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E-FILING: OPA-PA-24-003; [Proposed] Findings of Fact and Conclusions of Law

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Good morning,

Attached hereto for electronic filing is Appellant TakeCare Insurance Company, Inc.'s [Proposed] Findings of Fact and Conclusions of Law.

If you have questions, please contact our office.

Regards,

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PROCUREMENT APPEAL

IN THE OFFICE OF PUBLIC ACCOUNTABILITY

In the Appeal of TAKECARE INSURANCE COMPANY, INC., Appellant, and DEPARTMENT OF ADMINISTRATION, Purchasing Agency.	APPEAL NO. OPA-PA-24-003 **[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW**

INTRODUCTION

This matter came before the Office of Public Accountability ("OPA"), through the Public Auditor's designated Hearing Officer, on an appeal filed by TakeCare Insurance Company, Inc. ("TIC" or "Appellant"), regarding the Government of Guam's group health insurance program to be administered by a third party administrator described in the Request for Proposals DOA/HRD/ED-RFP-GHI-25-001 ("RFP").

The OPA conducted an evidentiary hearing on January 23, 2025. In addition to counsel for parties, institutional representatives were physically present. Physically present at the hearing for TIC was its corporate representative Arvin Lojo. Edward Birn, the Director for the Department of Administration was the representative for procuring agency Department of Administration ("DOA").

The OPA has considered the evidence, including the testimony of witnesses and exhibits admitted into evidence, the procurement record maintained and prepared by DOA, and the submissions placed into the record by the parties. The OPA further considered the written arguments and proposed findings of fact and conclusions of law submitted by counsel for the parties.

The OPA hereby enters the following findings of fact and conclusions of law. To the extent that findings of fact, as stated, may be considered conclusions of law, they shall be deemed conclusions of law. Similarly, to the extent that that matters expressed as conclusions of law may be considered findings of fact, they shall also be deemed findings of fact.

FINDINGS OF FACT

1. DOA issued the Request for Proposal DOA/HRD/ED-RFP-GHI-25-001 on May 23, 2024. The RFP sought administrators or insurance companies to administer the Government of Guam's self-insured group health insurance program. DOA was seeking proposals for an exclusive Third Party

Administrator ("TPA") to administer for medical (to include vision), pharmacy, and or dental services.

2. The RFP states that "the negotiating team shall determine which of the TPAs offering exclusive coverage will be best for the Government, and for the top two medical and dental TPAs to the Governor for selection of one medical (inclusive of vision), contract, one pharmacy, and one dental contract."

3. The RFP requires that the bidder was to propose what was their third party administrator fees would be. Third party administrator fees are the administration costs that the TPA would charge per enrolled employee per month ("PEPM").

4. The RFP did not require for the bidders to project what the claims costs would be. Claims costs are the costs that medical providers charge for treating the Government of Guam employees.

5. On June 18, 2024, TIC submitted its proposals in response to the RFP. On August 14, 2024, DOA formally informed TIC that it was not selected for an award under the RFP.

6. An agency level protest followed and the matter proceeded to the Office of Public Accountability. See Exhibit 10.

7. Citing an imminent threat to public health, safety and welfare, DOA declared a declaration of substantial interest which determined that award of the contract without delay is necessary to protect the substantial interest of the Territory.

8. On June 18, 2024, Appellant submitted its bid to DOA. Appellant's Exhibit 2.

9. On August 14, 2024 DOA advised TIC that it was not selected to be TPA for dental, medical and pharmacy. Appellant's Exhibit 7

10. On August 27, 2024, TakeCare protested the award. Appellant's Exhibit 8.

11. On September 4, 2024, DOA rejected the appeal and specifically advised TIC that "lower costs are not solely based on TPA fees, but also expected claims cost." Appellant's Exhibit 9.

12. On September 19, 2024, this appeal followed.

13. A formal hearing commenced on Thursday January 23, 2025.

14. Mr. Arvin Lojo, TIC's Health Plan Administrator, testified that during TIC's review of the RFP, nowhere did DOA require the bidder to provide what the claims cost will be.

15. Rather, Exhibit E of the RFP only required what the bidder's TPA fees would be.

16. In Appellant's Exhibit 2, which contained the relevant pages of TIC's bid, they only submitted what TIC's TPA fees would be. For example, PPO 1500, HAS 2000, RSP, TakeCare proposed $20.50 for medical and $2.00 for pharmacy per employee per month ("PEPM").

17. In contrast, Mr. Lojo pointed out that in the 2024 RFP, DOA specifically required not only the TPA fees, but also the claims cost. See, TakeCare's proposed bid for 2024 RFP, Appellant's Exhibit 6.

18. The exhibits for Exhibit E of the 2025 RFP and Exhibit E of the 2024 RFP are different in that the 2024 RFP requires the bidder to submit its expected claims cost.

19. In addition, Mr. Lojo testified that Milliman Consulting adjusted provider reimbursements on TakeCare's bid without adjusting for SelectCare. This resulted in TakeCare having a higher bid than what it should have been. See, Appellant's Exhibit 3, Appendix B to Governor's Briefing.

20. For example, in Appendix B page 13 of the Governor's Briefing, Milliman adjusted at 1.02 for TakeCare but not for SelectCare and kept it at 1.00. See Appendix B, Appellant's Exhibit 3.

21. As a result TakeCare's bid was considerably higher, despite it being the lowest responsive bidder and the negotiating team recommending TakeCare be awarded the TPA.

22. Ms. Barbara Dewey of Milliman Consulting also testified. Ms. Dewey acknowledged that TakeCare was adjusted for provider reimbursement. However, Ms. Dewey admitted that she did not know the actual provider reimbursement since bidders only provide the range of what their provider reimbursement fee is.

23. Therefore, Dewey's adjustments were based on speculation.

24. Mr. Edward Birn, the Director of DOA testified. Mr. Birn testified that the claims cost are always considered in awarding the bid, but nowhere did Mr. Birn point out that the RFP required the bidder to provide claims cost.

CONCLUSIONS OF LAW

25. A "Responsive bidder means a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids." 5 G.C.A. § 5201(g).

26. "Responsiveness addresses whether a bidder has promised to perform in the precise manner requested by the government. To be considered for an award a bid must comply in all material respects with the invitation for bids. A responsive bid is one that, if accepted by the government as submitted, will obligate the contractor to perform the exact thing called for in the solicitation. If there is material nonconformity in a bid, it must be rejected. Material nonconformity goes to the substance of the bid which affects the price, quality, quantity, or delivery of the article or service offered." Bean Dredging Corp. v. United States, 22 CL. Ct. 519, 522 (1991).

27. Adherence to the plain language of the RFP, and the follow on ERFP that was issues, is essential for bidders and the integrity of the procurement system. Baldridge v. Government Printing Office, 513 Fed. Appx. 965, 967 (Fed. Cir. 2013)("If the plain language of the IFB unambiguously called for delustered laminate film, that language controls."); Professional Bldg. Concepts, Inc. v. City of Cent. Falls Housing Authority, 783 F.Supp. 1558, 1563 (U.S. Dist. R.I. 1992), *aff'd* Professional Bldg. Concepts, Inc. v. City of Cent Falls, 974 F.2d. 1 (1st Cir. 1992). ("Unless ambiguous, it is the language of the IFB which controls the form that a big guarantee must take").

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

> Regardless of whether GIAA was required to obtain a concessions contract pursuant to an IFB or an RFP—an issue that the parties continue to dispute—**GIAA was obligated to evaluate the proposals only according to evaluation criteria set forth in the solicitation**. See 5 GCA §§ 5211(e), 5216(c), 5216(e) (2005); see also 2 GAR Div. 4 §§ 3109(c)(2)(B), (n), 3114(f)(2); cf. 5 GCA § 5030(t) (as used in the Procurement Code, "[s]hall denotes the imperative"). "It is 'hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation.'" NEQ, LLC v. United States, 88 Fed. Cl. 38, 47 (2009) (quoting Banknote Corp. of Am., Inc. v. United States, 56 Fed. Cl. 377, 386 (2003)). Doing so broadly supports the underlying policies and purpose of the Procurement Code. See 5 GCA § 5001(b); accord Fairbanks N. Star Borough 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.

DFS Guam LP v. GIAA, 2020 Guam 20 ¶ 136.

29. In accordance with Guam law and as confirmed by DFS v. GIAA, DOA is required to only consider the criteria in the bid specifications when evaluating and ultimately awarding a contract. Guam law does not permit DOA to base its award of the GovGuam health insurance contract on an undisclosed specification. "No criteria may be used in bid evaluation that are not set forth in the Invitation for Bids." 5 GCA § 5211 (e). By relying on claims cost, which is not an item contained in the bid specifications, DOA prevented all bidders, including TakeCare, from making an intelligent evaluation and bid. This placed TakeCare at an unfair disadvantage.

A similar incident took place in Browning-Ferris Indus. v. City of Lakawanna, 204 A.D.2d 1047 (N.Y. App. Div. 1994). In that case, the city awarded a waste disposal contract to a company based on a criterion that was not specified in the contract documents. Specifically, the city improperly considered the distance from the Lackawanna City garage to each bidder's disposal site. The City argued that the criterion was properly considered as mileage and travel time would factor into which bid resulted in the lowest actual cost to the City. The Court was not convinced.

30. Relying on principles very similar to provisions in the Guam Procurement Law, the Court in Browing-Ferris stated that:

> It is well settled that a municipal service contract is governed by the provisions of article 5-A of the General Municipal Law, which are designed "with the dual purposes of fostering honest competition and also to guard against favoritism, improvidence, extravagance, fraud and corruption" (Le Cesse Bros. Contr. v Town Bd., 62 AD2d 28, 31, affd on opn below 46 NY2d 960). To promote those purposes, a municipality is

> obligated, "in advance of bidding, to convey in precise terms to prospective bidders the exact basis on which the contract will be awarded, so that each such bidder will be enabled to make an intelligent evaluation and bid" (Matter of Suffolk Roadways v Minuse, 19 AD2d 888, 889; see also, Matter of Progressive Dietary Consultants of N.Y. v Wyoming County, 90 AD2d 214, 217). Furthermore, the municipality "is required to furnish specifications which state the nature of the work as definitely as practicable and which contain all the information necessary to enable bidders to prepare their bids" and "it must award the contract on the basis provided for in the specifications and determine the 'lowest responsible bidder' in accordance with the specifications" (Matter of Progressive Dietary Consultants of N.Y. v Wyoming County, supra, at 217).

Browning-Ferris, 204 A.D. 2d at 1047-1048.

31. In the present case, DOA is making a similar argument with respect to the criterion of claims costs. DOA is arguing that claims costs were properly relied upon when it awarded the contract as it would help determine the lowest cost to the Government. The problem with this argument is that claims costs were not specified in the bid specifications. As noted above, Guam law does not permit DOA to award the contract based upon an undisclosed specification. By relying on an undisclosed specification, DOA prevented TakeCare from intelligently evaluating all the criteria and submitting a thorough and competitive bid.

32. Guam law requires that an "RFP shall call for a plan that provides a level playing field with current and future private insurers ..." 4 G.C.A. § 4302(c)(2). A level playing field does not by definition exist if DOA adjusted TakeCare's costs without also adjusting SelectCare costs. By doing so, it gave the appearance that TakeCare's TPA fees and rates are higher than SelectCare.

33. As shown under Exhibit 3 of the submitted procurement appeal exhibits, the underlying claims cost for both SelectCare and TakeCare were the same amounts. However, under the same Exhibit 3, appendix B, TakeCare's claims cost were adjusted by .02% in FY 2022 and 1% in FY 2023 which were not included in SelectCare's claims cost. Apart from considering provider reimbursement, additional consideration should have included benefit design (preferred copayment to preferred providers), provider delivery system (lower copayment at preferred provider) and value-based benefits & services (robust wellness, fitness and disease management programs that are nationally recognized) that contributes to minimizing healthcare costs for the Government of Guam.

CONCLUSIONS

TakeCare was the best responsive bidder as it complied with all the bidding requirements. However, DOA issued an RFP that did not state that claims cost were to be part of the responsive bid. DOA required claims cost to be part of the bid but did not specifically state anywhere that the RFP required claims cost, but only for third party administrator fees. Moreover, DOA's consulting group, Milligan Consulting improperly adjusted TakeCare's provider reimbursement cost by .02% without adjusting for SelectCare. Therefore, TakeCare was not on a level playing field with SelectCare.

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Based on the foregoing, the Office of Public Accountability orders the following:

1. That DOA must disqualify SelectCare for award under the RFP as SelectCare could not have legally and responsibly responded to the bid.

2. That TakeCare was the most responsible bidder and is awarded the RFP.

Respectfully submitted this 10th day of February, 2025.

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Attorney for Appellant
TakeCare Insurance Company, Inc.

By: _____
Louie J. Yanza