Office of the Attorney General
Leonardo M. Rapadas
Attorney General of Guam
Civil Litigation Division
287 West O'Brien Drive
Hagåtña, Guam 96910 • USA
Tel. (671) 475-3324 • Fax (671) 472-2493
www.guamattorneygeneral.com

Attorneys for the Government of Guam

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PROCUREMENT APPEALS
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OFFICE OF PUBLIC ACCOUNTABILITY PROCUREMENT APPEAL

In the Appeal of Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Appellant.	)	Docket No. OPA-PA-12-013 **REBUTTAL TO COMMENTS ON AGENCY REPORT**

This Rebuttal to Comments filed by Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Inc. (SelectCare) and by TakeCare Insurance Company, Inc (TakeCare) is made by the Department of Administration (DOA) pursuant to 2 GAR, Div. 4 § 12104(c)(4).

I. Purview of Comments on Agency Report. To the extent that the Comments to Agency Report filed herein by TakeCare, an interested party, simply re-asserts its previously denied protest, it has exceeded the intended purview of such Comments under 2 GAR, Div. 4, §12104(c) (4). TakeCare did not take an appeal to the Notice of Decision and the rationale for its previous protest is irrelevant here. To the extent that TakeCare's Comments to Agency Report are responsive to the Agency

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Report, or to the Appeal taken by SelectCare, then those comments should be considered.[1] In other words, the Comments should be responsive to the Agency Report's answer to Appellant's pending appeal only and not go beyond it. And that should be the scope of review by the Public Auditor in considering the content of the Comments.

II. Jurisdiction. The Public Auditor does not have jurisdiction over the action taken by DOA on September 10, 2012 to reject all offers made in the subject solicitation and to cancel the solicitation. This rejection of offers and cancellation of the solicitation was taken one work day after a Notice of Decision was served on all offerors in response to three protests that had been filed.[2] There has been no protest taken by SelectCare, or any other offeror, of the action by DOA to reject all offers and cancel the solicitation. A protest of this procurement action, by an offeror, and a subsequent Notice of Decision in response to such a protest is a required prerequisite to the Public Auditor acquiring jurisdiction over the matter, which is the subject of the protest. 5 GCA §§ 5425 (a), (c) and (e), and §5703.

III. Permitted Amendment of Proposals. SelectCare asserts that the amendment of proposals, as permitted by DOA during the evaluation phase of the solicitation process, is both contrary to law and unfair to SelectCare and Island Home Insurance.

The permitted amendment of proposals is not only legal, in the circumstances of this procurement it became necessary in order to abide by the clearly intended policy of the law that there be increased competition in the solicitation of health insurance for government employees and retirees. The Agency Report sets out in detail the progression of amendments to the Group Health Insurance

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[1] As an example, TakeCare comments on jurisdiction of the Public Auditor and comments on cancellation as a proper remedy for the Public Auditor to consider are properly within the scope of Comments permitted by 2 GAR, Div.4 § 12104(c)(4).

[2] Delivery of the Notice of Decision on three offerors who had filed protests lifted an automatic stay of procurement, enabling DOA to proceed with the solicitation.

Benefits law by the Legislature for the explicit purpose of increasing competition and thereby permitting market forces to allow for more affordable health insurance. Further, procurement regulations dealing specifically with the question of the rejection of a proposal provide for the amendment of proposals if it is in the interest of the Territory to allow such, when the alternative would be to reject a proposal.

> "Unless the solicitation states otherwise, proposals need not be unconditionally accepted without alteration or correction, and the territory's stated requirements may be revised or clarified after proposals are submitted. This flexibility *must be considered* in determining whether reasons exist for rejecting all or any part of a proposal."

2 GAR, Div. 4 §3115(e)(3)(B). The Request for Proposals specifically provides for this process, stating:

> "At any time during the proposal evaluation and negotiation procedure, an offeror may be requested by the government, the government's consultant or the Negotiating Team to provide clarification, documentation, data, or any other additional information to supplement its proposal. Failure to provide such additional information upon request and by the specified deadline may result in a determination that the offeror is non-responsive or non-responsible, whichever is applicable."

Request For Proposal, Section III. C., found at page 19.

SelectCare asserts that §3115 is limited by or in some manner controlled by 2 GAR, Div. 4 §§3114(i)(3) and (j). The provisions of § 3115, dealing specifically with the rejection of bids or proposals stands independent of the provisions of §3114. Section 3115 states clearly that "[t]he provisions of this section *shall govern* the ... rejection of bids or proposals in whole or in part." This §3115 is clearly in addition to and not subject to provisions or procedures found at §3114.

As noted, the Request for Proposals states clearly that such modifications were anticipated and provided for. SelectCare did not protest these provisions in the Request for Proposals as being unfair

or illegal. It is long past time for such a protest or objection to the process clearly outlined in the Request for Proposals.

The amendments permitted by DOA with the TakeCare and Aetna Insurance Co. proposals did not create any unfairness or place any other offerors at a disadvantage. Indeed, SelectCare does not claim prejudice. The amendments that were permitted allowed only that the offerors would be required to state that the services offered and the conditions of the insurance to be provided would be consistent to the insurance plan laid out in the Request for Proposals. In the process of permitting two offerors to amend proposals, the offerors were not allowed to alter any of the answers or information that had been provided in response to those questions that were subject to evaluation by the Negotiating Team. Equally important, the offerors were not permitted to adjust in any manner the rates that were quoted for the insurance to be provided; rates that were also subject to evaluation by the Negotiating Team. In effect, none of the materials that were to be evaluated by the Negotiating Team in its effort to rate and rank the offerors was permitted to be changed.

In effect, two offerors were permitted, actually required, to clarify that the product they were offering to the government is the same product that the government was seeking to acquire; nothing more and nothing less. This is exactly the kind of amendment permitted by §3115(e)(3)(B). This is a clarification of the offer being made.[3] SelectCare does not allege how it or Island Home Insurance Co. were disadvantaged by the permitted amendment. The appellant asserts a disadvantage but does not set out how it was disadvantaged. It could not set out how it was disadvantaged because it was not. All the relevant factors to be evaluated by the Negotiating Team were fixed for all offerors as of the date of the submission of proposals, June 27, 2012. There was no advantage, in terms of materials that were to be considered in the evaluation of proposals, given to any offeror. All offerors were treated equally in this respect.

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[3] Such a clarification is not permitted in an Invitation for Bids, but specifically provided for in a Request for Proposals. Compare 2 GAR, Div. 4 §3115(e)(3)(A) for bids with 3115(e)(3)(B) for proposals.

Critical decisions in the solicitation of group health insurance are, by statute, made by the Negotiation Team. 4 GCA §4302(c). This is a dynamic process.

> "The Negotiating Team *shall* examine the financial information of the prepaid health insurance companies, health care providers or other legal entities for the purpose of developing the most economical and beneficial health plan for the Government of Guam employees and retirees. The Negotiating Team may obtain technical support from other financial and health-related agencies. The Negotiating Team shall develop its rules of procedure in accordance with the Administrative Adjudication Law. The Negotiating Team shall develop minimum qualification for proposals to be submitted for health insurance coverage. The Negotiating Team shall also develop a ranking system to rank the proposals. The Negotiating Team with the approval of *I Maga'låhi* is authorized to contract an actuary competent to develop proposed health insurance rates or other recognized expert to train and/or advise the Negotiating Team. Notwithstanding any other provision of law, each Fiscal Year, the Negotiating Team *shall* solicit both exclusive and non-exclusive proposals from each Health Insurance Provider and enter into negotiations with the top three (3) ranked Health Insurance Providers submitting qualified proposals for health insurance coverage for qualified active employees and qualified retirees of the government of Guam."

In almost every other solicitation by whatever source selection process used, decisions are made by an individual, either the Chief Procurement Officer, the Director of Public Works, or the head of the procuring agency. In reviewing the decisions made by the Negotiating Team, some deference must be given to this dynamic process. SelectCare asserts that the decision by the Negotiating Team to initially reject the offer by Aetna and proceed to evaluate and negotiate with three offerors (at a point when only Aetna was understood to be non-responsive), and then subsequently provide both Aetna and TakeCare the opportunity to amend their proposals to comply with the plan for insurance provided in the Request for Proposals (at a point when it was understood that both Aetna and TakeCare were non-responsive) is arbitrary, creating an appearance of favoritism.[4] It is much more likely that the initial decision to reject one non-responsive offeror, when only one was thought to be non-responsive, was based upon the fact that there were still three remaining offerors for the Negotiating Team to evaluate and with which to negotiate. At the point when that number dropped to two offerors, as it

[4] The government does not concede that the approval of amendments during either Phase I or Phase II is a violation of procurement law.

would have, had the TakeCare offer been rejected along with the Aetna offer, it is very logical and consistent with the policy established by the Legislature to reexamine the decision required by §3115(e)(3)(B), and to determine that it is now in the interest of the Territory to permit two offerors to amend their offers as was permitted here.

There is no evidence of favoritism; there is only evidence of a dynamic team approach to decision-making and an attempt to apply a clear legislative mandate to increase competition in this procurement process.

IV. Cancellation is Appropriate in the Circumstances.

Although DOA asserts that the law and regulations applicable to this procurement of group health insurance benefits would permit the kind of amendment to proposals as occurred here, nonetheless, the actual process undertaken was, on balance, deemed flawed in its execution, and justified a cancellation of the solicitation and a new Request for Proposals. The failure to properly review and assess all offers at the same time, and most appropriately in Phase I of the process, resulting in two complete evaluation processes, appearing to create two conflicting results in terms of ranking, has resulted in a convoluted process which is at variance with the stated policies of the law. It has rendered this procurement process, as it unfolded, questionable in the eyes of the participating offerors. It has resulted in three protests. DOA, through its Negotiating Team, in appreciation of the entire process determined that it is in the interest of the territory to initiate a new solicitation. It is understood that overall initiating a new procurement was the correct solution.

Cancellation of this procurement is consistent with following procurement policy:

> "(3) to provide for increased public confidence in the procedures followed in public procurement;
> (4) to ensure the fair and equitable treatment of all persons who deal with the procurement system of this Territory;

(5) to provide increased economy in territorial activities and to maximize to the fullest extent practicable the purchasing value of public funds of the Territory;

(6) to foster effective broad-based competition within the free enterprise system;

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

5 GCA §5001(b). The cancellation of the solicitation is consistent with Guam law as provided in the Request for Proposals, which states:

"The Government may cancel the RFP or solicitation, in whole or in part, at any time, or may reject all proposals so long as the Government makes a written determination that doing so is in the best interest of the Government and a contract has not yet been fully signed. In the event of cancellation or rejection of all proposals, proposals that have been unsealed shall remain the property of the Government and not returned to the respective offerors."

Request For Proposal, Section III. D., found at page 19. The Notice of Decision, served upon the protesting offerors, was approved by the Negotiating Team and serves as the written determination for this purpose. The cancellation of this solicitation is consistent with Guam law and reflects, in the decision of a majority of Negotiating Team members, the best interests of the Government.

V. Public Auditor De Novo Review of Solicitation.

DOA appreciates that the Public Auditor has the power to review and determine de novo any matter properly submitted to her. 5 GCA §5703. This appeal of the solicitation of group health insurance is properly within the jurisdiction of the Public Auditor and all parties will benefit from a resolution of this conflict as soon as feasible so that health insurance for government employees and retirees can be acquired consistent with law.

Respectfully Submitted,

OFFICE OF THE ATTORNEY GENERAL
Leonardo M. Rapadas, Attorney General

By: John Weisenberger
JOHN WEISENBERGER
Assistant Attorney General

November 19, 2012.