IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

NO. C01-1351 TEH

CLASS ACTION

ORDER RE STATE CONTRACTS AND CONTRACT PAYMENTS RELATING TO SERVICE PROVIDERS FOR CDCR INMATE/PATIENTS

On February 22, 2006, this Court directed the Correctional Expert ("Expert") to, *inter alia*, investigate and report to the Receiver concerning the status of: (a) State contracts relating to health care services for inmates confined by the California Department of Corrections and Rehabilitation ("CDCR"), (b) State contract negotiations relating to health care services for CDCR inmates, and (c) contractual payments to service providers (clinicians and medical facilities) who provide health care services to CDCR inmates. The Expert completed this investigation with the full cooperation of Defendants and reported to the Receiver. On March 27, 2006, the Expert filed with the Court a "Report Re Status of State Contracts and Contract Payments Relating to Service Providers for CDCR Inmate/Patients" summarizing the results of the investigation, attaching documentation, and setting forth recommendations for the Court's consideration.

The Report sets forth yet another chilling example of the inability of the CDCR to competently perform the basic functions necessary to deliver constitutionally adequate medical health care. In this instance, the abdication not only threatens the health and lives of inmates but also has significant fiscal implications for the State.

Under its current structure, the CDCR only directly provides a limited amount of speciality medical care and hospital services to inmates. As such, the CDCR has traditionally engaged in outside contracts to provide much of this care. In 2004, the California State Auditor found extensive problems in the CDCR's oversight of these contracts. As the Report summarizes:

> These [2004] audits found numerous serious fiscal problems, including but not limited to failing to competitively bid when appropriate, flawed negotiating practices, agreeing to excessive rates of compensation, failing to ensure discounts, failing to follow CDCR contract manual requirements, failing to secure required approval for exception cases in non-emergency situations, failing to ensure that only valid claims were paid, failing to implement appropriate utilization management policies and procedures, and failing to staff institutions with the appropriate personnel trained to conduct adequate contract negotiations. The Auditor also found systemic non-compliance concerning the corrective actions which should have been taken by the CDCR in response to previous and similar (year 2000) audit findings.

Report at 3, ¶ 2.

The CDCR's response to the 2004 audits was consistent with the pattern of bureaucratic passivity that this Court has repeatedly observed and criticized with respect to other aspects of this case. As the Report describes:

> The Expert, when reviewing the CDCR's responses to the 2004 findings, was struck by the inadequacy of CDCR responses to these audit findings . . . . In almost every instance, for example, the CDCR response to a specific fiscal problem pointed out by the Auditor was to propose a "plan for a plan," a suggestion for some future "process" which in fact has not been effectively implemented.

Report at 3, ¶ 2.

The California Department of General Services ("DGS"), however, did take action. It responded to the serious fiscal implications of the 2004 audit by requiring the CDCR to change its procedures and obtain competitive bids for all clinical contracts, absent certain special circumstances. Instead of approaching these new requirements proactively, the

CDCR and the State's control agencies – the Department of Finance, the Department of Personnel Administration, and the DGS – stuck their collective heads in the sand. The administrative processes required by the new DGS requirements are quite time-consuming and complex. Yet the CDCR and the State's control agencies failed to provide the staffing and training necessary to handle the newly heightened obligations and implement effective fiscal control over the contracting process. The Expert reports that most prisons do not even have a qualified employee assigned to negotiate and manage contracts; nor are the contract units in CDCR headquarters appropriately staffed. *See* Report at 4, ¶ 5.

Predictably, this stunning example of the State's bureaucratic inaction – previously described by this Court as "trained incapacity" – is now culminating in a crisis.[1] As the Expert reports:

> *the CDCR process for negotiating, processing, renewing, and payment of medical contracts has collapsed.* Hundreds, if not thousands of critical health care contracts are, as of today, in limbo because existing contracts with well-established providers at every CDCR prison have expired, or are about to expire. Under the new rules, these contracts cannot be renewed because of the competitive bid requirement. Likewise, necessary new contracts for critical care cannot be, and have not been established. An example of the consequences in terms of expired, un-renewed clinical contracts for just one of the CDCR's thirty-three prisons is attached as Exhibit 14.

Report at 5, ¶ 6.[2] (emphasis added). Thus, at this point in time "many, perhaps most CDCR clinical contract providers are . . . rendering services without a renewed contract (because there is no effective procedure for competitive bids, nor is there an effective policy and practice in place to waive the competitive bid requirement to the degree necessary for the

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[1] *See* October 3, 2005 Findings of Fact and Conclusions of Law re Appointment of Receiver at 39.

[2] Exhibit 14 lists dozens of California Medical Facility contracts with doctors and other entities that have expired that cover everything from cardiology, radiology, and eye prosthesis to emergency services.

CDCR's thirty-three prisons)." Report at 5, ¶ 8. As such, "it is impossible, in practice, for the CDCR to pay clinical providers at this time." *Id.* Some providers have resorted to seeking redress through the California Victims and Government Claims Board. As the Expert notes, "[v]alid claims processing through the Board creates an additional burden for California taxpayers in terms of both statutory interest awards and the compensation required for Board staff." Report at 6, ¶ 9.

The situation is expected to get more dire. The Report states that "Court experts, counsel, and prison clinicians report that many former contract providers are beginning to stop their services to CDCR inmates given the failure to receive payment for past services and the absence of a plan on the part of the State to pay for services rendered in the future." Report at 6, ¶ 10. The CDCR's historical irregularities in the contracting process – as found by the state auditors – and the current contracting fiasco no doubt also have significant fiscal consequences as well.

On Thursday, March 9, 2006, the Expert discussed the current crisis with Dr. Peter Szekrenyi, Director of the Division of Correctional Health Care Services, along with numerous contract and accounting personnel of the CDCR's Division of Correctional Health Care Services, and Division of Support Services of the CDCR, along with personnel from DGS, other agencies, and counsel. A follow-up meeting was held on March 24, 2006 which included, in addition to the original participants, the Chief Counsel for the Department of Finance and the Chief Operating Officer for the State Controller.

To their credit, the involved agencies and personnel fully cooperated with the Expert throughout this process and in the development of a corrective action. A general consensus was achieved as to the both the underlying problems and an appropriate corrective action. As such, the Expert represents that there are no objections to the Report's recommendations at this time. They have also been approved by the Receiver. Report at 2,11.

Accordingly, and good cause appearing, it is HEREBY ORDERED as follows:

A. Hiring and Training of Contract Analysts

1. In any CDCR prison in which such position does not already exist, Defendants shall establish and fund an appropriately compensated contract analyst position at every CDCR prison within 30 days of the date of this Order.[3] The CDCR shall commence the process to fill new analyst positions immediately thereafter, and shall report to the Receiver concerning the status of the hiring program on a schedule to be determined by the Receiver.

2. The CDCR, working in conjunction with DGS, shall develop and submit to the Receiver a contract/accounting training program for said analysts within 60 days of the date of this Order. Training for analysts shall commence 15 days after submission of the training program to the Receiver.

B. Emergency Payments to Health Care Contractors Pending Resolution of Current crisis

1. Defendants shall pay all current outstanding, valid and CDCR-approved medical invoices (even in the absence of a separate written approved contract) within 60 days of the date of this order. CDCR shall submit approved invoices for payment directly to the State Controller's Office which shall issue payment based on the invoice so submitted and in the amounts approved by CDCR, within 60 days of the date of this Order.[4] The CDCR shall notify all providers who are currently awaiting payment about this emergency payment process within 30 days of the date of this Order.

2. Defendants shall continue to pay received invoices for services under the emergency procedure described in paragraph B(1) above until new processes are in place pursuant to the plan developed under section C below. The CDCR procedure effectuating payments pursuant to this paragraph and paragraph B(1) above shall be developed in a manner to ensure a consistent and timely flow of payment requests from CDCR to the State Controller.

3. The Director of the Division of Correctional Health Care Services shall provide documentation concerning the emergency payment process set forth in paragraphs 1 and 2 to the Receiver and the Expert (after review by the State Auditor, DGS, the State Controller's Office, and the Inspector General) within 10 business days of the date of this Order.

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[3] The Court notes that in some cases it may be cost effective and administratively sound for one or two analysts to fulfill contract management duties for a small number of institutions located in close geographical proximity. Paragraph one of this Order shall not preclude this approach.

[4] The Court notes that the Department of Finance has assured the Expert that funding exists to pay the outstanding invoices.

4. The emergency payment process set forth above shall also include consideration and coordination of claims pending before the Victims and Government Claims Board.

C. Development of New Processes

1. CDCR, working with the Expert under the direction of the Receiver, and the State entities responsible for contract negotiations, management, and payment (including but not limited to DGS, Department of Finance, and the Department of Personnel Administration) shall establish a team of employees/experts ("Team") who shall develop and institute health care oriented policies and standards to govern CDCR medical contract management.[5] These policies and standards shall consider both the need for timely on-going care and the fiscal concerns of the State, including but not limited to the State Auditor findings of 2004.

2. The Team shall consider the following changes to State policy and procedure:

(a) Combining the two CDCR units currently responsible for health care contract management and accounting.

(b) Development of simplified template contracts applicable to health service providers.

(c) Streamlining the exception process for bidding requirements.

(d) Evaluating and recommending changes in legislation conducive to cost effective and timely contract services.

(e) Developing new and streamlined forms for contract processing.

(f) Establishing an information technology sub-group to evaluate and report on the purchase of a computerized state-wide data base to manage all CDCR medical contracts.

The Team shall also determine whether an outside consultant, skilled in health care contracts, should assist the Team concerning their recommendations.

3. The Team shall approach its task with the goal of implementing new contract policies and procedures, controls, and a training program, within 180 days of the date of this Order. Thereafter, Defendants shall present a plan to the Receiver to end the emergency payment process described in section B above.

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[5] The State Auditor has agreed to review and comment on the policies and standards developed by the Team. *See* Report, Ex. 24.

4. During the 180-day planning period, to ensure continuity of medical care and to mitigate the loss of life or limb and preserve the limited pool of competent providers, CDCR shall not be required to competitively bid medical services contracts nor file bid exemption applications with DGS pursuant to Management Memo 05-04. This exemption is intended to provide limited and short-term relief, with the recognition by CDCR that, absent statutory change, the new processes developed by the Team, pursuant to this section must take into account, and be consistent with, existing law relating to competitive bidding.

This Order is not intended, however, to limit in any manner the Receiver's authority to correct the serious on-going constitutional health care deprivations that exist in CDCR prisons. Thus, if the Team is unable to develop, in a timely manner, an adequate system for providing contract medical services given the realities of both: (a) CDCR prisons (for example, remote locations, limited provider pools, and poor working conditions); and (b) CDCR Central Office operations (inadequate staffing and inadequate State funding to effectuate a competitive bidding process for existing CDCR health care contracts), the Receiver retains full authority to order all appropriate remedies as set forth in the Order of February 14, 2006.

IT IS SO ORDERED.

Dated: 3/30/06

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California