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12 **OFFICE OF PUBLIC ACCOUNTABILITY**
13 **PROCUREMENT APPEAL**

14 In the Appeal of

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

18 Appellants.

Docket No. OPA-PA-12-013

**APPELLANTS TOKIO MARINE
PACIFIC INSURANCE LIMITED'S
AND CALVO'S INSURANCE
UNDERWRITERS, INC.'S
OPPOSITION TO MOTION TO
DISMISS PROCUREMENT
APPEAL**

19 **INTRODUCTION**

20 Appellants Tokio Marine Pacific Insurance Limited and Calvo's Insurance
21 Underwriters, Inc. (collectively "SelectCare") hereby submit their opposition to TakeCare
22 Insurance Company, Inc's ("TakeCare") motion to dismiss. The Office of Public
23 Accountability, Guam ("OPA") has jurisdiction to hear this appeal as SelectCare has properly
24 appealed the decision issued by the Department of Administration ("DOA") in response to
25 SelectCare's protest.¹

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27 _____
28 ¹ The references herein to DOA is intended to refer to the Negotiating Team established by 4 GCA § 4302(c) (2005).
The Director of DOA is the statutorily appointed chairperson of the Negotiating Team. *See id.*

1 On September 6, 2012 the Negotiating Team decided the protests. For the
2 reasons stated herein, the Negotiating Team has determined that, within these
3 protests there are meritorious claims **and will cancel this solicitation**. The basis
4 for the decision of the Negotiating Team to **cancel this solicitation** is 1) the
5 failure of the government to follow the General Procedures set out in the Request
6 For Proposals DOA/HRD-RFP-GHI-13-001, beginning at page 17, Section III;
7 more specifically, the failure of the government to determine both the
8 responsiveness of proposals and the qualification of proposals during Phase I of
9 the Proposal Evaluation and Negotiation Procedure, as required by the Request
10 for Proposals and 2) the release of a draft copy of the Evaluation Memorandum to
11 only two offerors, to the detriment of other offerors.

12 ***For the reasons stated herein, this solicitation is to be cancelled.***⁹

13 The Notice of Decision also advised SelectCare that it had the right to administrative and
14 judicial review pursuant to 5 G.C.A. 5425(e).

15 On September 10, 2012, SelectCare received a letter from DOA providing notice that the
16 RFP has been cancelled and all offers rejected (the “Notice of Cancellation”).¹⁰ The Notice of
17 Cancellation refers to the Notice of Decision issued in response to the three protests for the reasons
18 for the cancellation of the RFP.¹¹ Specifically, the Notice of Cancellation provides:

19 Please Take Notice that the solicitation . . . has been cancelled and all offers are
20 rejected pursuant to 5 GCA § 5225 and 2 GAR, Div. 4 § 3115(d)(2), and the
21 Request for Proposals No. DOA/HRD-RFP-GHI-13-001, page 19, Section III. D.
22 This cancellation is consistent with the Notice of Decision of September 7, 2012
23 issued in response to three protests received by the Department of Administration
24 in this solicitation **and is made for the reasons stated in the Notice of Decision of
25 September 7, 2012. Please refer to the Notice of Decision for further
26 particulars.**¹²

27 On September 19, 2012, SelectCare filed the instant appeal. SelectCare requests that the
28 OPA direct DOA to reinstitute the RFP, reject the materially deficient proposals of Takecare and
Aetna, accept the proposals of SelectCare and Island Home as qualified proposals, and commence

⁹ Notice of Dec. (Proc. Rec. 4367-68) (inner citations omitted) (emphasis added).

¹⁰ Notice of Cancellation (Proc. Rec. 4618).

¹¹ *Id.* (Proc. Rec. 4618).

¹² *Id.* (Emphasis added.).

1 negotiations with SelectCare and Island Home. SelectCare further requests such other relief as may
2 be just and proper.

3 **I. THE OPA HAS JURISDICTION OVER THE PROTEST AS SELECTCARE HAS**
4 **EXHAUSTED AND CONTINUES TO EXHAUST ITS ADMINISTRATIVE**
5 **REMEDIES.**

6 **A. DOA Has Issued A Final Agency Decision On SelectCare’s Protest And Thus**
7 **SelectCare’s Appeal Is Properly Before The OPA.**

8 The OPA has determined that its jurisdiction to hear a procurement appeal is contingent on
9 the issuance of a purchasing agency’s decision on a protest. *See In the Matter of Kim Bros. Constr.*
10 *Corp.*, OPA-PA-11-017 (Dec. & Order at 3 (Feb. 22, 2012)). As recognized by TakeCare, “a
11 protest and the purchasing agency’s protest decisio[n] are required for the Public Auditor to have
12 jurisdiction over a procurement protest decision appeal.” *Id.* There is no question that both are
13 present in this appeal – a timely protest by SelectCare and a final decision on that protest by DOA.

14 Indeed, the only two OPA decisions cited by TakeCare in support of its motion are easily
15 distinguishable since neither of the aggrieved parties in either case filed a protest before resorting to
16 a procurement appeal. *In the Matter of Kim Bros. Constr. Corp.*, OPA-PA-11-017 (Dec. & Order
17 (Feb. 22, 2012)), the issue was whether a letter to the superintendent of the Department of
18 Education and a response to that letter constituted a protest and a protest decision, respectively. *In*
19 *the Appeal of Mega United Corp.*, OPA-PA-09-001 (Order Dismiss at 1 (Jan. 26, 2009)), the Public
20 Auditor dismissed appellant’s appeal, concluding that there was no final decision by the concerned
21 administrative agency in response to a protest, and the record on appeal merely indicates that the
22 agency has provided an initial response to appellant’s bid.

23 Conversely, it is undisputed that SelectCare filed a protest and that DOA issued a final
24 decision in response to that protest. Title 5 Guam Code Annotated, Section 5425(c) provides:

25 (c) Decision. If the protest is not resolved by mutual agreement, the Chief
26 Procurement Officer, the Director of Public Works, the head of a purchasing
27 agency, or a designee of one of these officers shall promptly issue a decision in
28 writing. The decision shall:

1 (1) state the reasons for the action taken; and

2 (2) inform the protestant of its right to administrative and judicial review.

3 5 GCA § 5425 (2005). The Notice of Decision clearly did both.

4 First, it stated the bases for the cancellation of the RFP in response to SelectCare's protest.
5 Second, it informed SelectCare of its right to administrative and judicial review. As specified in
6 the Notice of Decision:

7 On September 6, 2012 the Negotiating Team decided the protests. For the reasons
8 stated herein, the Negotiating Team has determined that, within these protests there
9 are meritorious claims **and will cancel this solicitation**. The basis for the decision
10 of the Negotiating Team to **cancel this solicitation** is 1) the failure of the
11 government to follow the General Procedures set out in the Request For Proposals
12 DOA/HRD-RFP-GHI-13-001, beginning at page 17, Section III; more specifically,
13 the failure of the government to determine both the responsiveness of proposals and
14 the qualification of proposals during Phase I of the Proposal Evaluation and
15 Negotiation Procedure, as required by the Request for Proposals and 2) the release
16 of a draft copy of the Evaluation Memorandum to only two offerors, to the
17 detriment of other offerors.

18 ***For the reasons stated herein, this solicitation is to be cancelled.***¹³

19 The Notice of Decision further concludes “[p]ursuant to Title 5 of the Guam Code Annotated,
20 Chapter 5, at Section 5425(e), you have the right to appeal this decision. There are specific
21 timelines that apply to the appeal right.”¹⁴

22 TakeCare attempts to split hairs by arguing that SelectCare did not protest the Notice of
23 Cancellation and therefore DOA was denied the opportunity to issue a decision on the cancellation.
24 TakeCare's argument is unavailing, however, because DOA's decision on the cancellation is fully
25 set forth in the Notice of Decision issued in response to SelectCare's protest. The Notice of
26 Cancellation issued pursuant to 2 GAR, Div. 4 § 3115(d)(2)(B) merely provided notice to the
27 offerors that the RFP had been cancelled for the reasons set forth in the Notice of Decision. *See* 2
28 GAR, Div. 4 § 3115(d)(2). This is evident from the multiple references in the Notice of

¹³ Notice of Dec. (Proc. Rec. 4367-68) (inner citations omitted) (emphasis added).

¹⁴ *Id.* (Proc. Rec. 4376).

1 Cancellation to the Notice of Decision, in particular the explicit language that offerors should
2 “[p]lease refer to the Notice of Decision for further particulars.”¹⁵

3 Significantly, DOA has conceded that SelectCare is permitted to raise in this appeal
4 whether cancellation of the RFP is a proper remedy because the cancellation of the RFP was
5 asserted by DOA in the Notice of Decision issued in response to SelectCare’s protest.¹⁶

6 Additionally, TakeCare’s exhaustion of administrative remedies argument really has no
7 applicability here. While TakeCare correctly notes that an aggrieved party must exhaust its
8 administrative remedies before seeking resolution from the courts, citing various Guam cases, each
9 of those cases involved a party rushing to obtain judicial review before the courts before first
10 exhausting its administrative remedies. TakeCare’s citations are materially distinguishable because
11 the proceedings here still remain in the administrative level. Thus, rather than failing to exhaust its
12 administrative remedies, by appealing the Notice of Decision to the OPA SelectCare has exhausted
13 and is properly exhausting its administrative remedies prior to seeking relief from the courts.

14 **B. Requiring SelectCare To Protest The Notice Of Cancellation Would Have Been Futile**
15 **And Would Have Served No Useful Purpose Since The Bases For DOA’s Cancellation**
16 **Are Set Forth In The Notice Of Decision That SelectCare Has Appealed.**

17 Courts have long held that administrative remedies need not be exhausted if doing so
18 would be futile and serve no useful purpose. *Am. Fed’n of Gov’t Emps. v. Dunn*, 561 F.2d 1310,
19 1314 (9th Cir. 1977) (internal citations omitted) (“Resort to administrative remedies is not required
20 . . . where proceeding within the administrative process would be futile or serve no purpose.”); *see*
21 *also Elwood v. Jeter*, 386 F.3d 842, 844 n.1 (8th Cir. 2004) (concluding that the exhaustion
22 requirement is waived based on the government concession that “continued use of the
23 [administrative] grievance procedure to contest the validity of the [agency’s] new policy would be
24 futile.”); *Johnson v. Utah State Ret. Office*, 621 P.2d 1234, 1237 (Utah 1980) (“Exhaustion of
25 administrative remedies may not be necessary when it would serve no useful purpose.”).
26 Significantly, California, which TakeCare notes has guided Guam jurisprudence, has stretched this

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¹⁵ Notice of Cancellation (Proc. Rec. 4618).

28 ¹⁶ Agency Report at 23-24 (Oct. 16, 2012).

1 even further by stating that “it is improper to invoke the primary jurisdiction of an administrative
2 agency if it is clear that further proceedings within that agency would be futile.” *Jonathan Neil &*
3 *Assoc. v. Jones*, 33 Cal.4th 917, 936 (Ct. App. 2004) (citing *Farmers Ins. Exch. v. Superior Court*,
4 826 P.2d 730 (Cal. 1992)).

5 Similarly, decisions in many jurisdictions have further endorsed the position that
6 exhaustion is futile if an administrative agency has unequivocally decided the issue being
7 challenged. *See, e.g., Davis v. Bolger*, 496 F.Supp. 559, 567 (D.D.C. 1980) (“It is well settled that
8 where recourse to agency procedures would be futile because the agency’s position is firm a litigant
9 need not first exhaust his administrative remedies before bringing his case to the court.”); *State Bd.*
10 *of Medical Examiners v. Olson*, 206 N.W.2d 12, 17 (Minn. 1973) (concluding that where the
11 concerned administrative bodies have committed themselves to a determination of the issue being
12 challenged, the doctrine of exhaustion of administrative remedies does not require that futile
13 attempts at administrative relief be taken before seeking judicial determination); *see also Peralta*
14 *Fed’n of Teachers v. Peralta Cmty. Coll. Dist.*, 595 P.2d 113, 124 (Cal. 1979) (“[I]t has been held
15 that the rule requiring exhaustion of administrative remedies is subject to exception if the petitioner
16 knows what the agency’s determination will be.”).

17 As explained above, DOA’s reasons for cancelling the RFP are fully set forth in the Notice
18 of Decision that was issued in response to SelectCare’s protest. It would be absurd to assume that
19 filing a protest to the Notice of Cancellation would result in a different decision. In fact, at the time
20 that DOA issued its Notice of Decision, it had already unequivocally decided that it would be
21 cancelling the RFP. Thus, requiring SelectCare to protest the Notice of Cancellation – which
22 merely reiterated DOA’s final decision in the Notice of Decision and which was required by 2
23 GAR, Div. 4 § 3115(d)(2)(B) – would have been an exercise in futility and a waste of
24 administrative resources.

25 **II. SELECTCARE HAS STANDING BECAUSE UNDER 5 G.C.A. § 5425(e), IT HAS A**
26 **RIGHT TO APPEAL THE FINAL DECISION ISSUED IN RESPONSE TO ITS**
27 **PROTEST, NAMELY THE SEPTEMBER 7, 2012 NOTICE OF DECISION.**

28 Under 5 G.C.A. § 5425(e), a decision by the head of a purchasing agency “may be

1 appealed by the protestan[t] to the Public Auditor within fifteen (15) days after receipt by the
2 protestant of the notice of the decision.” 5 G.C.A. § 5425(e).

3 As explained above, DOA issued a final agency decision in response to SelectCare’s
4 protest, namely the September 7, 2012 Notice of Decision. SelectCare has a right to appeal that
5 decision pursuant to 5 G.C.A. § 5425(e). The Notice of Decision in turn formed the bases of the
6 agency’s final decision to cancel the RFP, and in fact the reasons for the cancellation are fully set
7 forth in the Notice of Decision. Pursuant to 5 G.C.A. § 5425(e), SelectCare has a right to appeal
8 DOA’s decision to cancel and no further protest is required.

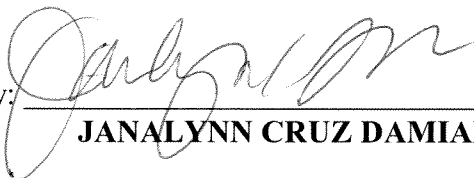
9 Therefore, SelectCare has standing as a matter of law.

10
11 **CONCLUSION**

12 The OPA has before it a final agency decision issued in response to a protest by
13 SelectCare. All the requirements have been met for this matter to be heard. SelectCare
14 respectfully requests that TakeCare’s motion to dismiss be denied and the OPA proceed to hear the
15 merits of this appeal.

16 Respectfully submitted this 28th day of December, 2012.

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21 and Calvo’s Insurance Underwriters, Inc.

22 By: 
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