MAIR, MAIR, SPADE & THOMPSON, L.L.C.
Attorneys at Law
238 A.F.C. Flores Street
Suite 801, DNA Building
Hagåtña, Guam 96910
Telephone: (671) 472-2089/2090
Facsimile: (671) 477-5206

Attorneys for Interested Party TakeCare
Insurance Company, Inc.

RECEIVED
OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS
DATE: 1/4/2013
TIME: 11:20 ☑AM ☐PM BY: R. Field
FILE NO OPA-PA: 12-013

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** **TAKECARE'S REPLY BRIEF RE MOTION TO DISMISS PROCUREMENT APPEAL**

INTRODUCTION

TakeCare Insurance Company, Inc. (hereinafter referred to as "TakeCare") hereby replies to Tokio Marine Pacific Insurance Limited and Calvo's Insurance Underwriters, Inc.'s (collectively referred to herein as "SelectCare") December 28, 2012 Opposition to Motion to Dismiss Appeal. For reasons stated herein, SelectCare's attempted justifications for failing to exhaust the "protest" remedy are unavailing. SelectCare's failure to protest DOA's cancellation decision at the agency level is fatal. The OPA should GRANT the instant motion, without hearing, as per the December 14, 2012 Scheduling Order.

DISCUSSION

I.

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

A. DOA Never Issued a Decision on any "Cancellation" Protest

SelectCare maintains that the instant appeal is properly before the OPA because DOA did in fact issue a final agency decision on SelectCare's protest. Specifically, SelectCare argues that "it is undisputed that SelectCare filed a protest and that DOA issued a final decision in response to that protest."[1] However, SelectCare's overly-simplistic view of administrative procedure does not withstand scrutiny.

SelectCare would have this tribunal overlook the fact that SelectCare's protest was specifically limited to DOA's evaluation and consideration of proposals submitted by TakeCare and Aetna.[2] SelectCare's protest never made reference to any cancellation of the RFP or rejection of all the offers. Of course, that would have been impossible at the time, as the cancellation notice had not yet issued. However, SelectCare does not deny that it could easily have filed a protest in response to DOA's subsequent notice of cancellation. Yet, for whatever reason, SelectCare failed to do so.

Guam Procurement Law provides that the Public Auditor has jurisdiction to review a matter so long as it is "properly submitted to him or her." 5 G.C.A. §5703. Matters that are "properly submitted" to the Public Auditor are limited to the issues raised in a

---

[1] SelectCare's Opposition to Motion to Dismiss Procurement Appeal ("Opposition"), p. 4 (Dec. 28, 2012).

[2] SelectCare's Protest, p. 2 (Aug. 21, 2012).

"protest." *See* 5 G.C.A. §5425. Section 5425 provides offerors a right to protest "the method of source selection, solicitation or award of a contract" to the head of a purchasing agency. 5 G.C.A. §5425(a). Thereafter, the head of a purchasing agency has the authority to settle or resolve the protest, through the issuance of a decision. 5 G.C.A. §5425(b) and (c). Section 5425 also provides offerors with the right to appeal the agency decision with the OPA. 5 G.C.A. §5425(e). Pursuant to this statutory scheme, the OPA has consistently held that issues raised for the first time on appeal are not within the OPA's jurisdiction. In Re Appeal Allied Pacific Builders, Inc., OPA-PA-12-10, Decision (June 14, 2012). The OPA should dismiss the instant appeal as the issues raised by SelectCare concerning DOA's cancellation of the RFP or DOA's rejection of all the offers were never protested in the first instance. Thus, the OPA is without jurisdiction to consider these matters as such matters have not been "properly submitted" to the OPA.

B. Allowing the Instant Appeal would be Contrary to Public Policy and Set a Harmful Precedent

SelectCare suggests that it would be "splitting hairs" to require the filing of a separate post-cancellation protest, and that its failure to do so is but a mere formalism that the OPA should simply disregard.[3] SelectCare is mistaken. SelectCare's argument, taken to its logical extreme, is that any aggrieved party protesting any particular agency action—such as allowing other offerors to modify their proposals—has *carte blanche* to file an appeal from any other subsequent action of the agency—such as cancellation of the RFP. Yet nothing in the Guam procurement law, and no case cited by SelectCare, suggests that an offeror can protest one agency action, and then take an appeal from another, entirely

[3] Opposition, p. 5.

different agency action. To countenance such a view would be to invite future dissatisfied bidders to skip administrative procedures altogether. It would likewise invite the filing of future improvident interlocutory appeals, and make a mockery of the orderly procedures embodied in the Procurement Law and Regulations.

Indeed, SelectCare's argument, if accepted, would deny not just DOA but also any other agency the opportunity to ever respond to a protest of an RFP cancellation. Such an outcome would be contrary to the intent of the procurement laws, which were designed to allow an agency to respond to protest, in the first instance, before an aggrieved offeror files an appeal with the OPA.

Allowing an agency to respond to a protest of its actions serves two salutary purposes. First, it affords the agency the opportunity to explain its actions in greater detail, and perhaps even reconsider its decision. Second, it allows the OPA to better understand the agency's rationale, process, and reasoning, should an appeal be filed after the agency responds to the protest. Denying the agency its right of review would essentially afford parties the right to lodge bid protests directly with the OPA. This process would run afoul of the protest and procurement appeal schemes established by the Guam Legislature.

C. DOA has Not Conceded that the OPA has Jurisdiction Over this Appeal

Undaunted by its failure to file a timely cancellation protest, SelectCare nevertheless maintains that OPA should proceed with this improvident appeal because "DOA has conceded that SelectCare is permitted to raise in this appeal whether cancellation of the RFP is a proper remedy because the cancellation of the RFP was

asserted by DOA in the Notice of Decision issued in response to SelectCare's protest."[4] SelectCare is once again mistaken. DOA has made no such concession. In fact, DOA has expressly taken the opposite position, to wit, that, "[t]he 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" and that "[t]here has been no protest taken by SelectCare, or any other offeror, of the action by DOA to reject all offers and cancel the solicitation."[5] In support of that position, DOA has maintained that "[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."[6]

Moreover, even if DOA *had* conceded that the OPA had jurisdiction—which it certainly has not—any such concession would be immaterial. For it is axiomatic that subject matter jurisdiction cannot be conferred by consent. As the U.S. Supreme Court has made plain, "[n]o action of the parties can confer subject-matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, principles of estoppel do not apply, and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings." Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982) (citations omitted). In short, jurisdiction either exists or it does not. In the instant case, it does not.

---

[4] Opposition, p. 6.

[5] DOA's Rebuttal to Comments on Agency Report ("Rebuttal Comments"), p. 2 (Nov. 19, 2012).

[6] Rebuttal Comments, p. 2.

II.

SELECTCARE'S FAILURE TO EXHAUST THE "PROTEST" REMEDY DOOMS ITS PURPORTED APPEAL OF THE CANCELLATION NOTICE

A. The Doctrine of Exhaustion of Administrative Remedies is Applicable

SelectCare next argues, half-heartedly, that the doctrine of exhaustion of administrative remedies is inapplicable to this case. In the alternative, it maintains that SelectCare "has exhausted and is properly exhausting its administrative remedies prior to seeking relief from the courts."[7] SelectCare is wide of the mark in both respects.

The U.S. Supreme Court has expressed that "[i]ssue exhaustion" is the "general rule" "because it is usually 'appropriate under [an agency's] practice' for 'contestants in an adversary proceeding' before it to develop fully all issues there." Sims v. Apfel, 530 U.S. 103, 109, 120 S. Ct. 2080, 2084-85, 147 L. Ed. 2d 80 (2000). Accordingly, parties may not simply bypass statutorily-specified prerequisites to an administrative appeal. In this instance, DOA never had an opportunity to rule on whether its cancellation of the RFP and rejection of all offers were supported under Guam law; and these issues were never fully developed at the agency level.

As TakeCare has pointed out, the requirement of exhaustion of administrative remedies is a jurisdictional prerequisite, not a matter of discretion. *See* Anthony v. Snyder, 116 Cal. App. 4th 643, 10 Cal. Rptr. 3d 505 (2004). SelectCare did not dispute this point, except to observe that the supporting court cases TakeCare cited were those in which a party had skipped an administrative review step in order to seek *judicial* review, rather than intermediate-level administrative review. Of course, it is hardly surprising that

---

[7] Opposition, p. 6.

judicial decisions would focus on parties seeking *judicial* review, because courts of law do not generally have the occasion to rule on matters that are still pending before administrative agencies. More importantly, it is noteworthy that SelectCare failed to cite any authority for the proposition that the failure to exhaust administrative remedies is a doctrine limited to judicial review scenarios. Indeed, as this tribunal has held, it certainly is not so limited. *See, e.g.,* 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) (holding 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.").

B. SelectCare Failed to Meet Its Burden of Showing that Exhaustion of the Protest Remedy would have been Futile

Undaunted, SelectCare takes the position that even if the "exhaustion" doctrine applies, its failure to protest DOA's cancellation of the RPF is excusable because doing so would have been "futile." That argument is not particularly surprising. Parties who fail to exhaust their administrative remedies invariably argue "futility" when called out on the matter. However, simply invoking the "futility" doctrine, without more, seldom suffices. SelectCare bears the burden of *proving* futility as an exception to the exhaustion doctrine. SelectCare has manifestly failed to meet its burden.

It is notable that while SelectCare cited several "futility" cases in its brief, it neglected to cite controlling Guam law on point. In fact, the Supreme Court of Guam has observed that one who seeks to avail himself of the "futility" exception to the exhaustion doctrine "must factually establish their eligibility for the exception." Amerault v. Intelcom

Support Servs., Inc., 2004 Guam 23, ¶6, n. 4 (declining to address futility exception where workers' compensation claimant had failed to establish facts entitling him to the exception).

Here, SelectCare has come forward with nothing but speculation and a host of authorities from other jurisdictions merely discussing the futility exception in general terms (but not applying it to facts similar to those at hand). For example, SelectCare cited the California Supreme Court's opinion in Peralta Fed'n of Teachers v. Peralta Cmty. Coll. Dist., for the proposition that exhaustion of administrative remedies is not required if it is clear that further agency proceedings would be futile. *Id.*, p. 7, citing Peralta, 24 Cal. 3d 369, 388, 595 P.2d 113, 124 (1979). However, SelectCare neglected to mention that the facts underlying the Peralta ruling are manifestly distinguishable from those in the instant case. In Peralta, the court's futility finding was based on the fact that, ". . . the board refused to discuss the matter because the issues were in other litigation." Peralta, 24 Cal. 3d at 388, 595 P.2d at 124. In the instant case, however, while DOA stated its then-current intention to cancel the RFP, it neither stated nor suggested that it would *refuse* to discuss the matter further.

California law confirms that one may not simply state that exhaustion of administrative remedies would likely have been futile, he must instead be able to "positively state what the administrative agency's decision in his particular case would be." Ogo Assocs. V. City of Torrence, 112 Cal. Rptr. 761, 762 (Ct. App. 1974). In fact, it is well settled by the California Supreme Court and the lower courts that **"[t]he futility exception ... is a very narrow one."** County of Contra Costa v. State of California, 177 Cal.App.3d 62, 77, 222 Cal.Rptr. 750 (1986); Sea & Sage Audubon Society, Inc. v.

Planning Com., 34 Cal.3d 412, 418, 194 Cal.Rptr. 357, 668 P.2d 664 (1983) (same); *see also* County of San Diego v. State of California, 15 Cal.4th 68, 89, 61 Cal.Rptr.2d 134, 931 P.2d 312 (1997); Doyle v. City of Chino, 117 Cal.App.3d 673, 683, 172 Cal.Rptr. 844 (1981) ("Futility is a narrow exception to the general rule.").

Indeed, in Gantner & Mattern Co. v. California E. Com., 17 Cal.2d 314, 318, 109 P.2d 932 (1941), the California Supreme Court early on emphasized that, '[t]he exhaustion of remedial procedure as laid down by the statute is required unless the petitioner *can positively state* that the commission has declared *what its ruling will be in a particular case* . . . .'" (Emphasis added.) More modernly, the narrowness of the futility exception was emphasized in one of the very cases SelectCare cited in its brief. *See* Jonathan Neil & Associates, Inc. v. Jones, 33 Cal. 4th 917, 936, 94 P.3d 1055, 1067 (2004) (Rejecting futility exception because, "[t]he futility exception requires that the party invoking the exception 'can positively state that the [agency] has declared what its ruling will be on a particular case.'" (quoting Sea & Sage Audubon Society, *supra*)).

In the instant case, SelectCare argues that filing a protest of the cancellation would have been "futile" because the "bases [sic] for DOA's decision is set forth in the notice of decision that SelectCare has appealed."[8] However, DOA also explained the basis of its decision when it re-ranked TakeCare and refused to negotiate, yet TakeCare was nonetheless required to file a protest before it could appeal directly to the OPA. If countenanced, SelectCare's argument would result in an aggrieved offeror, such as TakeCare in the instant case, being allowed to file an appeal directly to the OPA whenever

[8] Opposition, p. 6, ll. 14-16.

an agency explained the "basis of its decision." This is not how the procurement laws were intended to work.

Moreover, SelectCare's argument that a protest of the cancellation was futile because DOA had already "unequivocally decided the issue" borders on the comical considering the circumstances of the instant procurement. The record reveals that DOA had initially ranked the offerors one way, and then changed its mind. DOA had initially decided to negotiate with TakeCare, and then changed its mind. DOA had also initially decided to negotiate with SelectCare, Staywell and NetCare, and then changed its mind. DOA, if anything, has proven itself to be remarkably "equivocal"; and DOA should have been afforded an opportunity to respond to a protest of the cancellation. Would DOA have changed its mind regarding cancellation? No one can say for sure. Certainly, SelectCare cannot, as it never even bothered to place its arguments before DOA in the first instance.

It is noteworthy, moreover, that SelectCare's September 19, 2012 Notice of Appeal contains seven pages of arguments maintaining that the RFP should not have been cancelled, including arguments not made during the pendency of the protest, such as the following arguments: that "cancellation is unfair to the two offerors who made responsive proposals"[9]; that release of draft Evaluation Memorandum does not warrant cancellation[10]; that cancellation is not supported by the 2 GARR 3115(e)(3)(B))[11]; and that the decision failed to state adequate reasons for rejection of proposals submitted by Offerors 1 and 4[12].

---

[9] SelectCare's Notice of Appeal ("Appeal"), p. 5, ¶¶16, 19 (Sept. 19, 2012).

[10] Appeal, p. 5, ¶17.

[11] Appeal, pp. 5-6, ¶20.

[12] Appeal, p. 6, ¶21.

These and other arguments were not and could not have been made by SelectCare during the course of its protest, which solely objected "to the Team's evaluation and consideration of the proposals submitted by TakeCare Insurance Company, Inc. . . . and Offeror #2."[13] SelectCare has painted itself into a corner. If SelectCare's arguments against cancellation of the RFP are as compelling as it now contends, then it can hardly "positively state" that DOA would have rejected them if they had first been presented to DOA in the first instance.

III.

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

As TakeCare discussed in its opening brief, 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. In other words, SelectCare, having failed to protest the notice of cancellation, has placed itself outside the statutory scope of those who may pursue an appeal under the Procurement Law. In response, SelectCare had very little to say about the standing issue, except to advance the circular argument that because it protested one decision it is a "protester" for all purposes. Of course, nothing in the Guam procurement law or the case law suggests that an offeror can protest one agency action and then take an appeal from another. Our Supreme Court has held that, "[t]he party asserting an injury has the burden of proving that each element of standing exists." People v. Tennesson, 2011 Guam 2, ¶15. SelectCare can hardly meet that burden with circular reasoning alone.

---

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

In fact, what is significant is not what SelectCare said about standing but rather what it did *not* say. For example, SelectCare did not dispute 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. Accordingly, it is uncontroverted that a court or administrative tribunal lacks subject matter jurisdiction where the complaining party lacks standing.

SelectCare also did not dispute that where standing is statutorily conferred, we look first to the language of the relevant statute to determine whether a party has statutory standing. *See* Benavente, 2006 Guam 15, ¶¶ 20-21; Macris, 2008 Guam 6, ¶11. Neither did SelectCare dispute that 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).

SelectCare further failed to dispute that the standing statute at issue in the instant motion is 5 G.C.A. §5425(e), which 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). However, SelectCare now maintains that "protestant" means anyone who has filed a protest at any point during administrative proceedings, even before the action being protested has been executed. Needless to say, SelectCare did not manage to find any authorities that actually support such a novel proposition. Parties who, like SelectCare, fail to file a timely protest of DOA's decision to cancel the RFP simply lack statutory standing to pursue an appeal on that issue. SelectCare bears the burden of proof on standing; yet nothing contained in SelectCare's

opposition suggests otherwise. Absent 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. TakeCare's Motion to Dismiss should be GRANTED. Per the December 14, 2012 Scheduling Order, the motion should be entertained without hearing.

Respectfully submitted this 4th day of January, 2012.

MAIR, MAIR, SPADE & THOMPSON, L.L.C.
Attorneys for Interested Party TakeCare Insurance Company, Inc.

DAVID A. MAIR

P128111.RTT