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11 **OFFICE OF PUBLIC ACCOUNTABILITY**

12 **PROCUREMENT APPEAL**

13 In the Appeal of

14 TOKIO MARINE PACIFIC INSURANCE LIMITED
15 and CALVO'S INSURANCE UNDERWRITERS,
16 INC.

17 Appellants.

Docket No. OPA-PA-12-013

**APPELLANTS' COMMENTS ON
AGENCY REPORT**

1 Pursuant to 2 GAR Div. 4 § 12104(c)(4), Appellants Tokio Marine Pacific Insurance
2 Limited and Calvo's Insurance Underwriters, Inc. (collectively "Appellant") hereby submit
3 their comments on the Agency Report filed by the Department of Administration ("DOA") on
4 October 16, 2012, as corrected by that Errata to Agency Report filed on October 18, 2012,
5 (collectively the "Agency Report"). DOA and the FY2013 Government of Guam Health
6 Insurance Negotiating Team ("Team") are referred to herein collectively as the
7 "Government."¹ This appeal relates to the Government of Guam FY 2013 Health Insurance
8 Program, Procurement No. DOA/HRD-RFP-GHI-13-001 (the "RFP").

9 **I. INTRODUCTION**

10 In its Agency Report, the Government asserts that the Group Benefits law² and the
11 Procurement Regulations mandate that it allow materially deficient proposals to be corrected
12 so as to increase competition and maximize benefits. While Appellant agrees with those
13 objectives, fairness in the competitive process, an equally important objective, should not be
14 sacrificed along the way. The Team did the right thing by identifying and acknowledging the
15 material deficiencies in Aetna International, Inc.'s ("Aetna") and TakeCare Insurance
16 Company Inc.'s ("TakeCare") proposals. Where the Team erred, however, was in permitting
17 Aetna and TakeCare to correct the *material omissions* in their respective proposals in the name
18 of increased competition. Allowing the correction or modification of proposals to address
19 material omissions after the proposal submission deadline and after the proposals had already
20 been evaluated and ranked adversely affects the competitive solicitation process by giving
21 certain offerors an unfair advantage over other offerors. Fairness in the competitive process
22 must remain paramount to eliminate opportunities for favoritism and fraud. Accordingly, the
23 Government should be ordered to reject the proposals of Aetna and TakeCare for non-
24 responsiveness.

25 Further, the Government should be ordered to continue the RFP process with the
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27 ¹ Reference herein to DOA is also intended to refer to the Team. The Director of DOA is the Chairperson of the
Team. See 4 G.C.A. § 4302(c).

28 ² The Group Benefits law refers to the provisions found at 4 G.C.A. Chapter 4, Article 3.

1 remaining qualified and responsive proposers, namely Appellant and Island Home. Appellant
2 understands the complexities involved with the issuance of this RFP, however, just because the
3 procurement process got “convoluted” does not mandate cancellation of the RFP. Cancellation
4 should be a remedy of last resort. In this case, the RFP process can be reformed to comply
5 with law, and cancellation of the RFP can be and should be avoided.

6 **II. BACKGROUND**

7 The RFP was issued by the Government on June 5, 2012.³ On or about June 21, 2012, the
8 Team issued responses to inquiries to the RFP.⁴ The deadline for submission of responses to the
9 RFP was June 27, 2012 for hard copies and June 28, 2012 for electronic versions.⁵ Four insurance
10 companies submitted proposals in response to the RFP – Appellant, Aetna, TakeCare, and Island
11 Home Insurers, Inc. (“Island Home”).⁶

12 On July 23, 2012, the Team was advised by legal counsel and its consultant, the Hay
13 Group, that Aetna’s proposal contained material omissions.⁷ Subsequently, two separate motions
14 to give Aetna an opportunity to clarify and correct its proposal failed to pass, and on July 26, 2012,
15 the Government gave notice to Aetna that its proposal was being rejected for non-responsiveness.⁸

16 Also on July 26, 2012, the Hay Group presented the results of the evaluation of
17 Appellant’s, Island Home’s and TakeCare’s proposals by the Team.⁹ The offerors were ranked and
18 a letter was sent to TakeCare inviting it to begin negotiations on July 27, 2012.¹⁰

19 Prior to initiating negotiations with TakeCare, it was determined that TakeCare’s proposal
20 also contained material omissions, some of which were identical to Aetna’s, and for which Aetna’s

22 ³ Request for Proposal (Proc. Rec. 534-637). All references herein to “Proc. Rec.” refer to the Procurement Record
submitted by the Government to the OPA in the Appeal.

23 ⁴ June 21, 2012 Government Response to Inquiries and Correction to Response. (Proc. Rec. 696-722, 723-36).

24 ⁵ RFP at p. 5 (Proc. Rec. 538).

25 ⁶ Notice of Decision at p. 3. (Proc. Rec. 4368) These offerors were previously referred to as Offeror #1, Offeror #2,
Offeror #3, and Offeror #4, respectively. See Evaluation Memorandum (Proc. Rec. 3862-3877).

26 ⁷ Evaluation Memorandum at p.2 (Proc. Rec. 3863).

27 ⁸ Evaluation Memorandum at p.3-4 (Proc. Rec. 3864-65).

28 ⁹ Evaluation Memorandum at p. 4 (Proc. Rec. 3865). Aetna’s proposal was not evaluated, having been rejected for
non-responsiveness. The ranking results were as follows: for the Exclusive offers – Appellant was ranked number 1,
TakeCare was ranked number 2, Island Home was ranked number 3. For the Non-exclusive offers – Appellant was
ranked number 1, Island Home was ranked number 2, and TakeCare was ranked number 3. See *id.*

¹⁰ Evaluation Memorandum at p. 4 (Proc. Rec. 3865).

1 proposal had been rejected as non-responsive.¹¹ Subsequently, on July 31, 2012, the Team voted to
2 allow Aetna and TakeCare to amend their proposals to rectify omissions that the Team determined
3 were material.¹² This occurred after the Team had already completed evaluation and ranking of the
4 proposals.¹³

5 On July 31, 2012 and August 1, 2012, Aetna and TakeCare, respectively, submitted
6 amendments correcting the material omissions in their respective proposals.¹⁴

7 On August 3, 2012, Appellant received a letter from the Team advising Appellant that it
8 ranked amongst the top three for the exclusive plan and inviting Appellant to commence
9 negotiations.¹⁵

10 On August 8, 2012, TakeCare submitted a protest to the RFP.¹⁶
11 On August 9, 2012, Appellant received a letter from the Team advising Appellant that the
12 government of Guam is in receipt of a protest of the RFP. The Team further advised Appellant that
13 the negotiations to procure the services under the RFP are stayed until further notice.¹⁷

14 On August 21, 2012, Appellant submitted a protest to the RFP (the "Protest").¹⁸ On
15 August 23, 2012, Island Home submitted a protest to the RFP.¹⁹

16 On September 7, 2012, the Team issued a decision in response to all three protests (the
17 "Notice of Decision").²⁰ On September 10, 2012, Appellant received a letter from the Team
18 rejecting all offers and canceling the RFP (the "Notice of Cancellation").²¹ The Notice of
19 Cancellation refers to the Notice of Decision for the reasons for the cancellation of the RFP.²²

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¹¹ *Id.*

23 ¹² July 31, 2012 Letter to Aetna (Proc. Rec 3995-98); July 31, 2012 letter to TakeCare (Proc. Rec. 4001-03).

24 ¹³ Notice of Decision at pp. 4 and 5. (Proc. Rec. 4369-70).

25 ¹⁴ July 31, 2012 Letter from Aetna (Proc. Rec. 4005-09); August 1, 2012 Letter from TakeCare (Proc. Rec. 3921-23).

26 ¹⁵ August 3, 2012 Letter to Appellant (Proc. Rec. 4011).

27 ¹⁶ TakeCare protest (Proc. Rec. 4154-73).

28 ¹⁷ August 9, 2012 Letter to Appellant (Proc. Rec. 4276).

¹⁸ Appellant's protest (Proc. Rec. 4278-82).

¹⁹ Island Home protest (Proc. Rec. 4284-323).

²⁰ Notice of Decision (Proc. Rec. 4324-34 (Island Home), 4366-76 (Appellant), 4378-88 (TakeCare)).

²¹ Notice of Cancellation (Proc. Rec. 4618)

²² *Id.* (Proc. Rec. 4618)

1 **III. ALLOWING AETNA AND TAKECARE THE OPPORTUNITY TO MODIFY**
2 **THEIR PROPOSALS TO CORRECT MATERIAL DEFICIENCIES WAS**
3 **IMPROPER, AND THOSE PROPOSALS SHOULD HAVE BEEN REJECTED**

4 Although the Government is correct that the Procurement Law allows offerors to clarify
5 and alter proposals, the Government should not permit proposers to materially modify their
6 proposals in such a way that goes beyond mere clarification or correction. Accordingly, Aetna and
7 TakeCare should not have been permitted to amend their proposals to address *material* omissions,
8 and their materially deficient proposals should have been rejected.

9 The rejection of individual bids or proposals is governed by 2 GAR Div. 4 § 3115(e). See
10 2 GAR Div. 4 § 3115(e)(1) (“[T]his Section applies to rejection of individual bids or proposals in
11 whole or in part.”) Section 3115(e)(3)(B) provides as follows with regard to the rejection of
12 proposals:

13 As used in this Subsection, *proposal* means any offer submitted in response to any
14 solicitation, including an offer under § 3111 (Small Purchases), except a bid as
15 defined in Subsection 3115(e)(3)(a) of this Section. Unless the solicitation states
16 otherwise, proposals need not be unconditionally accepted without alteration or
17 correction, and the territory’s stated requirements may be revised or clarified after
18 proposals are submitted. This flexibility must be considered in determining
19 whether reasons exist for rejecting all or any part of a proposal. Reasons for
20 rejecting proposals include but are not limited to:

21 (i) the business that submitted the proposals is nonresponsible as determined
22 under §3116 (Responsibility of Bidders and Offerors) of these Regulations;

23 (ii) *the proposals ultimately (that is, after any opportunity has passed for altering
24 or clarifying the proposal) fails to meet the announced requirements of the
25 territory in some material respect; or*

26 (iii) the proposed price is clearly unreasonable.

27 2 GAR Div. 4 § 3115(e)(3)(B) (emphasis added). Consistent with 2 GAR Div. 4 §
28 3115(e)(3)(B)(ii), quoted above, which appears to permit the alteration or clarification of proposals,
the regulations governing requests for proposals provide that during the discussion phase of the
procurement process, the Government may engage in discussions with any offeror to further

1 explore with the offeror the scope of services and the method of performance, among other things.

2 The discussion phase of the request for proposals process also provides that offerors may modify or

3 withdraw their proposals prior to the conclusion of discussions. *See* 2 GAR Div. 4 § 3114(i)(3).

4 The Procurement Regulations provide as follows with regard to discussions:

5 (i) Discussion.

6 (1) Discussions Permissible. The head of the agency conducting the procurement
7 . . . shall evaluate all proposals submitted and may conduct discussions with any
8 offeror. The purposes of such discussion shall be to:

9 (A) determine in greater detail such offeror's qualifications, and

10 (B) explore with the offeror the scope and nature of the required services, the
11 offeror's proposed method of performance, and the relative utility of alternative
12 methods of approach.

13 ...

14 (3) Modification or Withdrawal of Proposals. Proposals may be modified or
15 withdrawn *at any time prior to the conclusion of discussions.*

16 2 GAR Div. 4 § 3114(i) (emphasis added).

17 Taken together 2 GAR Div. 4 § 3115(e)(3)(B)(ii) and § 3114(i)(3) tell us that some
18 modification or alteration of proposals is permitted before discussions conclude. However, such
19 modification or alteration should not extend to the correction of *material* omissions or deficiencies
20 and should not occur after discussions conclude. This is because permitting such *material*
21 modifications contravenes the stated policies underlying the Procurement Law by allowing for an
22 uneven playing field for competitors.

23 The Procurement Law provides as follows with regard to the purposes and policies
24 underlying the Procurement Law:

25 Purposes and Policies. The underlying purposes and policies of this Chapter are:

26 ...

27 (3) to provide for increased public confidence in the procedures followed in
28 public procurement;

(4) to ensure the fair and equitable treatment of all persons who deal with the
procurement system of this Territory;

...

1 (7) to provide safeguards for the maintenance of a procurement system of quality
2 and integrity.

3 5 G.C.A. § 5001(b). Thus, an alteration, modification or amendment of a proposal allowed by the
4 Government must not violate the underlying policies and purposes of the Procurement Law. *See* 5
5 G.C.A. § 5001(a) (“[The Procurement Law] shall be construed and applied to promote its
6 underlying purposes and policies.”). *See generally E.W. Bliss Co. v. U.S.*, 77 F.3d 445, 448 (Fed.
7 Cir. 1996) (“In negotiated procurements, a proposal that fails to conform to the material terms and
8 conditions of the solicitation should be considered unacceptable and a contract award based on
9 such an unacceptable proposal violates the procurement statutes and regulations.”).

10 Allowing an offeror the opportunity to correct a *material* omission contravenes the
11 underlying policies of the Procurement Law because it gives that offeror a second chance to present
12 its proposal so that it conforms to the material terms and conditions of the solicitation. In this
13 matter, Appellant and Island Home submitted proposals with no material deficiencies on or before
14 the proposal submission deadline established in the RFP. Aetna and TakeCare did not, but were
15 afforded a second chance to bring their non-responsive proposals into compliance with the material
16 terms and conditions of the RFP. This second chance provided Aetna and TakeCare with
17 additional time to submit a conforming proposal, which contravenes the deadlines set forth in the
18 RFP thereby resulting in the inequitable treatment of the other offerors.

19 Further, it appears that the Team’s decision to allow Aetna and TakeCare the opportunity
20 to amend their respective proposals to conform to the RFP was arbitrarily made. On July 25, the
21 Team had decided *not to allow* Aetna the opportunity to correct its non-responsive proposal and to
22 reject Aetna’s proposal based on the same material omissions that Aetna was later allowed to
23 correct on July 31.²³ As to why the Team changed its mind five days later to allow Aetna and
24 TakeCare an opportunity to amend their respective proposals to conform to the RFP, the
25 Government explains in its Notice of Decision and Agency Report that such decision was justified
26 by the policies of the Legislature to increase competition and maximize benefits.²⁴ What is

27 ²³ July 25, 2012 Notice to Aetna rejecting its proposal for non-responsiveness (Proc. Rec. 1542).

28 ²⁴ Notice of Decision at p. 8 (Proc. Rec. 4373); Agency Report at pp. 17-18.

1 apparent from these facts, however, is that the Team arbitrarily decided when to further the policy
2 of increased competition as seen by its first decision to reject Aetna's non-responsive proposal and
3 its second decision to allow Aetna and TakeCare to correct their materially non-conforming
4 proposals. This change in position by the Team also evidences the failure of the Team to treat all
5 offerors equally and creates an appearance of favoritism for a particular offeror (even though none
6 may have been intended as the Government asserts).

7 Moreover, Aetna and TakeCare were given the opportunity to amend their respective
8 proposals *after* the conclusion of the discussion period and *after* the ranking of the proposals,
9 which is contrary to 2 GAR Div. 4 § 3114(i) (3) ("Proposals may be modified or withdrawn *at any*
10 *time prior to the conclusion of discussions.*"). *See also* 2 GAR Div. 4 § 3114(j) (ranking and
11 selection of best qualified occurs "[a]fter the conclusion of validation of qualifications, evaluations,
12 and discussions as provided in § 3114(i) (Discussions)."). Thus, the Team's decision to give Aetna
13 and TakeCare an opportunity to amend material omissions in their respective proposals was not in
14 accordance with the Procurement Law.

15 The Government also argues that it would have been unfair to reject Aetna's and
16 TakeCare's proposals without affording them the opportunity to "easily" correct the material
17 omissions in their respective proposals.²⁵ If such is the case, then why didn't the Government
18 permit Aetna to correct the material deficiencies found in its proposal earlier in the procurement
19 process? All offerors came into this procurement knowing the requirements of the RFP and the
20 deadlines set forth in the RFP and at that point all offerors were on a level playing field. The
21 Government is required to carry out this solicitation in a manner that ensures ensure "the fair and
22 equitable treatment of all persons who deal with the procurement system." 5 G.C.A. § 5001(b)(4).
23 Allowing offerors a second bite at the apple is not fair or equitable. Precluding all modifications to
24 correct *material* omissions or deficiencies "provide[s] [a] safeguard[] for the maintenance of a
25 procurement system of quality and integrity" *id.* at § 5001(b)(7), by eliminating the opportunity for
26 the Government to arbitrarily decide when to allow material amendments to proposals, as was the

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28 ²⁵ *See* Agency Report at p. 21.

1 case here. Accordingly, the Team’s decision to allow Aetna and TakeCare to correct the material
2 deficiencies in their respective proposals must be reversed and Aetna’s and TakeCare’s proposals
3 must be rejected as non-responsive.

4 **IV. THE ISSUE OF THE FORM OF THE CANCELLATION AND CONSEQUENT**
5 **REJECTION OF ALL PROPOSALS IS PROPERLY BEFORE THE OPA**

6 The Government argues that Appellant cannot appeal the form of the Rejection of All
7 Offers and Notice of Cancellation (“Notice of Cancellation”) because it did not timely file a protest
8 after the Government’s issuance of that document.²⁶ The Government, however, is incorrect and is
9 attempting to create a distinction without a difference. Appellant is seeking review of the Notice of
10 Decision by the Government, which was issued in response to Appellant’s protest. Although the
11 Government issued a separate Notice of Cancellation, such document was issued to carry out the
12 decision to cancel the RFP set forth in the Notice of Decision. The Notice of Cancellation
13 distinctly refers to the Notice of Decision for the particulars of the reasons for the cancellation.²⁷
14 The case cited by the Government to support its position, *In the Appeal of Latte Treatment Center,*
15 *OPA-PA-08-008*, is also easily distinguished because in that case the cancellation was not set forth
16 in and as a result of a decision issued in response to a protest, as was the case here. Thus, as the
17 Government admits, Appellant is permitted to raise in this appeal whether the cancellation of the
18 RFP is a proper remedy because the cancellation of the RFP was asserted by the Government in the
19 Notice of Decision issued in response to Appellant’s protest.²⁸ Thus, the issue of cancellation of
20 the RFP and consequent rejection of all proposals, and more specifically whether such cancellation
21 and rejection of all proposals was proper, is properly before the OPA.

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²⁶ Agency Report at pp.19-20; Rejection of All Offers and Notice of Cancellation (Proc. Rec. 4618-22).

26 ²⁷ Notice of Cancellation (Proc. Rec. 4618-22) (“This cancellation is consistent with the Notice of Decision of
27 September 7, 2012 issued in response to three protests received by the Department of Administration in this
28 solicitation and is made for the reasons stated in the Notice of Decision of September 7, 2012. Please refer to the
Notice of Decision for further particulars.”).

²⁸ Agency Report at p. 20.

1 **V. CANCELLATION OF THE RFP AND REJECTION OF APPELLANT’S AND**
2 **ISLAND HOME’S PROPOSALS WAS IMPROPER AND UNNECESSARY**

3 The Notice of Decision canceled the RFP and that decision was improper and unnecessary.
4 Cancellation of a request for proposal is permitted under the Procurement Law only for compelling
5 and cogent reasons:

6 §3115. Cancellation of Invitations for Bids or Requests for Proposals.

7 (a) Scope of this Section. The provision of this Section shall govern the
8 cancellation of any solicitations whether issued by the territory under competitive
9 sealed bidding, competitive sealed proposals, small purchases, or any other
10 selection method and rejection of bids or proposals in whole or in part.

11 (b) Policy. Solicitations should only be issued when there is a valid procurement
12 need unless the solicitation states that it is for informational purposes only. . . .

13 Preparing and distributing a solicitation requires the expenditure of government
14 time and funds. Businesses likewise incur expense in examining and responding
15 to solicitations. Therefore, although issuance of a solicitation does not compel
16 award of a contract, *a solicitation is to be cancelled only when there are cogent
17 and compelling reasons to believe that the cancellation of the solicitation is in the
18 territory’s best interest.*

19 2 GAR Div. 4 § 3115(b) (emphasis added). See 5 G.C.A. § 5225 (“[A] Request for Proposals, or
20 other solicitation may be cancelled, or any or all bids or proposals may be rejected in whole or in
21 part as may be specified in the solicitation, when it is in the best interests of the Territory in
22 accordance with regulations promulgated by the Policy Office.”)

23 Thus, under Guam law, more than a rational basis is needed to support the cancellation of
24 any solicitation, whether a competitive bid or a request for proposal; ***a compelling reason is
25 required*** and the Government has failed to provide a compelling reason for cancellation of the RFP.

26 Here, the basis for cancellation was set forth in the Notice of Decision:

27 The basis for the decision of the Negotiating Team to cancel this solicitation is 1)
28 the failure of the government to follow the General Procedures set out in the
Request For Proposals DOA/HRD-RFP-GHI-13-001, beginning at page 17,
Section III; more specifically, the failure of the government to determine both the
responsiveness of proposals and the qualification of proposals during Phase I of

1 the Proposal Evaluation and Negotiation Procedure, as required by the Request for
2 Proposals; and 2) the release of a draft copy of the Evaluation Memorandum to
only two offerors, to the detriment of other offerors.²⁹

3 At the outset, Appellant notes that there was no specific finding or statement in the Notice
4 of Decision or related Notice of Cancellation, that the cancellation is determined to be in the best
5 interests of the Territory. Accordingly, the cancellation failed to conform to the requirements of
6 the Procurement Law and Regulations.

7 Further, cancellation was unwarranted because the solicitation process could be revised to
8 comply with the law. *See* 5 G.C.A. §5451 (“If prior to award it is determined that a solicitation or
9 proposed award of a contract is in violation of law, then the solicitation or proposed award shall be:
10 (a) cancelled; or (b) revised to comply with the law.”). Contrary to the Government’s position that
11 it is impossible for the process currently undertaken to be put straight,³⁰ to ensure “the fair and
12 equitable treatment of all persons who deal with the procurement system” (*See* 5 G.C.A. §
13 5001(b)(4)) it was possible for the Team to correct its errors and proceed with the solicitation.

14 In fact, on July 30, the Team did just that. The Team corrected its error of not fully and
15 properly reviewing the proposals submitted to determine whether the proposals were “qualified
16 proposals” as required by Public Law 31-197, when its consultant advised the Team of the material
17 omissions in Aetna’s and TakeCare’s proposals.³¹ However, rather than allowing Aetna and
18 TakeCare to amend their proposals to comply with the RFP requirements, their proposals should
19 have been rejected, the same way Aetna’s proposal was rejected five days earlier, and the Team
20 should have commenced negotiations with Appellant and Island Home. Cancellation is unfair to
21 Appellant and Island Home, both of whom submitted responsive proposals. Cancellation provides
22 an unfair advantage to and demonstrates bias in favor of TakeCare and Aetna, offerors that
23 submitted materially deficient proposals.

24 Moreover, even if it were proper for the Team to have allowed Aetna and TakeCare to
25 amend their proposals to correct the material deficiencies, which it was not, cancellation would still
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27 ²⁹ Notice of Decision at pp. 2-3 (footnotes omitted) (Proc. Rec. 4367-68).

³⁰ Agency Report at p. 21.

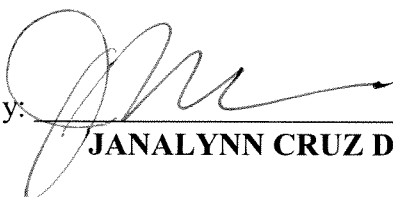
28 ³¹ Evaluation Memorandum, pp. 4-5. (Proc. Rec. 3873-74)

1 not have been warranted. The Team could have commenced negotiations with the top three ranked
2 offerors as provided for in the RFP.

3 Cancellation of a solicitation is an option of last resort and when pursued, it must be
4 supported by cogent and compelling reasons. *See generally US Rentals*, 69 Comp. Gen. 395,
5 398 (1990) (citations omitted) (“The fact that a solicitation is defective in some way does not
6 justify cancellation after bid opening if award under the IFB would meet the government's actual
7 needs and there is no showing of prejudice to other bidders.”). No cogent and compelling reasons
8 have been presented by the Government to support the decision to cancel the RFP. Because
9 the solicitation process can proceed in a manner that is consistent with the Procurement Law
10 and its underlying policies and purposes, cancellation of the RFP was improper and
11 unnecessary. Appellant respectfully requests that the OPA direct the Government to reinstitute
12 the RFP, reject the materially deficient proposals of Aetna and TakeCare, accept the proposals
13 of Appellant and Island Home as qualified proposals, and commence negotiations with the two
14 remaining qualified offerors.

15 Respectfully submitted this 9th day of November, 2012.

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18 Attorneys for Appellants
19 Tokio Marine Pacific Insurance Limited
and Calvo’s Insurance Underwriters, Inc.

20
21 By: 
22 **JANALYNN CRUZ DAMIAN**