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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

The Court is in receipt of the Receiver’s Supplemental Application No.1 seeking (1) an Order Waiving State Contracting Statutes, Regulations, and Procedures, and Approving Receiver’s Substitute Procedure Bidding for Award of Contracts, and (2) an Order Approving *Nunc Pro Tunc* ACNL Supervisory Nurse Training Contract (hereafter “Supplemental Contract Waiver Application No. 1”). Defendants have filed a Statement of Non-Opposition and represent that the “pertinent state agencies that report to the Governor (Defendants), do not oppose the Receiver’s [Supplemental Contract Waiver Application No.1].” *See* Defs.’ Statement at 2. Plaintiffs have filed a response which similarly states that they “do not oppose any aspect of the Receiver’s motion” but request that the Receiver provide them with certain information. *See* Pls.’ Response at 2, 3. In his reply, the Receiver agrees to provide the requested information. The Court addresses both aspects of the Receiver’s Application below.

1 I. SUPPLEMENTAL APPLICATION NO. 1 FOR ORDER WAIVING STATE
2 CONTRACTING STATUTES, REGULATIONS, AND PROCEDURES, AND
3 APPROVING RECEIVER'S SUBSTITUTE PROCEDURE FOR BIDDING AND
4 AWARD OF CONTRACTS

5 In April 2007, the Receiver filed a Master Application for a Waiver of State
6 Contracting Law with respect to 13 projects in the following six areas: (1) Medical Records
7 and Management of Patient Care, (2) Clinical Space, (3) Recruitment and Staff
8 Accountability, (4) Emergency Response, (5) Fiscal Management, and (6) Pharmacy. He
9 filed the Application pursuant to this Court's February 14, 2006 Order Appointing Receiver
10 ("OAR").

11 The OAR directs the Receiver to make all reasonable efforts to exercise his powers in a
12 manner consistent with California state laws but permits the Receiver to request a waiver of
13 state law in the event such waiver becomes necessary and other alternatives are inadequate:

14 In the event, however, that the Receiver finds that a state law, regulation,
15 contract, or other state action or inaction is clearly preventing the Receiver
16 from developing or implementing a constitutionally adequate medical health
17 care system, or otherwise clearly preventing the Receiver from carrying out his
18 duties as set forth in this Order, and that other alternatives are inadequate, the
19 Receiver shall request the Court to waive the state or contractual requirement
20 that is causing the impediment.

21 Feb. 14, 2006 Order at § II(D).

22 After reviewing the record, the Court found, and the parties did not dispute, that
23 requiring full compliance with the State's extensive web of contracting laws and procedures
24 would "effectively stymie the Receiver's efforts to implement the projects identified in his
25 Application in a timely manner." See June 4, 2007 Order at 3. The Court further concluded
26 that the requirements for a waiver were satisfied and that the Receiver's Application should
27 therefore be granted:

28 In short, the Court concludes that the lengthy and cumbersome State
contracting process, combined with State inaction, is clearly preventing the
Receiver from implementing the 13 projects identified in his Application in a
timely manner, and thus, timely addressing the crisis in the delivery of medical
care. Nor has any party offered any alternative to the requested waiver to
achieve a constitutional remedy in this instance. It thus appears that, absent a

1 waiver, the Receiver would ultimately be “constrained by the very burdens that
2 have impeded the State in dealing with the undisputed challenges in the prison
3 health care system.” *See* Application at 9. It would indeed be a hollow gesture
4 to appoint a Receiver only to let him become entangled in the same
bureaucratic quagmire that has thwarted prior efforts to provide constitutional
medical care. As such, the Court concludes that the instant request for a waiver
has merit.

5 *Id.* 4-5.

6 The Court also affirmed, however, that the fundamental purposes underlying State
7 contracting law – preventing fraud and corruption, ensuring transparency and procedural
8 fairness, and protecting the public interest – should be preserved as much as possible. *Id.* at
9 5. The Court thus approved, with some modifications, the Receiver’s proposal to impose
10 three alternative contracting procedures in lieu of State law procedures. (“The Court agrees
11 that alternative procedures should be utilized in order to preserve the purposes of the State’s
12 contracting laws to the extent possible without unduly compromising the Receiver’s need to
13 act in a timely and effective manner given the on-going crisis in the delivery of medical care
14 in California’s state prisons.”) *Id.* The three alternative procedures consist of (1) an
15 expedited formal bidding procedure, (2) an urgent informal bidding procedure, and (3) a sole
16 source bidding procedure. *Id.* at 6-8.

17 The Receiver now seeks a supplemental order (1) waiving the governing State
18 contracting laws and regulations, and (2) substituting the above alternative procedures, with
19 respect to five additional projects in the areas of (a) radiology services, (b) clinical
20 laboratory services, (c) nursing leadership development, (d) physician credentialing, and (e)
21 medical specialty services. The specific projects and anticipated contracts are described in
22 the Receiver’s Supplemental Contract Waiver Application No. 1 at pages 6-14 and will not
23 be repeated here.

24 Having reviewed the record herein the Court agrees, and the parties do not dispute,
25 that the above projects are “critical to the systemic changes necessary to achieve
26 constitutional medical care in the State’s prisons,” *id.* at 15, and that without the requested
27 waiver the Receiver would be prevented from achieving this goal in a timely fashion.
28 Further, no party has identified any alternative to the requested waiver that would achieve a

1 constitutional remedy in this instance. Indeed, the State’s inaction has necessitated this
2 waiver. *See* June 4, 2007 Order at 3-4 (describing State’s inaction with respect to contracting
3 issues and the fact that the State has instead “consistently recommended that the Receiver
4 ‘get an order from the Federal Court’ to waive State law”) (citation omitted). As such, the
5 Court is satisfied that the Receiver’s Supplemental Contract Waiver Application No. 1 has
6 merit and should be granted with respect to the five projects identified therein.

7
8 II. RECEIVER’S SUPPLEMENTAL APPLICATION NO.1 SEEKING AN ORDER
9 APPROVING *NUNC PRO TUNC* ACNL SUPERVISORY NURSE TRAINING
CONTRACT

10 In 2006, the California Department of Corrections and Rehabilitation (“CDCR”),
11 through its Division of Correctional Health Care Services, engaged in an informal
12 competitive process to obtain supervisory nurse training. Specifically, the CDCR solicited
13 bids from three top California leadership training providers: Cal State Extension, Cross
14 Country Nursing, and the Association of California Nurse Leaders (“ACNL”). Hagar Dec.
15 ¶ 31. CDCR subsequently arranged for ACNL to provide four 3-day training sessions to
16 nurse supervisors within the CDCR. In yet another example of its administrative
17 dysfunction, however, the CDCR never executed a formal contract with ACNL and did not
18 notify the Receiver of the informal arrangement when it was entered into in November 2006.
19 *Id.* ¶ 29.

20 After ACNL had completed two of the four training sessions it refused to complete
21 the remaining sessions without a formal contract. *Id.* at 29. The Receiver concluded that the
22 training “on a programmatic basis, was beneficial and necessary for CDCR nursing”:

23 An informal survey during the training session showed that approximately
24 three-quarters of the nurses attending had never received any prior nurse
25 leadership training. These nurses would have remained entirely without
26 training had not ACNL – one of the top nurse leadership training organizations
in the state – provided the necessary training.

27 *Id.* Further, without the final two training sessions, approximately half of the nursing
28 supervisors within the CDCR would have been left untrained. *Id.* ¶ 30. Accordingly, the

1 Receiver entered into a contract with ACNL on an emergency basis so that the remaining two
2 training sessions could be concluded on a timely basis and to avoid the probability that
3 ACNL would otherwise refuse to offer its services to the CDCR or the Receiver in the future.
4 *Id.* “This would have been detrimental to the State since ACNL is among the leading nurse
5 leadership training organization[s] in the State, and nursing leadership is critical to reform of
6 the prison medical system.” *Id.*

7 Under these unusual circumstances, and in light of the entire record herein, the Court
8 concludes that a retroactive waiver is appropriate with respect to the ACNL contract
9 described above. *See* Hagar Dec. ¶ 29 and Ex. 1. Accordingly, the Court grants the
10 Receiver’s unopposed request to approve the ACNL Supervisory Nurse Training Contract
11 *nunc pro tunc*.

12
13 III. CONCLUSION

14 In light of all of the above, and good cause appearing, the Court HEREBY ORDERS
15 as follows:

16 1. The Receiver’s Supplemental Contract Waiver Application No. 1 is granted.

17
18 2. The following state codes and laws shall be waived with respect to the five projects
19 identified in the Supplemental Contract Waiver Application No. 1. In the event the Receiver
20 needs to seek a waiver for any project not identified in this Supplemental Contract Waiver
21 Application No. 1, a separate waiver request shall be required.

22 Government Code (“Gov’t Code”) §§ 14825 – 14828 and State Contracting Manual
23 (“SCM”) §§ 5.10A, 5.75, 5.80 (governing advertisement of State contracts).

24 Public Contracts Code (“PCC”) §§ 10290 – 10295, 10297, 10333, 10335, 10351,
25 10420 – 10425; Gov’t Code § 14616; SCM §§ 4.00 – 4.11; (governing approval of contracts
26 by Department of General Services (“DGS”) and exemption from and consequences for
27 failure to obtain DGS approval). PCC §§ 10308, 10309, 10314; SCM vol. 2, State
28 Administrative Manual (“SAM”) §§ 3500 – 3696.3 (governing procurement of goods).

1 PCC §§ 6106, 10109 – 10126, 10129, 10140, 10141, 10180 – 10185, 10220, 10301 –
2 10306, 10340 – 10345, 10351, 10367, 10369; Gov’t Code §§ 4525 – 4529.20, 4530-4535.3,
3 7070-7086, 7105-7118, 14835-14837; and Mil. & Veterans Code §§ 999-999.13; 2 CCR §§
4 1195 – 1195.6; SCM §§ 5.00 – 6.40 and Management Memo (“MM”) 03-10 (governing
5 competitive bidding, required language in bid packages, Non-Competitive Bid (“NCB”)
6 procedures, preferential selection criteria, contractor evaluations and notice, contract award
7 and protest procedures for service, consulting service, construction project management and
8 public works contracts).

9 PCC §§ 10314, 10346 (progress payment limitations).

10 Gov’t Code § 13332.09 and MM 06-03 (governing vehicle purchases).

11 PCC §§ 12100 – 12113, 12120 – 12121, 12125 – 12128; SCM vol. 3; SAM §§ 4800 –
12 4989.3, 5200 – 5291 (governing procurement of IT, telecommunication and data processing
13 goods and services and applicable alternate protest procedures).

14 Gov’t Code §§ 13332.10, 14660, 14669, 15853 (governing acquisition and leasing of real
15 property).

16 Gov’t Code §§ 13332.19, 15815 (governing plans, specifications and procedures for
17 major capital projects).

18 PCC §§ 10365.5, 10371; SCM § 3.02.4 (governing restrictions on and approval for
19 multiple contracts with same contractor).

20
21 3. The Receiver shall follow the alternative, streamlined contracting procedures
22 set forth in detail in this Court’s June 4, 2007 Order for the five projects described in this
23 Supplemental Contract Waiver Application No. 1.

24
25 4. Pursuant to the June 4, 2007 Order, the Receiver shall publish the relevant
26 provisions requiring contractor certifications of compliance on his website and include a
27 single representation in the contracts he awards to the effect that the contractor has read, and
28 attests that he/she/it is in compliance with, the required provisions. *See* June 4, 2007 Order,

1 n.2 at 5-6.

2 5. Consistent with this Court’s June 4, 2007 Order, the Receiver’s quarterly
3 progress reports shall contain a summary that (1) specifies each contract the Receiver has
4 awarded during the quarter, (2) provides a brief description of each such contract, (3)
5 identifies to which of the five categories of projects such contract pertains, and (4) identifies
6 the method the Receiver utilized to award the contract (*i.e.*, expedited formal bid, urgent
7 informal bid, sole source).

8
9 6. The Receiver shall, within 30 days of receipt, provide the parties with copies
10 of the assessments, critiques, designs, and road maps provided by the respective contractors
11 in phase one of the radiology services and clinical laboratory services projects. *See*
12 Receiver’s Supplemental Contract Waiver Application at 3-4, 5-6. Further, once the
13 Receiver has engaged any medical administrative services organization to provide local
14 administrative support for the coordination of specialty services, *see id.* at 9, he shall, within
15 10 days of such engagement, notify the parties of the prison or prisons chosen for the “pilot”
16 of this project.

17
18 7. The Receiver’s contract with the Association of California Nurse Leaders to
19 provide supervisory nurse training, *see* Hagar Dec. ¶ 28, Ex. 1, is hereby approved *nunc pro*
20 *tunc*.

21 **IT IS SO ORDERED.**

22 Dated: 8/13/07



23 _____
24 THELTON E. HENDERSON
25 UNITED STATES DISTRICT JUDGE
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