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E-FILE: Appellant TakeCare Insurance, Inc.'s Hearing Brief; OPA-PA-24-003

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Good afternoon:

Attached for E-filing is TakeCare Insurance Company, Inc.'s Hearing Brief.

Please let us know if you have any questions.

Regards,

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**TakeCare Insurance Company, Inc.'s Hearing Brief.pdf**

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7 **PROCUREMENT APPEAL**

8 **IN THE OFFICE OF PUBLIC ACCOUNTABILITY**

9 In the Appeal of

APPEAL NO. OPA-PA-24-003

10 TAKECARE INSURANCE COMPANY,
11 INC.,

12 Appellant,

**TAKECARE INSURANCE
COMPANY, INC.'S HEARING
BRIEF**

13 and

14 DEPARTMENT OF ADMINISTRATION,

15 Purchasing Agency.

16
17 **I. INTRODUCTION AND ISSUES ON APPEAL**

18 TakeCare Insurance Company, Inc. ("TakeCare" or "Appellant") submits
19 this Hearing Brief in conformance with the December 2, 2024 Scheduling
20 Order of the Office of the Public Accountability ("OPA"). This Trial Brief will
21 assist the OPA in addressing the following issues to be resolved in this appeal.

22 A. Was TakeCare materially responsive to the requirements of the
23 Department of Administration ("DOA") Request for Procurement
DOA/HRD/EB-RFP-GHI-25-001 (the "RFP") to be the lowest bidder?

1 B. Did DOA improperly use bid criteria that was not part of the RFP?

2 C. Did DOA improperly adjust claims costs that significantly raised the
3 claims cost projection for TakeCare?

4 **II. GOVERNMENT OF GUAM'S SELF-INSURANCE GROUP HEALTH**
5 **PROGRAM**

6 In the past, DOA awarded the group health insurance contracts to the
7 qualified health insurer(s) who were responsive to the DOA RFPs. The
8 Government of Guam ("GovGuam") members would enroll with the health
9 insurer, and DOA would then pay the premiums to the health insurer.

10 In FY 2024, DOA began its inaugural year of implementing the
11 Government of Guam's full self-insurance group health program for its
12 employees, dependents, retirees, and foster children.¹ Rather than paying
13 premiums to the health insurer, DOA would award the RFP to the qualified
14 health insurance bidder whose bid was the lowest fees in terms of being the
15 Third Party Administrator for managing GovGuam's self-insurance group
16 health program. In Exhibit E of the FY 2024 RFP, DOA also required what the
17 claims costs will be. Claims costs are the expected costs of covering GovGuam
18 employees' claims or reimbursements for their medical care for the upcoming
19 fiscal year. For FY 2024, DOA awarded SelectCare to be the TPA for medical,
20 and pharmacy, and Netcare for dental.

21 For the FY 2025 RFP, DOA presumably would award the RFP to the
22 lowest TPA fees.²

23 ¹ For FY 2023, pharmacy and dental were self-insured, and TakeCare was the TPA.

24 ² Exhibit A of the RFP was not attached. Exhibit A contains the Evaluation Forms the
25 Negotiating Team would use to determine the bidder's qualifications.

1 **III. RELEVANT PROCEDURAL AND FACTUAL HISTORY**

2 On June 18, 2024, TakeCare submitted its bid to be the TPA for the
3 GovGuam’s medical, dental, and vision self-insurance group health program
4 for FY 2025. See Exhibit 2.

5 On August 14, 2024, TakeCare received notification that the Agency
6 rejected TakeCare’s bid but did not state the grounds for the rejection. See
7 Exhibit 7.

8 Because no grounds were given for the rejection, and the FY 2025 RFP
9 was awarded to SelectCare, TakeCare filed a procurement protest with DOA on
10 August 17, 2024. See Exhibit 8. On September 4, 2024, DOA denied the
11 protest, and this appeal followed. See Exhibits 9 and 10.

12 **IV. BASIS FOR PROTEST AND APPEAL**

13 **1. TakeCare Insurance Company, Inc. was the lowest bidder**

14 As required by the Procuring Agency DOA’s RFP, TakeCare was the
15 lowest bidder and provided the Territory greater purchasing value of public
16 funds. 5 GCA § 5001. Guam law requires that an RFP result in the selection
17 of the “most economical and beneficial” proposal, which “shall be defined as
18 the lowest cost option of either the exclusive or non-exclusive proposal.” Public
19 Law 34-83 Section 2, and codified as 4 G.C.A. § 4302(c)(2). SelectCare and
20 NetCare’s TPA fees are substantially higher than those of TakeCare.
21

22 The higher TPA fees for SelectCare will be passed on to government
23 employees in the form of higher premiums. This is directly contrary to the
24 intent of Section 4301(c)(2), which requires the “lowest cost option” for
25

1 government health insurance. Instead of resulting in a health insurance
2 contract for the TPA with the “lowest cost option,” DOA has selected TPAs with
3 higher costs.

4 As part of the RFP response submission, potential bidders were required
5 to submit Third Party Administrator (“TPA”) fees under Exhibit E of RFP. The
6 TPA fee Exhibit A did not require bidders to include claims costs.

7 When DOA notified TakeCare that its bid was rejected, DOA provided no
8 explanation or reason the bid was rejected. When TakeCare protested, DOA
9 responded that: “Lower costs are not solely based on TPA fees, but also
10 expected claims cost. This total makes up the total funding rates that
11 influence overall cost. The Negotiating Team’s third-party actuaries conducted
12 an independent evaluation of the costs of each proposal that includes the
13 overall costs.” Exhibit 9.

14 When the Agency provided the entire procurement record, TakeCare was
15 confirmed to be the lowest bidder as required by the RFP.

17 **2. DOA Improperly Used Criteria that was not part of the RFP**

18 Under Guam’s Procurement law, “[u]nless otherwise authorized by law,
19 all territorial contracts shall be awarded by competitive sealed bidding,
20 pursuant to § 5211 of this Article.” 5 GCA § 5210. DOA’s own procurement
21 regulations also require competitive sealed bidding for all contracts. See 2 GAR
22 §§ 3108 and 3109. In the present case, DOA was therefore required to procure
23 the Third-Party Administrator and Stop Loss Insurance Carrier through competitive
24 sealed bidding. Moreover:

1 [b]ids shall be unconditionally accepted without
2 alteration or correction, except as authorized in this
3 Chapter. Bids shall be evaluated based on the
4 requirements set forth in the Invitation for Bids, which
5 may include criteria to determine acceptability such as
6 inspection, testing, quality, workmanship, delivery and
7 suitability for a particular purpose. Those criteria that
8 will affect the bid price and be considered in evaluation
9 for award shall be objectively measurable, such as
10 discounts, transportation costs, and total or life cycle
11 costs. The Invitation for Bids shall set forth the
12 evaluation criteria to be used. No criteria may be used in
13 bid evaluation that are not set forth in the Invitation for
14 Bids.

15 5 GCA § 5211 (e). Equally important is the requirement that “[t]he contract
16 shall be awarded with reasonable promptness by written notice to the lowest
17 responsible bidder whose **bid meets the requirements and criteria set forth**
18 **in the Invitation for Bids...**” 5 GCA § 5211 (g) (emphasis added); *see also* 2
19 GAR § 3109 (n) (1). A responsive bidder is defined in the procurement law as
20 “a person who has submitted a bid which conforms in all material respects to
21 the Invitation for Bids.” 5 GCA § 5201 (g); *see also* 2 GAR § 3109 (n) (2).

22 It bears noting that on appeal, the “[i]f the Public Auditor determines that
23 a solicitation or proposed award is in violation of law, the Auditor must cancel
24 the solicitation or proposed award, or otherwise revise it to comply with the
25 law. 5 GCA § 5451.” *See DMR, LLC v. OPA*, 2013 Guam 27 ¶ 47. Moreover,
“when a dissatisfied bidder appeals to OPA after an unsuccessful protest, OPA
shall determine whether a decision on the protest of method of selection,
solicitation or award of a contract ... is in accordance with the statutes,
regulations, and the terms and conditions of the solicitation.” 2 GAR § 12201
(renumbered to 12112).

1 In DFS Guam LP v. GIAA, 2020 Guam 20, one of the many Guam
2 Supreme Court opinions concerning the years long dispute concerning the
3 concession contract at the airport, the Court addressed the issue of whether
4 additional benefits to GIAA could be considered as part of the award of the
5 concession contract. The additional benefits were not a part of the criteria
6 contained in the bid specifications. As part of its analysis upholding the trial
7 court's denial of summary judgment, the Court stated:

8 Regardless of whether GIAA was required to obtain a
9 concessions contract pursuant to an IFB or an RFP—
10 an issue that the parties continue to dispute—**GIAA**
11 **was obligated to evaluate the proposals only**
12 **according to evaluation criteria set forth in the**
13 **solicitation**. See 5 GCA §§ 5211(e), 5216(c), 5216(e)
14 (2005); see also 2 GAR Div. 4 §§ 3109(c)(2)(B), (n),
15 3114(f)(2); cf. 5 GCA § 5030(t) (as used in the
16 Procurement Code, “[s]hall denotes the imperative”).
17 “It is ‘hornbook law that agencies must evaluate
18 proposals and make awards based on the criteria
19 stated in the solicitation.’” NEQ, LLC v. United States,
20 88 Fed. Cl. 38, 47 (2009) (quoting Banknote Corp. of
21 Am., Inc. v. United States, 56 Fed. Cl. 377, 386
22 (2003)). Doing so broadly supports the underlying
23 policies and purpose of the Procurement Code. See 5
24 GCA § 5001(b); accord Fairbanks N. Star Borough
25 Sch. Dist. v. Bowers Office Prods., Inc., 851 P.2d 56,
58 (Alaska 1992) (“[A] government agency which
solicits bids for goods or services has an implied
contractual duty to fairly and honestly consider bids .
. . .”). Accordingly, if the evaluation criteria do not
permit GIAA to consider the additional benefits
included in Lotte’s proposal, then GIAA would not be
entitled to judgment as a matter of law on DFS’s out-
of-scope-benefit claims. In order to resolve this
question, we therefore must analyze the RFP itself.

1 DFS Guam LP v. GIAA, 2020 Guam 20 ¶ 136. In accordance with Guam law
2 and as confirmed by DFS v. GIAA, DOA is required to only consider the criteria
3 in the bid specifications when evaluating and ultimately awarding a contract.

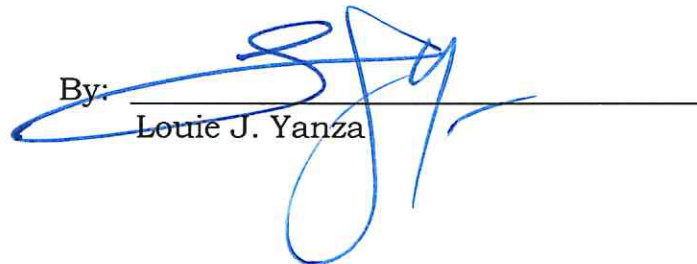
4 As earlier noted, DOA's rejection of TakeCare's protest on the basis that
5 costs were not based solely on proposed TPA fees and it includes expected
6 claims cost. However, any expected cost information was not required nor
7 requested as part of Exhibit E nor any other information relating to it was
8 requested under the RFP.

9 A comparison of the 2024 RFPs proves TakeCare's point. In Exhibit E of
10 the FY 2024 RFP, the Agency inquired that the expected claims costs will be for
11 the bidder. See Exhibit 6. For example, in the Dental Plan, DOA requested as
12 part of the RFP under Exhibit E, the expected costs under the TPA agreement
13 as shown in Exhibit 6 of the submitted procurement appeal exhibits. To
14 illustrate, under Exhibit 6, section 3.a, the base diagnostic and preventive cost
15 per covered life per month is \$68.75. Under Exhibit 6, section 4.a., this base
16 cost is adjusted by \$7.69 and \$1.73 for utilization and unit cost respectively for
17 both FY 2022 to FY 2023 and FY 2023 to FY 2024. Similarly, under the same
18 exhibit, basic and restorative procedures had a base cost of \$36.76 and this
19 was adjusted by \$4.12 and \$0.93 respectively for the same factors and period.
20 In the FY 2025 RFP, nowhere does Exhibit E inquire on what the claims costs
21 will be. As such, it was unreasonable for DOA to include claims costs without
22 notifying the bidders or potential bidders to include claims costs in their bid.
23
24
25

- 1
2 (2) That because DOA used a different criteria – claims cost – to
3 determine the total costs for the RFP, that DOA’s findings was
4 arbitrary, capricious, and abuse of discretion;
5 (3) That DOA’s denial of TakeCare’s protest was unreasonable, arbitrary,
6 capricious, and an abuse of discretion;
7 (4) That because TakeCare was the lowest responsive bidder, TakeCare
8 should be made the awardee of DOA’s DOA/HRD/EB-RFP-GHI-25-
9 001; and
10 (5) For such further relief as the OPA deems just and appropriate.

11 Respectfully submitted this 17th day of January, 2025

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13 Attorneys for Appellant
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15 By: 
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