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2007 MAR 30 PM 3:18
RICHARD W. WIEKING
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U.S. DISTRICT COURT
NO. DISTRICT OF CA

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 RECEIVER'S APPLICATION FOR ORDER NUNC PRO TUNC

The Court is in receipt of the Receiver's "Application for Order Nunc Pro Tunc Waiving State Contracting Statutes, Regulations, and Procedures with Respect to Contract Awarded to Maxor National Pharmacy Services Corporation and Approving Receiver's Substitute Procedure for Bidding and Award of Such Contract." On March 9, 2007, Plaintiffs filed a statement of non-opposition to the Receiver's Application stating that they do not oppose either the Application for an order *nunc pro tunc* or the Receiver's substitute bidding procedure in this instance.

On March 19, 2007, the Defendants filed their response stating that they "agree that the state law waivers are needed to allow the Receiver to proceed with its Maxor contract." *See* Defs.' Response at 2. This is consistent with the position taken by Defendants at this Court's hearing on July 26, 2006. *See* July 26, 2006 Tr. at 54 (acknowledging the urgency of the situation and approving of Receiver's plan to undertake expedited process to procure a pharmacy management contract outside of "those same State old procurement processes that we all know about"). Defendants do not otherwise take a position with respect to the

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Receiver's motion other than to say that "Defendants will continue to work with the Receiver, comply with this Court's orders, and implement remedial measures to improve the delivery of medical care to inmates housed in state correctional facilities." Defs.' Resp. at 2..

Having carefully reviewed the Receiver's Application, supporting documents, and the record herein, the Court agrees with the parties that a limited waiver of state contracting procedures was essential in this instance. As detailed by the Receiver, and not contested by the parties, full compliance with such procedures would have delayed by 16-24 months the Receiver's ability to *begin* addressing the crisis in pharmacy mismanagement within the California Department of Corrections and Rehabilitation ("CDCR"). The plain need for immediate intervention, however, could hardly be more compelling. As audits have shown, the CDCR's grossly inept pharmacy operation was so mismanaged that it was failing to properly dispense and track medications (causing a high potential for drug diversion), putting inmates at medical risk, and causing serious waste. *See e.g.* Receiver's App. at 5-6; December 29, 2006 Goldman Decl., Ex. 1; January 26, 2007 Order at 2. Further, pharmacy services are indisputably a critical component of any medical health care system and thus it was eminently reasonable for the Receiver to regard intervention in this area as an "essential early step in addressing the crisis within the entire prison health care system." *See* Receiver's Application at 6.

Accordingly, and for all of the reasons set forth in the Receiver's Application, the Court concludes that complying with state contracting procedures in this instance would have clearly prevented the Receiver from carrying out his duties under this Court's February 14, 2006 Order and from developing and implementing a constitutionally adequate medical health care system in a timely manner. *See* February 14, 2006 Order at 5. The Court will therefore grant the Receiver's application for an order *nunc pro tunc* waiving state contracting procedures with respect to the October 20, 2006 contract awarded to Maxor National Pharmacy Services Corporation ("Maxor") for the purpose of revamping the management of pharmacy services within the CDCR.

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Of course, even where it is appropriate and necessary to waive the State's lengthy contracting process, the Receiver has recognized his inherent obligation to conduct all contracting operations in a fair and reasonable manner. Accordingly, in this instance, the Receiver undertook the substitute solicitation and bidding process described in his Application. The Court addressed the specifics of that process in its January 25, 2007 Order and letter attached thereto, and thus will not repeat that discussion here. For the reasons set forth in those documents, however, the Court concludes that the substitute process utilized by the Receiver constituted a reasonable approach under the circumstances by appropriately balancing the need for an open and fair process while still proceeding relatively expeditiously.

In light of all of the above, the entire record herein, and good cause appearing, the Court HEREBY GRANTS the Receiver's request for an order *nunc pro tunc* for waiver of state law, regulations, and procedures governing the development, advertisement, bidding, award and protest of state contracts, to the extent they would otherwise apply to the contract awarded by the Receiver to Maxor National Pharmacy Services Corporation on October 20, 2006. This waiver includes but is not limited to the following: Government Code § 14825 *et seq.,* and State Contracting Manual ("SCM") §§ 5.10A, 5.75, 5.80 (governing advertisement of State contracts); Public Contracts Code ("PCC") §§ 10295, 10297, and SCM §§ 4.00-4.11 (governing approval of contracts by the Department of General Services), and PCC §§ 10335-10345, 2 California Code of Regulations ("CCR") § 1195 *et seq.,* and SCM § § 5.00-6.40 (governing competitive bidding, contract award and protest for service and consulting services contracts).

IT IS SO ORDERED.

Dated: 3/30/07

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

PLATA et al,

Plaintiff,

v.

DAVIS et al,

Defendant.

_____/

Case Number: CV01-01351 TEH

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 30, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: March 30, 2007

Richard W. Wieking, Clerk
By: R.B. Espinosa, Deputy Clerk