6956 Fax (671) 647-3551

April 18, 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: 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"). This letter constitutes a formal protest of the RFP by TakeCare pursuant to 5 G.C.A. §5425 and 2 G.A.R. §9101 ("Protest"). 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. Pursuant to 2 G.A.R. §9101(c)(1), this Protest is being filed in duplicate.

TakeCare protests the RFP on the following grounds: (1) The Government of Guam Health Insurance Negotiating Team (the "Negotiating Team") included an invalid minimum requirement in the RFP for a qualified proposal that is inconsistent with and in violation of Guam law, including Public Law 34-83 and Guam Procurement Law; and (2) the Negotiating Team failed to adopt rules of procedure as required by the Guam Legislature for the development of minimum qualifications for proposals to be submitted for the Group Health Program.

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 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.

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 this Protest. Finally, TakeCare reserves its right to supplement and modify the grounds for this Protest, as its investigation is ongoing.

FACTUAL BACKGROUND

On April 6, 2018, the Department of Administration ("DOA") published the subject RFP and invited TakeCare to submit a proposal in response to the RFP.¹ TakeCare was further asked to register as an interested party by completing the "Acknowledgement of Receipt of RFP" and submitting the Acknowledgement to personnel at the DOA. On April 6, 2018, TakeCare timely submitted the Acknowledgement of Receipt of RFP, and consequently registered as an interested party.

¹ The RFP, cover letters from DOA and exhibits are incorporated by this reference as part of this Protest. The RFP is published at the Human Resources section of the DOA website: <http://hr.doa.guam.gov/>.

A qualified proposal for the Group Health Program is defined in law by 4 G.C.A. §4301.1 as follows:

Qualified proposal means a proposal from a health care provider that submits both an exclusive and a non-exclusive proposal and meets the minimum requirements specified in the RFP in response to any request for proposals for the Government of Guam Health Insurance Program.

The RFP accordingly requires that a prospective offeror submit a proposal made up of two parts—an exclusive proposal and a non-exclusive proposal. The RFP specifically provides:

A qualified proposal shall consist of two independent proposals: an exclusive proposal and a non-exclusive proposal. To be **qualified**, pursuant to 4 G.C.A. §4302(c), an offeror shall submit a proposal made up of two parts; first, an exclusive proposal, and second, a non-exclusive proposal, and meet the minimum requirements specified in the RFP (See Exhibit A for list).

RFP, p. 12. (Emphasis added).

The RFP includes the following minimum requirement listed on Exhibit A:

To be considered as the Exclusive provider, Offeror must have both Guam Regional Medical City (GRMC) and Guam Memorial Hospital (GMH) in your provider network. Note: the law requires that a bidder have both a valid exclusive and non-exclusive bid in order to be a qualified bidder. Please state "Confirmed" that both of these on-island hospitals are in your proposed network for your exclusive proposal. Also, if the proposed network is different for non-exclusive bids, please explain.

Exhibit A to DOA/HRD-RFP-GHI-19-001. (Emphasis added).

GRMC is not a government of Guam entity but rather a private entity operating a private hospital in Guam. TakeCare submits that the minimum requirement in the RFP that offerors include GRMC in their provider networks "[t]o be considered as the Exclusive provider" is improper and in violation of law.

DISCUSSION

A. Guam Law Only Requires Offerors to Include Government Health Care Entities in Their Networks

Guam law does not require that any particular private entity be included as a network provider in the resulting contract(s) for the Group Health Program. Guam law *only* requires that health care insurers "applying to provide health insurance or the provision of health care, shall have contracts for services with all government of Guam entities that are providing health care services to any and all of their subscribers." 4 G.C.A. §4302(f). Had Guam's Legislature wished to require that a health insurance company applying to provide coverage to government of Guam employees also have a contract with any private entity, including GRMC, it could have easily done so. Guam's Legislature elected not to impose such a requirement on health insurance companies applying for the Group Health Program for Government of Guam employees and retirees.

"[I]f the words of the statute are unambiguous, the judicial inquiry is at an end, and the plain meaning of the text must be enforced." U.S. v. Atlas Lederer Co., 174 F. Supp.2d 666, 670 (S.D. Ohio 2001). "We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says." Connecticut Nat. Bank v. Germain, 112 S.Ct. 1146, 1149 (1992). "[T]he statute is unambiguous, so there is no room for administrative interpretation." Christensen v. Harris County, 120 S.Ct. 1655 (2000). (Emphasis added).

The statutory requirement that offerors *only* be required to contract with Guam Memorial Hospital ("GMH") and other government of Guam entities providing healthcare is clear and unambiguous. This requirement is also grounded in sound public policy because it is in the interest of the government of Guam to financially support government of Guam entities to ensure their continued availability for the people of Guam. The government of Guam has no financial interest in supporting private hospitals such as GRMC to the detriment of GMH. To the contrary, the government of Guam paying more for health care at GRMC is against the financial interest of the government of Guam. Every dollar spent at GRMC represents many more dollars that could have been spent at GMH. Moreover, every dollar spent by government of Guam at GRMC means more dollars will most likely have to be appropriated as a subsidy to GMH from the General Fund to keep GMH afloat as a viable hospital for the People of Guam.

The Negotiating Team is the administrative agency responsible for developing the "minimum qualification of proposals." 4 G.C.A. §4302(c). However, that responsibility does not give the Negotiating Team the authority to require that offerors include GRMC in their networks if doing so is inconsistent with law. As just discussed, Guam law only requires that offerors have contracts for services with government of Guam entities that are providing health care services to subscribers. 4 G.C.A. §4302(f). An administrative agency cannot "extend a statute to give it a greater effect than its language permits." GE Solid State, Inc. v. Director, Div. of Taxation, 625 A.2d 468, 472 (N.J. 1993). Likewise, an administrative agency cannot "add to a statute something that is not there." Service Amament Co. v. Hyland, 362 A.2d 13, 20 (N.J. 1976).

B. GRMC Requirement Is Inconsistent with Public Law 34-83

Public Law 34-83 was recently enacted to require the Governor of Guam (the "Governor") to select "the most economical and beneficial healthcare insurance proposal plan" for the Group Health Program. Section 1 of Public Law 34-83 amended 4 G.C.A. §4301(a) by adding the following sentence:

No government funds shall be authorized or expended, and no contract shall be executed with any healthcare respondent/provider for group insurance for all employees, or separate groups of employees, and foster children, of the government of Guam, whose proposal *does not* represent the most economical and beneficial healthcare insurance proposal plan, as defined in §4302(c)(2) of this Article, and as determined by the Negotiating Team in §4302(c) of this Article.

Section 2 of Public Law 34-83 amended 4 G.C.A. §4302(c)(2), and reads as follows:

(2) The Negotiating Team upon selection and review of the **single best available proposal** by participating healthcare respondent(s)/provider(s), which **shall be the most economical and beneficial healthcare insurance proposal plan** for government of Guam employees and retirees, and foster children, shall forward said proposal to *I Maga 'lâhen Guâhan* for consideration, and to *I Liheslaturan Guâhan* for its review *no later than* July 31, and prior to the annual legislative sessions wherein the upcoming fiscal year budget for the government of Guam is before *I Liheslaturan Guâhan* for consideration. Notwithstanding any other provision of law, rule or regulation, **the most economical and beneficial healthcare insurance proposal plan for government of Guam employees and retirees, and foster children shall be defined as the lowest cost option of either the exclusive or non-exclusive proposal.**

The Negotiating Team shall forward only the single most economical and beneficial healthcare insurance proposal plan for government of Guam employees and retirees, and foster children, to *I Maga 'lâhen Guâhan*, and shall not forward both an exclusive and a non-exclusive proposal to *I Maga 'lâhen Guâhan*.

(Emphasis added).

Under Guam law, the most “economical and beneficial” plan is defined as the one with the “lowest cost option.” 4 G.C.A. §4302(c)(2). GRMC is now substantially more expensive than GMH for most services and neither the Negotiating Team nor government of Guam can control the cost of services at GRMC. Nor can the Negotiating Team or government of Guam control the terms of any agreements GRMC has (if any) with insurance companies. Hence, requiring offerors to include GRMC in their networks cannot by definition result in the most “economical and beneficial” plan for providing health care to government of Guam employees because it will not be the “lowest cost option.”

C. The RFP Violates Guam Procurement Laws

In addition to not requiring that offerors include specific private entities in their provider networks, Guam law with respect to the Group Health Program also states that,

The RFP shall call for a plan that provides a level playing field with current and future private insurers, and the non-profit public healthcare insurance option which pays for care from individual premiums and copayments not of the General Fund of the government of Guam.

4 G.C.A. §4302(c)(2). (Emphasis added).

By making GRMC a required provider in all of the offerors' provider networks, the RFP does not call for a plan that provides a “level playing field” for current or future insurers. Unlike GMH, GRMC is free to dictate what provisions it is willing to include in its provider agreements on a case-by-case basis. Indeed, GRMC is free to refuse to enter into a provider agreement with any insurer it so chooses. Consequently, GRMC can make sure that the offerors submitting proposals for the Group Health Program are not on a level playing field. Actually, GRMC can make sure that certain offerors are not even qualified to submit proposals if GRMC refuses to enter into any provider contract with an offeror, or offers unacceptable terms to certain providers. Delegating such power to GRMC, a private entity, ensures that there will not be a level playing field among the private insurers.

One of the primary purposes of Guam's Procurement Law is to “provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory.” 5 G.C.A. §5001(5) and 2 GAR Div. 4 §1102(4). The healthcare costs at GRMC are already substantially higher than at GMH. Because GRMC is not a party to the contract under the Group Health Program, it can increase its prices at will and government of Guam will have no control over costs for hospital services as it does at GMH. The cost of these increased fees (which could be entirely unreasonable) would of course be passed onto government of Guam and its employees, retirees, and other government members because the Group Health Program is a co-insurance plan where members pay a percentage of the cost of services. As a consequence, requiring exclusive offerors to include GRMC in their provider network is contrary to a primary purpose of Guam's Procurement Law because it increases the cost of health care for government of Guam employees and other beneficiaries of the Group Health Program.

Another primary purpose of Guam's Procurement Law is to “ensure the fair and equitable treatment of all persons who deal with the procurement system.” 5 G.C.A. §5001(4) and 2 GAR Div. 4 §2201(3). Some health insurers may have elected not to enter into a contract with GRMC because it would result in substantially higher premiums to be charged to members. Requiring that all offerors have a contract with GRMC is not “fair and equitable” to those offerors who do not have a contract with GRMC.

Guam's Procurement Law is also intended to “foster effective broad-based competition within the free enterprise system.” 5 G.C.A. §5001(6) and 2 GAR Div. 4 §1102(5). The “specifications” in a bid are also required by law to “promote overall economy for the purposes intended and encourage competition in satisfying the Territory's needs, and shall not be unduly restrictive.” 5 G.C.A. §5265. Requiring that offerors have a contract with a specific private health care provider is inconsistent with these goals because doing so reduces competition, and eliminates any potential offeror who does not have such a contract. It is also contrary to “free enterprise” to require that any potential offeror first enter into a contract with another private entity. For all of these reasons, the RFP with the GRMC requirement violates Guam's Procurement Law.

D. The RFP Denies Due Process and Includes an Improper Delegation of Executive Authority

GRMC is a private entity with a financial self-interest in the health care industry in Guam. In Association of American Railroads v. U.S. Dept. of Trans., 821 F.3d 19 (D.C. Cir. 2016) the Court ruled that it violated due process for a private entity such as Amtrak to be given control over the business of other private businesses. “[A] statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property’ and transgresses ‘the very nature of governmental function.’” Id. at 32. GRMC, like Amtrak, cannot be allowed by statute or regulation to have the power to determine whether a private health insurer can submit a proposal for the Group Health Program.

It is also an improper delegation of executive authority to allow GRMC to determine what entities may participate in responding to an RFP for a government contract. *See e.g. People v. Pollution Control Board*, 404 N.E. 2d 351 (Ill. App. 3d 1980)(Allowing private automobile association to determine which events are subject to noise regulations is an improper delegation of legislature authority); Texas Boll Weevil Eradication Foundation v. Lewellen, 952 S.W.2d 454 (Tex. 1997)(It is an unconstitutional delegation of authority to allow a private foundation whose members have a pecuniary interest to assess costs against other private companies); and, G. Curtis Martin Investment Trust v. Clay, 266 S.E.2d 82 (S.C. 1980)(It is an improper delegation of power to allow a private entity to control who participates in government owned sewer system).

E. The Negotiating Team Failed To Promulgate Rules of Procedure

Guam law mandates that “[t]he Negotiating Team *shall* develop its rules of procedure in accordance with the Administrative Adjudication Law.” 4 G.C.A. §4302(c). The word “shall” is a mandatory requirement. “Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.” Kingdomeware Technologies, Inc. v. U.S., 136 S. Ct. 1969, 1977 (2016). Recently, 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 mandatory duty to establish procedures relating to the RFP. *Id.* at Decision and Order dated February 2, 2018 at pages 10-13.

Under the Administrative Adjudication Law (“AAL”), the word “rule” means “any rule, regulation, standard, classification, procedure or requirement of any agency designed to have or having the effect of law or interpreting, supplementing or implementing any law enforced or administered by it . . .” 5 G.C.A. §9107. Promulgation of rules and procedures pursuant to the AAL requires publication, hearing, and transmittal to the Legislature with an economic impact statement. 5 G.C.A. §9301 *et. seq.* All rules and procedures developed in accordance with the AAL must be published. 5 G.C.A. §9305. The method of developing rules and procedures set forth in the AAL is “the only lawful method of adopting and promulgating administrative rules and regulations.” 5 G.C.A. §9311.

The Negotiating Team failed to develop any rules or procedures pursuant to the AAL as required by Title 4 Guam Code Annotated, Section 4301(c). In particular, no rules or procedures were developed by the Negotiating Team pursuant to the AAL regarding:

- (1) **the procedures to determine the minimum qualifications for proposals to be submitted for health insurance coverage;**
- (2) the procedures to rank offers;
- (3) the procedures to determine when an offer is nonresponsive;
- (4) the procedures to reject an offer as nonresponsive;
- (5) the procedures to reverse or modify a finding that an offer is nonresponsive and should be rejected;
- (6) the procedures to notify an offeror that it was qualified and selected as one of the top three offerors;
- (7) the procedures to negotiate with an offeror;
- (8) the procedures to reverse or modify a finding that an offeror was qualified and selected as one of the top three offerors;

- (9) the procedures to insure that the individual Negotiating Team member rankings were conducted in such a manner so as not to improperly influence each other;
- (10) the procedures pertaining to when and how individual Negotiating Team members could disclose their rankings to each other;
- (11) the procedures pertaining to when or how individual Negotiating Team members could correct or modify their rankings; and
- (12) the procedures relating to the disclosure of the identity of individual Negotiating Team members so that offerors could challenge their participation in the process because of potential or actual conflicts of interest.

“Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature . . . They have no general or common-law powers but only such as have been conferred upon them by the law expressly or by implication.” Ada v. GTA, 1999 Guam 10, ¶11. The Negotiating Team’s authority to negotiate with potential health care offerors is conditioned upon the mandatory requirement that it first “shall develop its rules of procedure in accordance with the Administrative Adjudication Law.” 4 G.C.A. §4302(c)(Emphasis added).

As the highest court of Pennsylvania recently cautioned, “[t]he effect of an agency’s failure to promulgate a regulation in accordance with these various statutory requirements is to have the regulation declared a nullity.” Borough of Bedford v. Com., Dept. of Env’tl. Prot., 972 A.2d 53, 62 (Pa. Commonwealth Ct. 2009). Where the statute itself contains a clear command that the agency proceed by rulemaking, failure to promulgate regulations specifying comprehensive and complete standards coupled with an application of informal standards on a case-by-case basis, may lead to the agency action being stricken as arbitrary, capricious, and otherwise not in accordance with law. *See, e.g., Ethyl Corp. v. E.P.A.*, 306 F.3d 1144, 1149–50 (D.C. Cir. 2002).

Case law makes it plain that agencies cannot simply make up rules as they go along, especially if those rules are inconsistent with the law. “Members of the public, and others affected thereby, should not be subjected to critical agency rules and regulations that are known only by agency personnel.” Hallmark Cards, Inc. v. Kansas Dept. Of Commerce And Housing, 88 P.3d 250, 257 (Kan. App. 2004). “If a state agency suddenly applies a new (but unpromulgated) generally applicable policy, even *within* a case-specific adjudication, the agency may be at fault for failure to promulgate the new policy.” Degraffenreid v. State Bd. of Mediation, (Slip. Op.) --- S.W.2d ---, 2012 WL 1499890 (Mo. Ct. App. May 1, 2012), reh’g and/or transfer denied (May 29, 2012). It is undisputed that neither DOA nor the Negotiating Team has ever promulgated any rules regarding the minimum requirements of offerors to provide GovGuam health care, much less rules requiring that such offerors include specific private entities such as GRMC in their networks.

Inasmuch as the Negotiating Team has not developed *any* rules of procedure in accordance with the AAL, much less those involving the issues in dispute in this Protest, all of its negotiations regarding the offending qualification are *ultra vires* and void. The solicitation should, therefore, be cancelled pursuant to 2 G.A.R. §9105, and reissued without the GRMC requirement so that it complies with law. Any proposals submitted before the RFP is reissued should be rejected in whole pursuant to 2 G.A.R. §3115. *See also* 5 G.C.A. §5451 (“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.”).

So in addition to being against the financial interest of the government of Guam, as shall be discussed herein, the Negotiating Team has not “developed” the required rules and procedures as required by the AAL to develop minimum qualifications for proposals to be submitted for insurance coverage.

F. TakeCare Has Standing To Protest Under Guam Law.

An “interested party means an actual or *prospective* offeror . . . that may be aggrieved by the solicitation or award of a contract and who files a protest.” 2 GAR Div. 4 § 9101(1)(a). “If prior to award it is determined that a solicitation . . . is in violation of law, then the solicitation . . . shall be cancelled or revised to comply with the law.” 5 G.C.A. § 5451 2 GAR Div. 4 §9101(e). Any “prospective, bidder, offeror, or contractor who may be aggrieved in

TAKECARE PROCUREMENT PROTEST

Mr. Edward M. Bim
Department of Administration
April 18, 2018
Page 7 of 7

connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer . . . or the head of a purchasing agency.” 5 G.C.A. §5425(a) and 2 GAR Div. 4 §9101(c)(1).

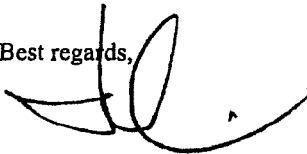
“The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto.” 5 G.C.A. §5425(a). “In the event of a timely protest . . . the Territory shall not proceed further with the solicitation or with the award of the contract 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.

CONCLUSION

The law governing procurement of government contracts sets forth certain basic principles. First, “[t]he dictates of public policy require that all responsible bidders shall have the opportunity to compete, and accordingly devices or unreasonable actions by authorities which are designed or tend to limit the list of qualified bidders are presumed to be injurious to the taxpayer and are illegal.” 10 Eugene McQuillan, *The Law of Municipal Corporations* §29.44 (3rd ed. Rev. 1990). Per se excluding offerors who do not include GRMC in their networks “limits the list of qualified bidders” and is thereby inconsistent with not only Guam law, but general law relating to government procurements.

For the reasons set forth herein, TakeCare respectfully requests that DOA either cancel or amend the solicitation to remove the minimum requirement that offerors include GRMC in their provider network. In addition, TakeCare also requests all information and documents requested herein. Further, TakeCare requests that the instant procurement be stayed and that no award of a contract for the Government of Guam Group Health Insurance Program be made until the resolution of this Protest.

Best regards,



JOSEPH HUSSLEIN
President and CEO
TAKECARE INSURANCE COMPANY

**DOA DENIAL OF
TAKECARE PROTEST**



Eddie Baza Calvo
Governor
Ray Tenorio
Lieutenant Governor

Government of Guam
(Gubetnomention Guahan)
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Edward M. Birm
Acting Director
Vincent P. Arriola
Deputy Director

MAY 02 2018

Joseph Husslein
President and CEO
TakeCare Insurance Company

**Subject: Response to Procurement Protest
Government of Guam FY2019 Group Health Insurance Program
RFP 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 protest of April 18, 2018, as referenced above. TakeCare protests the RFP on the following grounds: (1) the Negotiating Team included an invalid minimum requirement in the RFP for a qualified proposal that is inconsistent with and in violation of Guam law and (2) the Negotiating Team failed to adopt rules of procedure for the development of minimum qualifications for proposals to be submitted for the Group Health Program.

Guam Regional Medical City as a Minimum Requirement to Qualify as an Exclusive Provider

Health care is an essential service and should be made accessible to our GovGuam families. The selection of group health insurance coverage for our government employees, retirees, and their dependents should be based on quality of care and availability of services.

To ensure adequate coverage of essential services, the Guam Regional Medical City ("GRMC") should be included in a provider network to qualify as an Exclusive provider. GRMC is located in the more populated and congested region of our Island. Its proximity and coverage to many residents means more utilization by our members especially in health emergencies. Furthermore, GRMC provides services not available at GMHA just as GMHA has services not provided by GRMC. To require GovGuam employees to be admitted to only a single facility would incur a risk that the limited availability of beds would delay health services to subscribers and their dependents. Therefore, requiring both civilian hospitals in a provider network means adequate coverage of essential services to our employees, retirees, and their dependents.

The inclusion of GRMC as a minimum requirement is not limited by law but is authorized in 4 G.C.A. § 4302 which requires the solicitation to set forth minimum qualifications as determined by the Negotiating Team. The same authorization allows the Negotiating Team to require the provider network include Guam, Philippines, Hawaii and the U.S.

Response to TakeCare's protest FY19 RFP

Furthermore, lowest cost option will be assessed by the Negotiating Team among the qualified proposals submitted in response to the solicitation as authorized in Public Law 34-83. Arguing the inclusion of GRMC in the provider network cannot result in the most economical and beneficial plan because it will not be the lowest cost option assumes the outcome of the solicitation before proposals have been properly evaluated and negotiated.

Finally, the inclusion of GRMC in the provider network does not violate Guam's procurement laws. The law requires the RFP to solicit group health insurance plans that provide for a level-playing field with health insurance companies. Therefore, it is important to have parity in Exclusive proposals to meet this mandate. Without parity, an offeror could have an unfair price advantage and not rank the most qualified or beneficial offeror in providing quality services to our employees, retirees, and their dependents. This means equivalent hospital network designs. The requirement of GRMC in the provider network would promote an even level playing field and parity of proposals in the solicitation for an Exclusive proposal.

There is no legal impediment barring the Negotiating Team from requiring Guam Regional Medical City as a minimum qualification to be an Exclusive provider. Therefore, TakeCare's protest that the Negotiating Team included an invalid minimum requirement in the RFP is denied.

Rules of Procedure for the Government of Guam Health Insurance Negotiating Team

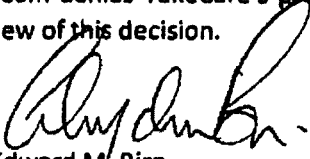
The Rules of Procedure for the Government of Guam Health Insurance Negotiating Team and the Conduct of the Annual Solicitation of Health Insurance Coverage for Government of Guam Active Employees, Retirees, and Their Dependents was adopted by law as Public Law 32-083. Public Law 32-83, the Group Health Insurance Program laws found at 4 GCA §§ 4301, et seq., and the Procurement Act and Procurement Regulations govern the solicitation for group health insurance and provide for the procedures listed in your protest. Therefore, the Negotiating Team denies TakeCare's protest that the Negotiating Team failed to adopt rules of procedure for the development of minimum qualifications for proposals to be submitted for the Group Health Program.

Request for Procurement Documents

The documents and audio recordings requested in your letter may not be available for public inspection until award of the contract or cancellation of the solicitation. TakeCare can review the documents and audio recordings requested at that time and not be prejudiced as the law allows 14 days from when it is discovered or should have been discovered grounds to file a protest. Due to the ongoing procurement and the need to protect the integrity of the procurement process, TakeCare's request for procurement documents is denied at this time.

Decision and Appeal Available

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
Chairperson, Negotiating Team



RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

Appendix D: Hearing Request/Waiver Form
PROCUREMENT APPEAL

DATE: 05-04-18
TIME: 2:35 AM PM BY: [Signature]
FILE NO OPA-PA: 18-003

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

HEARING
REQUEST/WAIVER

Docket No. OPA-PA 18-003

Please select one:

- Pursuant to 2 GAR § 12108(a), the undersigned party does hereby request a hearing on the appeal stated above.
- Pursuant to 2 GAR § 12108(a), the undersigned party does hereby waive his/her right to a hearing and is submitting the appeal stated above on record without a hearing.

Submitted this 4 day of MAY, 2018.

By: (Please select one)

- APPELLANT
- Chief Procurement Officer
- Director of Public Works
- Head of Purchasing Agency

[Signature]
Signature

David Mair
Print Name



RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS

**Appendix B: Declaration Form
PROCUREMENT APPEAL**

DATE: 05-04-18
TIME: 2:35 AM PM BY: [Signature]
FILE NO OPA-PA: 18-003

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

Docket No. OPA-PA 18-003

DECLARATION RE COURT ACTION
(To be signed by the Government Purchasing Agency.)

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 4 day of MAY, 2018.

By: [Signature]
DECLARANT

David Mair
Print Declarant's Name