

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

CRISTINA NICHOLE IGLESIAS
(a.k.a. CRISTIAN NOEL IGLESIAS),

Plaintiff,

v.

IAN CONNORS, *et al.*,

Defendants.

Case No. 19-cv-00415-NJR

DEFENDANTS' BRIEF REGARDING PROCUREMENT ISSUES

INTRODUCTION

Defendants respectfully submit this brief and the attached declaration of William Robinson in response to the Court's direction at the February 22, 2022 hearing that Defendants "file a brief as to the procurement process, bids (if any are required), what a contract allows third parties to do or not do, and any other information relevant to Ms. Iglesias's request for surgery and related medical treatment." *See* Doc. 200. This brief is divided into three sections. Section I provides an overview of the legal authorities that govern the federal procurement process in general and the Federal Bureau of Prison's ("BOP") procurement process in particular. Section II sets forth BOP's procurement process for providing medical care to individuals housed in secure facilities. Section III sets forth BOP's procurement process for providing medical care to individuals housed in Residential Reentry Centers, which is the process that BOP plans to follow in connection with Plaintiff's request for gender-confirmation surgery.

This brief and the accompanying declaration address the procurement process in general, with a particular focus in Section III of the brief on those aspects of the process that are relevant to BOP's efforts to provide gender-confirmation surgery to Plaintiff. Section II of the brief and portions of the declaration relate to the process for procuring health care services for inmates in secure detention. That complex process will not apply to Ms. Iglesias, who will be housed in Residential Reentry Center at the relevant time. For Ms. Iglesias, there will not be a need to follow the typical bidding process for procuring services from contractors. Her care will be arranged under an existing contract.

The brief and declaration are not intended to provide an exhaustive summary of every aspect of the procurement process. Federal procurement law is a complicated topic, and BOP is actively working through some of those complexities on an ongoing basis, as BOP seeks to provide gender-confirmation surgery to individuals for the first time. Defendants have attempted to address all of the Court's questions in this filing and accompanying declaration. Of course, to the extent the Court has

further questions about BOP's procurement processes—whether in general or as applied to its efforts to provide Plaintiff with gender-confirmation surgery—Defendants would be happy to provide whatever additional information the Court requests.

I. Authorities Governing BOP's Procurement Process

The Competition in Contracting Act of 1984 (“CICA”) provides the current statutory authority governing Federal procurement practice. *See* Pub. L. No. 98-369, Division B, Title VII, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984); 41 U.S.C. § 3101 *et seq.* CICA is implemented by the Federal Acquisition regulation (“FAR”), which is codified in Title 48 of the U.S. Code of Federal Regulations. The FAR provides a complex set of rules that govern the Federal Government's acquisition process. *See* Robinson Decl. ¶ 6. Among other things, FAR regulations ensure that purchasing procedures are standard and consistent and conducted in a fair and impartial manner. *Id.* ¶¶ 6, 10; *see also* FAR 1.102.

As a federal agency, BOP must comply with CICA and FAR regulations in procuring goods and services. For example, to ensure adequate planning, BOP generally must conduct market research and solicit bids prior to a procurement. *See* Robinson Decl. ¶ 10 (citing 41 U.S.C. § 3306). The bid solicitation must identify the factors that the agency will consider in evaluating a bid, such as those related to cost and price as applicable. *Id.* BOP must also comply with other federal statutes that implicate its procurement practices. For example, the Antideficiency Act, codified at 31 U.S.C. § 1341, requires that BOP not obligate funds in excess of available appropriations. *See id.*

As explained below, BOP has different procurement processes depending on whether it is (i) providing health care services to individuals housed in secure facilities or (ii) providing health care services to individuals housed in Residential Reentry Centers (*i.e.*, halfway houses). Because Plaintiff is scheduled to soon be transferred to a halfway house, BOP has followed the RRC procurement process in seeking to identify an appropriate surgeon to provide gender-confirmation surgery.

Nonetheless, the distinct process relating to secure facilities is described below in Section II as further background on BOP's general procurement processes.

II. BOP's Procurement Process for Secure Facilities

BOP provides for the custody and care of approximately 154,000 individuals in a nationwide system of prisons and detention facilities. Robinson Decl. ¶ 12. BOP is generally charged with providing necessary medical care to individuals in its custody. *See id.* ¶ 8; *see generally* 28 C.F.R. part 549; BOP Program Statement 6031.04. To meet the healthcare needs of these individuals, BOP provides many essential medical, dental, and mental health services through physicians who are employed directly by BOP. Robinson Decl. ¶ 12. Oftentimes, however, a need arises for health care services that BOP cannot provide through its own resources. *Id.* Accordingly, BOP designs “comprehensive medical procurements” to provide each of its institutions “all such healthcare requirements through a single, fixed price, comprehensive, indefinite delivery/requirements-type contract.” *Id.* Most of the services covered by these contracts are routine procedures that are provided on a regular basis. *Id.* ¶ 13. When BOP determines, however, that an individual requires a medical procedure that is not contemplated under the contract, BOP must determine whether it will request that the service be provided by an existing contractor or procure the service separately. *Id.*

In October 2021, BOP's Transgender Executive Council recommended for the first time that an individual housed in a secure facility receive gender-confirmation surgery. Since the TEC's recommendation, BOP has identified a potential recurring need to provide gender-confirmation surgery to individuals housed in its secure facilities and has begun the procurement process for this procedure. Robinson Decl. ¶ 14. As part of that process, BOP has, among other things, “sp[oken] with GCS providers, hospitals, and insurance professionals to determine how readily available GCS services can be obtained, basic pricing, and the variety of GCS services” that are available. *Id.* BOP will then use this information to create a performance work statement, which will specify the services

and supplies necessary to perform gender-confirmation surgery. *Id.* ¶ 15. Once the performance work statement is complete, BOP will create an independent government estimate to determine the expected cost. *Id.* Once the performance work statement and independent government estimate are finalized, BOP procurement officials will use them to determine the best method for procuring gender-confirmation services. *Id.* After the procurement official has chosen a process, BOP will post the procurement for 60–90 days and solicit proposals from contractors. *Id.*

As noted, the process described above is the process that BOP plans to follow for procuring gender-confirmation surgery services for individuals housed in secure facilities. It is not the process that BOP will be following to provide gender-confirmation surgery for Plaintiff; that process is described in the following section.

III. BOP’s Procurement Process for Residential Reentry Centers

As noted above, BOP’s process for procuring services for individuals housed in halfway houses is different from the process described above for inmates in secure facilities. Specifically, BOP has a comprehensive medical contract with NaphCare, Inc. to provide medical services across the nation to individuals housed in halfway houses. Robinson Decl. ¶ 16; Iglesias_00002039–60 (NaphCare contract, to be filed separately under seal); Iglesias_00002081–88 (Performance Work Statement, to be filed separately under seal). Individuals housed in a Residential Reentry Center request medical care through their case managers. *See* Robinson Decl. ¶ 17. A Residential Reentry Center Management Branch Health Systems Specialist reviews the request and, if approved, forwards it to NaphCare. *Id.* NaphCare then works to identify an appropriate provider and arrange for treatment. *Id.* NaphCare does not solicit bids from providers, and there is no minimum number of providers that NaphCare must contact (or “bids” that NaphCare must obtain) before moving forward with a particular provider. *Id.* Rather, BOP’s costs under its contract with NaphCare for in-network services are based on Medicare rates plus a certain percentage. *Id.* For out-of-network services, BOP’s

costs are establish on a “cost-plus” percentage basis. *Id.*

Because the TEC recommended that Plaintiff be referred to a surgeon while she is housed in a Residential Reentry Center, BOP has begun the process of identifying an appropriate provider through NaphCare. Robinson Decl. ¶ 19. As the Court is aware, on February 11, 2022, BOP was advised that NaphCare had located an appropriate surgeon in the Miami area. *Id.* On February 15, 2022, BOP provided Plaintiff’s medical records to the surgeon. *Id.* On February 24, 2022, NaphCare relayed certain questions from the surgeon, and BOP responded to those questions the next day. *Id.* On March 1, 2022, BOP was advised that the surgeon scheduled an appointment for an initial consultation with Plaintiff on April 7, 2022. *Id.*

If, after this consultation, the surgeon agrees to accept Plaintiff as a patient, BOP expects that NaphCare will provide BOP with a proposal to provide gender-confirmation surgery, which would include estimated pricing information. Robinson Decl. ¶ 21. BOP would then promptly review the proposal to confirm that it is consistent with best practices and the industry standard of care. *Id.* If BOP has concerns with the proposal, it would work to address them with NaphCare. *Id.* Once any concerns are resolved, BOP would accept the proposal, and NaphCare would proceed to implement it. *Id.* BOP will pay for procedures that it has approved and are performed while Plaintiff remains in BOP custody, including while she is housed at the Residential Reentry Center. *Id.* ¶ 22.

Dated: March 2, 2022

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Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CRISTINA NICHOLE IGLESIAS (a.k.a.,)	
CRISTIAN NOEL IGLESIAS),)	
)	
Plaintiff,)	
)	
vs.)	Case No. 19-cv-00415-NJR
)	
IAN CONNORS, ET AL.,)	
)	
Defendants.)	

DECLARATION OF WILLIAM ROBINSON

I, William Robinson, make the following declaration, in accordance with the provisions of 28 U.S.C. § 1746:

1. I am currently employed by the Federal Bureau of Prisons (“BOP”) as Associate General Counsel in the BOP’s Commercial Law Branch. I have held my current position since June, 2017. I have been employed by the BOP since January 2001.

2. As an Associate General Counsel , I am generally responsible for procurement issues and budget concerns.

3. I have been advised of the BOP’s efforts in working with its contractor to locate a surgeon for a consultation for the plaintiff in this matter, Ms. Iglesias.

4. I am aware that on February 22, 2022, this Court ordered Defendants to provide briefing addressing “the procurement process, bids (if they are required), what a contract allows third parties to do or not do, and any other information relevant to Ms. Iglesias’s request for surgery and related medical treatment.” (Doc. 200). I write now to provide such information to the Court.

General Overview of Authorities Governing Federal Procurement

5. The current statutory authority that governs Federal procurement practice is the Competition in Contracting Act of 1984 (“CICA”). *See* The Competition in Contracting Act of 1984. Pub. L. No. 98-369, Division B, Title VII, §§ 2701-2753, 98 Stat. 1175 (July 18, 1984). CICA, as amended, is located in several titles of the United States Code, including Title 41 U.S.C. §§ 1101-1102, 1121-1131, 1301-1304, 1311-1312, 1701-1713, 3101-3106, 3301-3311.

6. The CICA is implemented by the Federal Acquisition Regulation (“FAR”), which is codified in Title 48 of the United States Code of Federal Regulations. The FAR is a substantial and complex set of rules governing the Federal Government’s acquisition process. It ensures purchasing procedures are standard and consistent, and conducted in a fair and impartial manner. The FAR governs what is called the “acquisition process.” This is the process through which the government purchases (“acquires”) goods and services. That process generally consists of three phases: (1) need recognition and acquisition planning, (2) contract formation, and (3) contract administration. The FAR System regulates the activities of government personnel in carrying out that process to ensure compliance with CICA.

7. An agency contracting officer is the person “who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts” 41 U.S.C. § 7101(6). Pursuant to the FAR, contracts may be entered into and signed on behalf of the Government only by contracting officers. 48 C.F.R. § 1.601(a).

General Overview of Health Care Procurement by BOP

8. BOP is generally charged with providing necessary medical care to inmates in its custody. BOP policy regarding medical care and procedures for caring for inmates with medical needs is set forth in 28 C.F.R. pt. 549, and Patient Care, Program Statement 6031.04. Service is provided by a variety of health care professionals, including psychiatrists, physicians, nurses,

advanced practice providers (nurse practitioners and physician assistants), dietitians, dentists, and pharmacists. Community medical professionals are consulted as needed, and inmates are sent to community hospitals should medically necessary care be unavailable at the institution. *See* Health Services Administration, Program Statement 6010.05.

9. In order to acquire such services, BOP contracts with medical providers in the community.

10. Generally, BOP's procurement process is governed by applicable statute, regulations, and policy. Medical procurements are generally funded through the BOP's Salaries and Expenses account using appropriated funds. BOP may not obligate funds in excess of available appropriations. 31 U.S.C. § 1341. Notable authorities establishing appropriate use of those funds include Title 41 of the U.S. Code; Title 48 of the Code of Federal Regulations, which includes the Federal Acquisition Regulation ("FAR") and the Justice Acquisition Regulations; and the Bureau of Prisons Acquisition Policy, among others. For all procurements for property or services generally, BOP must use competitive procedures to maximize full and open competition. 41 U.S.C. § 3301(a). The FAR establishes operating procedures for all executive agencies on the basis of guiding principles that include promoting competition; minimizing administrative operating costs; and conducting business with integrity, fairness, and openness. FAR 1.102. To ensure adequate planning, BOP generally must conduct market research and solicit bids prior to the procurement. 41 U.S.C. § 3306. The bid solicitation must identify all factors that the agency will consider in evaluating a bid, such as those related to cost and price as applicable. *Id.*

BOP's Health Care Procurement Process for Individuals Housed in Secure Facilities

11. The BOP houses inmates in both secure facilities, such as Federal Correctional Institutions and United States Penitentiaries, and in community settings such as Residential Reentry Centers (RRCs or halfway houses). Ms. Iglesias is scheduled to soon be transferred to an RRC, and therefore, the process relating to secure facilities is not the process BOP has followed to arrange an

appointment for her to meet with a surgeon for consultation for Gender Confirming Surgery (“GCS”). Nonetheless, the process relating to secure facilities is described here generally, for purposes of background information.

12. The BOP provides for the custody and care of approximately 154,000 inmates in a nationwide system of prisons and detention facilities. To meet the healthcare needs of these inmates, BOP provides essential medical, dental, and mental health services. Oftentimes, however, a medical need arises that cannot be provided through BOP’s own resources. Accordingly, BOP designs comprehensive medical procurements to provide each institution all such healthcare requirements through a single, fixed price, comprehensive, indefinite delivery/requirements-type contract.

13. The goal of these procurements is to provide the necessary professional and facility services for both inpatient admissions and outpatient encounters for a base year and four option years at a fair and reasonable price. Contracts are calculated from benchmarks utilizing Medicare reimbursement methodologies. Specifically, contractors could propose a percentage premium or discount to the Medicare rates established by the Centers for Medicare and Medicaid Services. The intent of these contracts is to provide as robust a medical network as possible to the institution in question. The vast majority of services provided under these contracts are common or routine procedures that one would expect in a diverse inmate population. When a medical need arises that was not contemplated under the contract, the BOP must determine if it will ask for the services from the existing contractor or procure them separately.

14. BOP has identified a potential recurring need for GCS services and has begun the procurement process for individuals housed in secure facilities. Because the BOP has not obtained GCS services previously, it is in the process of better understanding the requirements and concerns regarding best practices and procedures for GCS. This process takes many forms, including but not limited to speaking with GCS providers, hospitals, and insurance professionals to determine how

readily available GCS services can be obtained, basic pricing, and the variety of GCS services if any. The BOP has also issued a Request for Information in which the BOP has asked the procurement community if they are interested in potentially providing the GCS services.

15. This process will result in the creation of a “Performance Work Statement” that describes the BOP’s GCS need. The Performance Work Statement will include all the services and supplies necessary to perform the specific GCS requested. Once the Performance Work Statement is complete, an “Independent Government Estimate” is created to determine how much the government believes the performance work statement should cost. The Independent Government Estimate will be used to assist the BOP in determining a fair and reasonable cost for the Performance Work Statement as well as used to set aside funds to pay for the contract created from the Performance Work Statement. Once the Performance Work Statement and Independent Government Estimate are finalized, they will be reviewed by procurement officials to determine the best method for procuring the GCS services. Once the procurement official has chosen a process, the BOP will post the procurement for 60-90 days to solicit proposals that comply with the needs outlined in the Performance Work Statement. Once the procurement closes, the proposals will be provided to BOP subject matter experts for review and evaluation. Procurement would then evaluate all the proposals, including but not limited to the inputs from the BOP subject matter experts to make award(s) to the proposals that best meet the included evaluation methodology. As noted, this is not the process that will be followed to procure GCS for Plaintiff since she will no longer be in a secure facility at the relevant time.

BOP’s Procurement Process for Individuals Housed in Residential Reentry Centers

16. As referenced above, the process for providing inmates housed in Residential Reentry Centers is distinct from the process described above for inmates in secure facilities. Specifically, BOP has a comprehensive medical contract with NaphCare, Inc. to provide medical services across the nation in the RRC context. *See* Iglesias_00002039–60 (NaphCare contract, to be

filed separately under seal); Iglesias_00002081–88 (Performance Work Statement, to be filed separately under seal).

17. When an individual housed in a Residential Reentry Center requires medical care, they identify their concern to their case manager. The Residential Reentry Management Branch Health Systems Specialist reviews the request, with appropriate consultation with BOP subject matter experts. If approved, the request is forwarded to the contractor (NaphCare). The contractor then identifies an appropriate provider and arranges the treatment. When a provider is out-of-network, for reasons that could include emergent needs or specialized treatment, the contractor arranges care with that out-of-network provider. BOP's costs under the contract for in-network services are based on Medicare rates plus a percentage and for out-of-network services are established on a cost-plus-percentage basis. NaphCare does not solicit bids from providers, and there is no minimum number of providers that NaphCare must contact (or "bids" that NaphCare must obtain) before moving forward with a particular provider. There is also no need in this situation for BOP to solicit any bids from providers. The process set forth above for procuring services for individuals in secure detention does not govern NaphCare's selection of a provider.

18. Gender-confirmation surgery is not expressly covered by the NaphCare contract, but in the case of Ms. Iglesias, BOP has asked, and NaphCare has agreed, to look for surgeon to have a consultation with Ms. Iglesias.

19. As it relates to Ms. Iglesias's request for GCS, I have been advised that BOP has started this process. Although I was not personally involved in the process, I have been advised that the following has occurred in regard to Ms. Iglesias:

- On January 14, 2022, BOP inquired if NaphCare could identify a surgeon for potential GCS consultation in the Miami area.
- On January 24, 2022, the TEC recommended that Ms. Iglesias be referred for a consultation for GCS after approximately one month of placement in a Residential Reentry Center.

- On February 11, 2022, BOP asked NaphCare to schedule a consultation with a surgeon they had identified.
- On February 15, 2022, BOP provided Ms. Iglesias's medical records to the surgeon.
- On February 24, 2022, NaphCare forwarded to BOP a message from the surgeon indicating that the surgeon had reviewed Ms. Iglesias's medical records. While the surgeon indicated that the surgeon had not yet made a decision about whether to accept Ms. Iglesias as a patient, the surgeon appeared to be open to potentially accepting Ms. Iglesias as a patient if certain requirements are satisfied. *See* Decl. of Alix McLearn ¶ 5, Doc. 204-1. The surgeon indicated that the surgery could feasibly be completed by December 2022. *Id.*
- On February 25, 2022, BOP responded to the surgeon, through NaphCare. *Id.* ¶ 6. The response addressed the requirements identified by the surgeon and sought to confirm the appointment for a consultation for Ms. Iglesias. *Id.*
- On March 1, 2022, BOP was advised that the surgeon scheduled an appointment for consultation with Iglesias on April 7, 2022.
- BOP has also taken steps to broaden its search beyond the above-referenced surgeon. *Id.* ¶ 7. Specifically, BOP determined that it was appropriate to ask NaphCare to reach out to another surgeon (and potentially a third surgeon) while awaiting a decision from the first surgeon, and BOP so notified NaphCare on February 24, 2022. *Id.*
- Also on February 24, 2022, BOP informed its contractor that while BOP believes it makes sense for the removal of hair at the surgical site to be part of the consultation with the surgeon, in the interest of time, BOP requested that NaphCare identify other options for hair removal at the surgical site. *Id.* ¶ 8. BOP has also confirmed that there are no BOP staff or currently contracted providers at FMC Carswell who can provided hair removal at the surgical site. *Id.* ¶ 9.

20. I am advised that BOP intends to proceed with the consultation for GCS with the identified surgeon on April 7.

21. After consultation, if NaphCare's provider is willing to move forward with the GCS, I would expect NaphCare to provide the BOP with a detailed proposal of the necessary services to provide GCS including estimated pricing. Although NaphCare would submit the proposal under its existing contract, I would advise the contracting officer reviewing the proposal in accordance with FAR 15.404-1(a). The proposal will then be promptly evaluated by the appropriate BOP subject matter experts to confirm that it is consistent with the best practices and industry standard of care. I would expect the BOP's review to analyze all aspects of NaphCare's proposal. Specifically, I would expect BOP to vet any service providers under the proposal, any pre-operative requirements necessary to be completed prior to surgery, all facilities providing services, and post-operation

regimen and recovery. BOP may need to confirm the plaintiff is able to meet all of the surgeon's requirements both before and after surgery. After the BOP's review, any concerns with NaphCare's proposal will be addressed for resolution. This resolution process will continue on an expedited basis until all concerns are successfully addressed and BOP accepts NaphCare's revised proposal. If BOP and NaphCare are unable to resolve any concerns, BOP may need to solicit additional proposals.

22. BOP will pay for approved procedures performed while Iglesias remains in BOP custody, including while she is at the RRC.

I declare under penalty of perjury that the foregoing is true and correct to the best of my belief. Executed on this 2nd day of March 2022.

William Robinson