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IN THE OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEAL

In the Appeal of TOKIO MARINE PACIFIC INSURANCE LIMITED and CALVO'S INSURANCE UNDERWRITERS, INC. Appellants.	**DOCKET NO. OPA-PA-12-013** **MOTION TO DISMISS PROCUREMENT APPEAL**

INTRODUCTION

TakeCare Insurance Company, Inc. (hereinafter referred to as "TakeCare") hereby moves to dismiss the instant procurement appeal filed by Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Inc. (collectively referred to herein as "SelectCare") on the basis that the Office of Public Auditor (the "OPA") lacks jurisdiction over the appeal because there was no underlying protest of the agency decision to cancel the RFP and reject all the offers. This motion is being filed pursuant to 2 G.A.R. §12109(d), and the December 14, 2012 Scheduling Order entered into between TakeCare, SelectCare, DOA, and Island Home Insurance Company (hereinafter "StayWell"), and approved by the OPA.

RELEVANT FACTS

A. Issuance of the RFP and Submission of Proposals

On June 5, 2012, DOA issued the RFP. Proposals were due on June 27, 2012. The RFP required that offerors submit a proposal made up of two parts—an exclusive proposal and a non-exclusive proposal.[1] Specifically, the RFP provided:

> A qualified proposal shall consist of two independent proposals: an exclusive proposal and a non-exclusive proposal. To be qualified, pursuant to 4 G.C.A. § 4202(c) [*sic*], as amended by P.L. 31-197, an offeror shall submit a proposal made up of two parts; first, an exclusive proposal, and second, a non-exclusive proposal, and meet the minimum requirements specified in the RFP.[2]

On June 27, 2012, four insurance providers responded to the RFP and submitted proposals.[3]

B. TakeCare's Bid Protest

On August 8, 2012, TakeCare filed its protest concerning the method of source selection on the following grounds:

1. DOA failed to adopt rules of procedure as required by the Guam Legislature;
2. The rules of procedure used by DOA were unclear and inadequate;
3. DOA failed to follow the RFP General Procedures;
4. DOA improperly retracted TakeCare's ranking and re-ranked TakeCare;
5. DOA improperly reversed a finding that Aetna/NetCare was nonresponsive;

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[1] DOA's Procurement Record ("Procurement Record") (Oct. 9, 2012), Bates Stamped No. 000536; *See also* Public Law 31-197 (codified at 4 G.C.A. § 4302(c)) ("P.L. 31-197").

[2] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000544.

[3] *See* DOA's Agency Report ("Agency Report"), Exhibit C ("Notice of Decision"), p. 3 (Oct. 16, 2012).

6. DOA is not limited to negotiating with just three offerors;
7. DOA evaluators improperly changed ranking scores;
8. DOA refused to identify the evaluators who ranked the offerors;
9. DOA erroneously re-ranked TakeCare in violation of the law; and
10. DOA acted in bad faith.[4]

C. SelectCare's Bid Protest

On August 21, 2012, SelectCare filed its protest to the RFP. In the protest, SelectCare stated the following:

> SelectCare hereby protests the evaluation by the Health Insurance Negotiating Team (the "Team") of proposals submitted in response to the RFP that are materially deficient and therefore non-responsive. Specifically, SelectCare objects to the Team's evaluation and consideration of the proposals submitted by TakeCare Insurance Company, Inc. ("TakeCare" or "Offeror #3") and Offeror #2. Both proposals were found by the Team and its advisors to contain material omissions and it was prejudicial and illegal for the Team to allow Offerors #2 and #3 to correct such material omissions after the proposal submission deadline.[5]

Accordingly, SelectCare requested that "the Team reject as non-responsive the proposals of Offerors #2 and #3 and cease all further or any future negotiations with Offers #2 and #3"; and that "the Team commence and/or continue negotiations with the two remaining qualified offerors."[6]

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[4] *See, e.g.*, Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004154-004173.

[5] SelectCare's Protest of Government of Guam Request for Proposal No. DOA/HRD/RFP-GHI-13-001 ("SelectCare's Protest"), p. 2 (Aug. 21, 2012).

[6] SelectCare's Protest, p. 2.

SelectCare concluded its protest by stating that "Offerors #2 and #3 clearly submitted non-responsive proposals by virtue of the material omissions in their respective proposals. The Team should reject such proposals and proceed to negotiate with the remaining qualified offerors."[7]

D. StayWell's Bid Protest

On August 23, 2012, StayWell also filed a bid protest to the RFP. In its protest, StayWell alleged that DOA improperly released the Evaluation Memorandum to TakeCare, and that DOA should have rejected the proposals submitted by Offerors #2 and #3 as being "nonresponsive."[8]

E. DOA's Notice of Decision

On September 7, 2012, DOA issued its Decision responding to all three protests. In the Decision, DOA stated that within the protests, there were "meritorious claims" that justified cancellation of the RFP. DOA stated the basis of the cancellation as follows:

> 1) the failure of the government to follow the General Procedures set out in the Request for Proposals DOA/HRD-RFP-GHI-13-001, beginning on 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 the Proposal Evaluation and Negotiation Procedure, as required by the Request for Proposals, and 2) the release of a draft copy of the Evaluation Memorandum to only two offerors, to the detriment of other offerors.

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[7] SelectCare's Protest, p. 5.

[8] Protest by Island Home Insurance Company of Government of Guam Request for Proposal DOA/HRD-RFP-GHI-13-001 ("StayWell's Protest"), pp. 4-5 (Aug. 23, 2012).

Furthermore, DOA stated in the Decision that "there is no basis to enter into negotiations with only two offerors."[9]

F. DOA's Notice of Cancellation

On September 10, 2012, DOA issued a Notice of Cancellation and Rejection of All Offers ("Notice of Cancellation"). The Notice of Cancellation cancelled the RFP and rejected all offers received pursuant to 5 G.C.A. §5225 and 2 G.A.R. §3115(d)(2). It is undisputed that neither SelectCare nor any other offeror filed a protest of DOA's Notice of Cancellation.

G. SelectCare's Procurement Appeal

On September 19, 2012, SelectCare filed the instant Procurement Appeal. In the Appeal, SelectCare first argued that "[t]here was no specific finding or statement in the Decision that *cancellation* is determined to be in the best interests of the Territory and no reasons set forth to support such finding."[10] Second, SelectCare further maintained that "[*c*]*ancellation* is unfair to the two offerors who submitted responsive proposals."[11] Next, SelectCare argued that "[*c*]*ancellation* of the RFP because of the release of the draft Evaluation Memorandum to Offerors #2 and #3 is undoubtedly unfair to Offerors #1 and #4 who submitted proposals that were wholly qualified."[12]

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[9] Agency Report, Exhibit C ("Notice of Decision"), p. 3.

[10] SelectCare's Notice of Appeal ("SelectCare's Procurement Appeal"), p. 4 (Sept. 19, 2012).

[11] SelectCare's Procurement Appeal, p. 5 (emphasis added).

[12] SelectCare's Procurement Appeal, p. 5.

DISCUSSION

I.

THE OPA LACKS JURISDICTION SINCE SELECTCARE NEVER PROTESTED THE AGENCY DECISIONS TO CANCEL THE RFP AND REJECT ALL OFFERS

A. Jurisdiction Of The OPA Over Procurement Appeals Is Strictly Construed

"As creatures of legislation, the powers of administrative agencies and their executive officers are 'dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common law powers but only such as have been conferred upon them by law expressly or by implication.'" Carlson v. Guam Telephone Authority, 2002 Guam 15, ¶9 (citing Ada v. Guam Telephone Authority, 1999 Guam 10, ¶11). "Administrative agencies are tribunals of limited jurisdiction." 2 Am. Jur. 2d *Administrative Law* §275. Thus, they enjoy only such jurisdiction as has been conferred upon them by statute. *Id.*

B. The OPA Lacks Jurisdiction Over Agency Action Without Protest

Exhaustion of administrative remedies by filing a timely administrative protest is generally considered a fundamental jurisdictional prerequisite to administrative and judicial appellate review. *See* Macrotel Int'l Corp. v. United States, 1995 WL 562255 (Fed. Cl. Sept. 22, 1995), *aff'd,* 92 F.3d 1207 (Fed. Cir. 1996). Indeed, it is well settled that the OPA is without jurisdiction to hear a procurement appeal until after a government agency has filed a reasoned decision in response to a protest from an aggrieved offeror. The OPA has consistently expressed that "a purchasing agency's decision on a protest is a pre-requisite for acquiring the Public Auditor's jurisdiction in a procurement protest appeal." In the Matter of Kim Brothers

Construction Corporation, Appeal No. OPA-PA-11-017, Decision and Order Re. Purchasing Agency's Motion to Dismiss, p. 3 (Feb. 22, 2012); *See also* In the Appeal of Mega United Corp., Appeal No. OPA-PA-09-001, Order of Dismissal, pp. 1-2 (Jan 26, 2009). "Thus, a protest and the purchasing agency's protest decision, are required for the Public Auditor to have jurisdiction over a procurement protest decision appeal." In the Matter of Kim Brothers Construction Corporation, *supra*, p. 3.

The OPA's consistent rulings requiring exhaustion of administrative remedies by filing of a protest is fully endorsed by Guam judicial authorities. For example, the Supreme Court of Guam has held that it is incumbent on an aggrieved party, based on the "universal principle that one must exhaust one's administrative remedies" to establish that he exhausted his procurement act remedies before resorting to the Government Claims Act. Limtiaco v. Guam Fire Dept., 2007 Guam 10, ¶27.

As Chief Judge Frances Tydingco Gatewood wrote in a 2009 decision issued by the District Court of Guam, the Supreme Court of Guam has also observed that, "even where the administrative remedy may not provide the specific relief sought by a party or resolve all the issues, exhaustion is preferred [under Guam law] because agencies have the specialized personnel, experience and expertise to unearth relevant evidence and provide a record which a court may review." Cyfred, Ltd. v. Ticor Title Ins. Co., 2009 WL 4730327 (D. Guam, Dec. 2, 2009), *quoting* Carlson v. Perez, 2007 Guam 6, ¶ 69 (*following* Westlake Comm. Hosp. v. Superior Court, 551 P.2d 410, 416 (Cal.1976)); *See also* Booth v. Churner, 532 U.S. 731, 734-35 (2001); O'Guinn v. Lovelock Correctional Ctr., 502 F.3d 1056, 1061 (9th Cir. 2007); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (stating, albeit in context of statutory rather than

prudential exhaustion, that "obligation to exhaust 'available' remedies persists as long as *some* remedy remains 'available'") (emphasis in original).

Guam courts have invariably followed California precedent regarding the exhaustion doctrine. *See* Carlson v. Perez, 2007 Guam 6, ¶69. In turn, California authorities have consistently held that, "[t]he exhaustion doctrine 'is not a matter of judicial discretion, but is a fundamental rule of procedure' [citation] under which 'relief must be sought from the administrative body and this remedy exhausted before the courts will act' [citation]." Sahlolbei v. Providence Healthcare, Inc., 112 Cal. App. 4th 1137, 1146, 5 Cal. Rptr. 3d 598, 603 (2003); *See also*, Anthony v. Snyder, 116 Cal. App. 4th 643, 10 Cal. Rptr. 3d 505 (2004) (requirement of exhaustion of administrative remedies before pursuing judicial remedies is a jurisdictional prerequisite, not a matter of judicial discretion); Today's Fresh Start, Inc. v. Los Angeles County Office of Educ., 197 Cal. App. 4th 436 (2d Dist. 2011).

C. SelectCare Did Not Protest The "Cancellation" Of The RFP

Concerning the instant appeal, SelectCare filed its protest with DOA on August 21, 2012. SelectCare's protest was limited to the following:

> SelectCare hereby protests the evaluation by the Health Insurance Negotiating Team (the "Team") of proposals submitted in response to the RFP that are materially deficient and therefore non-responsive. Specifically, SelectCare objects to the Team's evaluation and consideration of the proposals submitted by TakeCare Insurance Company, Inc. ("TakeCare" or "Offeror #3") and Offeror #2. Both proposals were found by the Team and its advisors to contain material omissions and it was prejudicial and illegal for the Team to allow Offerors #2 and #3 to correct such material omissions after the proposal submission deadline.[13]

[13] SelectCare's Protest, p. 2.

SelectCare's protest neither addressed nor made reference to any cancellation of the RFP or rejection of all the offers. In fact, it was impossible for SelectCare to have protested DOA's cancellation of the RFP or rejection of all the offers at the time it filed the protest since DOA issued its Decision to cancel the RFP on September 7, 2012, and its Notice of Cancellation on September 10, 2012, nearly three weeks ***after*** SelectCare's protest was filed.

D. <u>The Time For SelectCare To Protest The Cancellation Has Expired</u>

Guam Procurement Law provides that "[a]ny actual or prospective bidder, offeror, or contractor who may be aggrieved in connection with the method of source selection, solicitation or award of a contract, may protest to the Chief Procurement Officer, the Director of Public Works or the head of a purchasing agency. The protest shall be submitted in writing within fourteen (14) days after such aggrieved person knows or should know of the facts giving rise thereto." 5 G.C.A. §5425(a). Similarly, 2 G.A.R. §9101(c)(1) requires that "[p]rotests shall be made in writing to the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency, and shall be filed in duplicate within 14 days after the protestor knows or should have known of the facts giving rise thereto." "Protests filed after the 14 day period shall not be considered." 2 G.A.R. §9101(c)(1).

Accordingly, SelectCare had until September 21, 2012 to protest DOA's Decision to cancel the RFP, and until September 24, 2012 to protest DOA's Notice of Cancellation. Had SelectCare elected to challenge DOA's decision to cancel the RFP or reject all the offers, SelectCare should have filed a timely protest of those decisions. However, neither SelectCare nor any other offeror protested DOA's cancellation of the RFP in the September 7, 2012 Decision or DOA's November 10, 2012 Notice of Cancellation. As a result, SelectCare's failure

to protest DOA's decisions concerning cancellation and rejection of all the offers has foreclosed any administrative remedies otherwise available under Guam Procurement Law.

E. DOA Was Denied An Opportunity To Issue A Decision On Cancellation

SelectCare's disregard of the protest requirement is no mere formalism. As discussed above, a protest is a fundamental jurisdictional prerequisite to perfecting a procurement appeal. In the absence of a protest from SelectCare regarding DOA's decision to cancel the RFP, and an agency decision from DOA either upholding or granting any such protest, there is simply no agency decision from which an appeal may be taken. Accordingly, the OPA lacks jurisdiction to hear matters in the instant appeal concerning DOA's decision to cancel the RFP and rejection of all the offers. In the Matter of Kim Brothers Construction Corporation, *supra*, p. 3; In the Appeal of Mega United Corp., *supra*, pp. 1-2.

II.

THE OPA ALSO LACKS JURISDICTION ON THE ALTERNATIVE GROUND THAT SELECTCARE LACKS STATUTORY STANDING TO APPEAL

The conclusion that SelectCare's failure to file a protest deprives the OPA of jurisdiction to hear SelectCare's appeal is further bolstered by jurisprudential "standing" principles.

The Guam Supreme Court has repeatedly recognized that, "[s]tanding is a threshold jurisdictional matter." Macris v. Guam Mem'l Hosp. Auth., 2008 Guam 6, ¶11, *quoting* Benavente v. Taitano, 2006 Guam 15, ¶14 (in turn quoting Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth., 2004 Guam 15, ¶17). Accordingly, a court or administrative tribunal lacks subject matter jurisdiction where the complaining party lacks standing. Macris,

supra (citing Benavente and Taitano v. Lujan, 2005 Guam 26, ¶15) ("Thus, we have held that a court has no subject matter jurisdiction to hear a claim when a party lacks standing.").

The Supreme Court has further held that where standing is statutorily conferred, we look first to the language of the relevant statute to determine whether a party has statutory standing:

> [S]tanding may be predicated upon the statutory grant of such standing by the legislature or the common-law standing principles of Article III. Therefore, where standing is statutorily conferred, we look first to the language of the relevant statute to determine whether a party has statutory standing. Where standing is not conferred by statute, we turn to the common law principles of Article III to determine whether a litigant satisfies such standing requirements . . . .
>
> Thus, in determining whether Petitioners have standing, our analysis begins by examining if any statutory authority exists for the claims asserted.

Benavente, 2006 Guam 15, ¶¶ 20-21; Macris, 2008 Guam 6, ¶11.

Where a standing statute evidences a clear statutory intent to restrict standing to certain categories of persons, then all others lack standing to seek administrative review. *See* Waste Mgmt. of Wisconsin, Inc. v. State of Wis. Dept. of Natural Res., 144 Wis. 2d 499, 510, 424 N.W.2d 685, 689 (1988). In the instant case, as we have seen, there is an express statute governing the right to appeal an agency decision. *See* 5 G.C.A. §5425(e). Specifically, that statute gives the right to appeal to a "protestant"—*i.e.* one who has actually filed a protest—"within fifteen (15) days after receipt of the protestant of the notice of decision." 5 G.C.A. §5425(e). Therefore parties who, like SelectCare, failed to file a timely protest of DOA's decision to cancel the RFP and reject all the offers simply lack statutory standing to pursue an

appeal. Absent such standing, the appeal is destined for dismissal for want of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, SelectCare's procurement appeal should be dismissed in its entirety. Accordingly, TakeCare's Motion to Dismiss should be GRANTED.

Respectfully submitted this 21st day of December, 2012.

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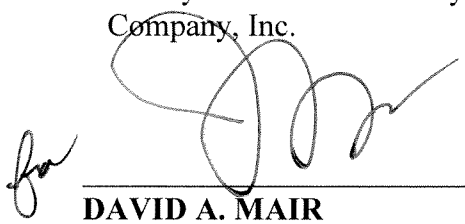

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