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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

TAKECARE'S COMMENTS TO AGENCY REPORT

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INTRODUCTION

TakeCare Insurance Company, Inc. ("TakeCare"), pursuant to 2 G.A.R. §12104(c)(4), hereby submits its Comments to the Agency Report regarding the September 19, 2012 Procurement Appeal ("Appeal"), which concerns Request for Proposal DOA/HRD-RFP-GHI-13-001 ("RFP") filed by Tokio Marine Pacific Insurance Ltd. and Calvo's Insurance Underwriters, Inc. (hereinafter collectively referred to as "SelectCare"). For the following reasons, SelectCare's appeal should be denied, and the decision of the Department of Administration, on behalf of the Government of Guam Health Insurance Negotiating Team (hereinafter collectively referred to herein as "DOA"), to cancel the RFP and reject all proposals should be upheld: (1) the Office of Public Auditor (the "OPA") lacks jurisdiction because there was no underlying "protest" of the agency decision to cancel the RFP or reject all the offers; (2) DOA properly cancelled the RFP; (3) DOA properly rejected all proposals; (4) SelectCare does not have a vested or contractual right to be awarded a contract; and (5) delay in the solicitation process can be remedied by denying the Appeal.

RELEVANT FACTUAL BACKGROUND

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)

[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").

> [*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. Notice of Completion of Phase I of the RFP Process

During Phase I, DOA is tasked with screening all proposals to determine whether the minimum requirements specified in the RFP were met, "including submission of qualified proposals as required by P.L. 31-197, submission of all disclosure forms, and whether the proposals were signed as required."[4] On July 5, 2012, DOA issued a letter to TakeCare, as well as to two other offerors, stating that it had completed Phase I and was proceeding to Phase II.[5] The July 5, 2012 letter stated, in part, as follows:

> We have ***now proceeded to Phase II***, Evaluation of Information by the Negotiating Team. In the event your company meets all the criteria and is ranked as one of the top three (3) highest rated exclusive and/or non-exclusive offeror, you will receive notification from our office inviting your company to proceed with Phase III, Negotiating Process.[6]

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[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).

[4] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000550.

[5] *See* Agency Report, Exhibit C ("Notice of Decision"), p. 4; *See also* Procurement Record (Oct. 9, 2012), Bates Stamped Nos. 001535, 001537, and 001538.

[6] Procurement Record (Oct. 9, 2012), Bates Stamped No. 001537.

C. TakeCare Ranked Amongst Top Three Offerors after Phase II

Thereafter, on July 26, 2012, DOA issued a letter to TakeCare advising it that the Government of Guam had concluded Phase II, Evaluation of Information.[7] This letter stated, in part, as follows:

> ***Your company has ranked amongst the top three*** for both the exclusive and non-exclusive plans, and therefore, ***this is*** to ***invite your company to Phase III***, the Negotiations Process.[8]

The July 26, 2012 letter further informed TakeCare that "Negotiation with your company is scheduled to commence at 9:00 a.m., July 27, 2012."[9] DOA also issued letters to SelectCare and Island Home Insurance Company ("StayWell") on August 3, 2012 advising that "the government has concluded Phase II, Evaluation of Information."[10]

D. DOA Cancels Negotiations and Retracts Notice to TakeCare

The next day, right before negotiations were to commence on the morning of July 27, 2012, Assistant Attorney General John Weisenberger, and DOA Director Ms. Benita Manglona, *verbally* informed TakeCare that negotiations with TakeCare were being cancelled and that DOA's July 26, 2012 letter inviting TakeCare to negotiate was being withdrawn.

On the same day, DOA retracted its letter of July 26, 2012 to TakeCare extending an offer to negotiate, and also retracted DOA's letter of rejection to Aetna

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[7] *See* Agency Report, Exhibit C ("Notice of Decision"), pp. 4-5.

[8] Procurement Record (Oct. 9, 2012), Bates Stamped No. 001541 (emphases added).

[9] *See* Procurement Record (Oct. 9, 2012), Bates Stamped No. 001541.

[10] Procurement Record (October 9, 2012), Bates Stamped No. 004011, 004013; Agency Report, Exhibit C ("Notice of Decision"), p. 4.

International ("Aetna/NetCare").[11] Despite the fact that DOA had previously stated that it had concluded Phase II of the RFP process, DOA then re-opened evaluations, continued Phase II of the RFP process, and re-ranked the proposals.[12]

Thus, instead of proceeding from Phase I to Phase II and then to Phase III—as required by the RFP—DOA instead proceeded from Phase I to Phase II to Phase III, back to Phase II, and then returned to Phase III. This process was completely at odds with the procedures set forth in the RFP.

E. TakeCare is Re-Ranked in Violation of the RFP and Guam Law

On August 3, 2012, DOA issued a letter to TakeCare stating that the Government of Guam had concluded its second review and re-ranking of the proposals received. The August 3, 2012 letter stated in part:

> The RFP, as required by Public Law 30-93 requires the negotiation team to negotiate for an exclusive and non-exclusive plan with the top three highest rated offerors for both categories. ***Your company did not place amongst the top three*** in the overall rating. Negotiations are now underway.[13]

Somehow, as part of this re-ranking—even though only one additional insurer, namely Aetna/NetCare, was included within the re-ranking—TakeCare went from being ranked second to being ranked fourth.[14] This is a mathematical impossibility since

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[11] *See also* Procurement Record (Oct. 9, 2012), Bates Stamped Nos. 001546 and 001549; Errata to Agency Report Filed on October 16, 2012 ("Errata to Agency Report"), Exhibit A ("Evaluation Memorandum"), p. 4.

[12] Errata to Agency Report, Exhibit A ("Evaluation Memorandum"), pp. 4-5.

[13] DOA's Amendment to Procurement Record ("Amendment to Procurement Record") (Oct. 19, 2012), Bates Stamped No. 004010 (emphasis added).

[14] Errata to Agency Report, Exhibit A ("Evaluation Memorandum"), pp. 6-7.

TakeCare was already ranked ahead of another bidder before the Aetna/NetCare proposal was considered as an additional offer. Furthermore, as noted above, the re-ranking was neither authorized by the RFP nor by any provision of Guam law.

F. DOA Admits to not Reviewing Proposals as Required by the RFP

On August 3, 2012, DOA invited TakeCare representatives to meet and discuss the RFP evaluation. On August 6, 2012, Jeffrey Larsen and Timothy Ogata, of TakeCare, and Dana Gutierrez, an attorney for TakeCare, met with Ms. Manglona, Attorney Weisenberger and Marie Dufresne of Hay Consulting, Inc. ("the Hay Group"). At the start of the meeting, Attorney Weisenberger provided TakeCare with a draft Evaluation Memorandum for review.[15] Unbeknownst to TakeCare, Mr. Weisenberger neglected to provide this Evaluation Memorandum to all the other offerors.[16]

During the meeting, Attorney Weisenberger informed TakeCare that at the time negotiations were scheduled with TakeCare, he determined it was necessary for DOA to go back and "competently" review the offers, since until that point, DOA had not reviewed the offers competently as required by the RFP and Guam law.

G. TakeCare and Other Offerors File Protests

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;

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[15] *See* Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 003878-003884.

[16] Agency Report, Exhibit C ("Notice of Decision"), p. 5.

4. DOA improperly retracted TakeCare's ranking and re-ranked TakeCare;
5. DOA improperly reversed a finding that Aetna/NetCare was nonresponsive;
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.[17]

On August 21, 2012, SelectCare filed its protest with DOA. Subsequently, on August 23, 2012, StayWell filed its protest with DOA.

H. DOA Issues its Decision to Cancel the RFP

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.

Further, in the Decision, DOA stated that "there is no basis to enter into negotiations with only two offerors."[18]

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

DISCUSSION

I.

THE OPA LACKS JURISDICTION OVER THE CANCELLATION OF THE RFP AND DOA'S REJECTION OF ALL OFFERS BECAUSE NO PROTESTS OF THESE ACTIONS WERE EVER FILED

As a threshold matter, it is the duty of the OPA, as an administrative adjudicative body, to determine whether it may properly exercise jurisdiction over an Appeal. *See* Fed. Power Comm. v. Panhandle Eastern Pipeline Co., 337 U.S. 498, 69 S.Ct. 1251 (1949); 2 Am. Jur. 2d *Administrative Law* §277 (1994 ed.). "Administrative agencies are tribunals of limited jurisdiction." 2 Am. Jur. 2d *Administrative Law* §275. Generally, they enjoy only such jurisdiction as has been conferred upon them by statute. *Id.* Exhaustion of administrative remedies by filing 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).

In accordance with these fundamental principles, the OPA's jurisdiction is not unlimited. In fact, the OPA's procedural rules confirm that "[t]he Public Auditor shall have the right at any time and on her or his own motion to raise the issue of its jurisdiction to proceed with an Appeal and shall do so by an appropriate order." 2 G.A.R. §12104(c)(9). Further, 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 unambiguously stated this proposition in In the Appeal of Mega United Corp., Appeal No. OPA-PA-09-001, *Order of Dismissal*, pp. 1-2 (Jan 26, 2009). Further, the "jurisdiction of the Public Auditor to

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

review and decide matters is limited to matters that are properly submitted to her." In the Appeal of Latte Treatment Center, Inc., Appeal No: OPA-PA-08-008, *Decision*, at 8 (Feb. 26, 2009) (finding that the OPA lacked jurisdiction to hear an appeal on one solicitation, while having jurisdiction to hear an appeal on another matter).

In the instant case, the only "protest" filed by SelectCare with DOA was on August 21, 2012. SelectCare's protest neither addressed nor made reference to any cancellation of the RFP or rejection of all the offers. Indeed, it could not have done so inasmuch as those agency decisions had not yet issued. That did not occur until September 7, 2012, when DOA issued its Decision in response to the protests of SelectCare, TakeCare and Aetna/NetCare. Only afterwards, on September 10, 2012, did DOA issue and serve SelectCare with its Rejection of All Offers and Notice of Cancellation.

If SelectCare wished to challenge or question DOA's decision to cancel the RFP or reject all the offers, the proper procedure would have been for SelectCare to file a timely "protest" of those decisions *after* they had been issued. However, neither SelectCare nor any other offeror ever filed a "protest" of those agency decisions within fourteen (14) days after September 7, 2012 or September 10, 2012, as required by Guam law. 5 G.C.A. §5425(a). Instead of filing a timely "protest," SelectCare instead filed the instant appeal.

SelectCare's disregard of the "protest" requirement is no mere formalism. A protest is a fundamental jurisdictional prerequisite to perfecting an appeal. Its failure to file a timely "protest" of DOA's decisions to cancel the RFP and reject all the offers foreclosed the various administrative remedies otherwise available under Guam procurement law. For instance, had SelectCare filed a timely "protest" regarding DOA's cancellation of the RFP or reject all the offers on September 7 and 10, 2012, respectively,

DOA would have had the opportunity to file a decision in response to such a protest. 5 G.C.A. §5425(e). SelectCare could have then appealed from that decision to the OPA, which would have had both jurisdiction and a complete record to review.

However, without an agency decision in response to a "protest" of the cancellation of the RFP or rejection of the offers, there is simply no agency decision from which an appeal may be taken regarding either action. As noted above, absent a protest and subsequent agency decision in response to such a protest, the OPA lacks jurisdiction to hear any appeal on any matter raised in DOA's Notice of Decision or Rejection of All Offers and Notice of Cancellation. *See* 5 G.C.A. §5425; and In the Appeal of Latte Treatment Center, Inc., at 8.

More importantly, inasmuch as neither SelectCare nor anyone else ever filed a timely "protest," DOA's decisions to cancel the RFP or reject all the offers are now final and not subject to any further protest or review by anyone, including the OPA. *Id.* Administrative appeal is not an inherent right but is of statutory origin; and thus an aggrieved party is entitled only to such administrative review as provided for by statute. Rooney v. New York State Dept. of Civil Serv., 477 N.Y.S.2d 939 (Sup. Ct. 1984). It is axiomatic that the OPA lacks jurisdiction to hear appeals from agency decisions that are final and non-reviewable as a matter of law.

II.

SELECTCARE FAILED TO ALLEGE THAT DOA ACTED IN AN IRRATIONAL OR ARBITRARY MANNER

When seeking to undo a cancelation of a solicitation, the aggrieved offeror bears the burden of showing that the cancellation was "arbitrary or capricious." It is the burden of the aggrieved bidder to demonstrate that the challenged agency decision is either

irrational or involved a clear violation of applicable statutes and regulations. Banknote Corp. of America, Inc. v. United States, 365 F.3d 1345, 1351 (Fed. Cir. 2004). "A necessary corollary to that burden is consideration of the discretion accorded to procurement officials." Parcel 49C Ltd. Partnership v. United States, 31 F.3d 1147, 1153 (Fed. Cir. 1994).

Guam courts have expressly adopted this high burden. In refusing to reverse a cancellation of a solicitation, the Superior Court of Guam held that reviewing tribunals have a "limited role to play in the procurement process." J&B Modern Tech v. Guam Int'l Airport Auth, Civil Case No. CV0732-06, *Findings of Fact and Conclusions of Law*, p. 4 (Super Ct. Guam, July 15, 2007) (Barrett-Anderson, J.). The court reasoned that the "court [or the OPA] may not substitute its judgment for that of the awarding authority, but may ***only*** act where the authority's decision is ***irrational or arbitrary***." *Id.* (emphasis added).

Yet, SelectCare has not alleged anywhere in the Appeal that DOA acted in an "arbitrary" or "irrational" manner when it cancelled the RFP. As a consequence, the Appeal lacks the essential allegations that are required in order for the OPA to justify review of an agency action. For this reason alone, notwithstanding the jurisdictional problem discussed above, the OPA should deny this appeal and leave the parties where it found them.

III.

CANCELLATION OF THE RFP WAS JUSTIFIED DUE TO VIOLATIONS OF GUAM LAW

Under Guam Procurement Law, a solicitation "shall" be cancelled where it is determined that the solicitation is in violation of law. Specifically, 5 G.C.A. §5451 provides:

> If prior to award it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award ***shall*** be: (a) cancelled; or (b) revised to comply with the law.[19]

Guam's Procurement Regulations, 2 G.A.R. §9104 and 2 G.A.R. §9105(a), mirror the language of Section 5451. Likewise, the Supreme Court of Guam has held that cancellation under Section 5451 is the appropriate remedy prior to award of the contract where the solicitation of a contract was procured incorrectly. Fleet Services, Inc. v. Department of Administration, 2006 Guam 6, at ¶ 36 (finding that where an incorrect procurement method was utilized, the proper remedy was cancellation under 5 G.C.A. §5451).

A. DOA Followed Procedures Inconsistent with the RFP Itself

DOA has admitted that it failed to follow the procedures that were provided for in the RFP itself:

> A determination of whether proposals were responsive and qualified did not take place in Phase I. The failure to review all four proposals in Phase I has resulted in a ***convoluted process that is inconsistent with the process set out in the RFP***. This has resulted in confusion on the part of offerors and a lack of any confidence that the process has been fair, impartial and free from inappropriate influence or manipulation.[20]
>
> * * *
>
> The unique nature of the services being procured and P.L. 31-197 requirements that only "qualified proposals meeting the minimum requirements of the RFP" emphasize how the failure for Phase I to have been appropriately concluded

[19] 5 G.C.A. §5451 (emphasis added).

[20] Agency Report, Exhibit C ("Notice of Decision"), p. 6 (emphasis added).

causes a cloud to occur over the processes that then took place after Phase I.[21]

This admission substantiates DOA's determination that the solicitation was in violation of Guam law, and therefore warranted cancellation. Moreover, as discussed below, the procurement process was tainted for numerous other reasons as well.

B. Numerous Violations of Law Occurred During the Solicitation Process

In addition to the problems with the solicitation procedures noted by DOA in its Decision, there were numerous other violations of law that occurred as well.

1. DOA Failed to Adopt Rules of Procedure

Public Law 31-197 mandates that "[t]he Negotiating Team *shall* develop its rules of procedure in accordance with the Administrative Adjudication Law." DOA attached to its RFP certain Rules of Procedure, but failed to have those procedures approved under Guam's Administrative Adjudication Law (the "AAL").[22] This failure constitutes a *per se* violation of P.L. 31-197.

Under the AAL, the word "rule" means "any rule, regulation, standard, classification, procedure or requirement of any agency designed to have or having the effect of law or interpreting, supplementing or implementing any law enforced or administered by it . . ." 5 G.C.A. §9107. Promulgation of rules and procedures pursuant to the AAL requires publication, hearing, and transmittal to the Legislature with an economic impact statement. 5 G.C.A. §9301 *et. seq.* All rules and procedures developed in accordance with the AAL must be published. 5 G.C.A. §9305. The method of developing

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[21] Agency Report, Exhibit C ("Notice of Decision"), p. 6.

[22] Procurement Record, Bates Stamped Nos. 000627-000634.

rules and procedures set forth in the AAL is "the only lawful method of adopting and promulgating administrative rules and regulations." 5 G.C.A. §9311.

DOA failed to develop any rules or procedures pursuant to the AAL as required by P.L. 31-197. In particular, no rules or procedures were developed by DOA pursuant to the AAL regarding the following:

(1) the procedures to determine the minimum qualifications for proposals to be submitted for health insurance coverage;
(2) the procedures to rank offers;
(3) the procedures to determine when an offer is nonresponsive;
(4) the procedures to reject an offer as nonresponsive;
(5) the procedures to reverse or modify a finding that an offer is nonresponsive and should be rejected;
(6) the procedures to notify an offeror that it was qualified and selected as one of the top three offerors;
(7) the procedures to negotiate with an offeror;
(8) the procedures to reverse or modify a finding that an offeror was qualified and selected as one of the top three offerors;
(9) the procedures to insure that the individual Negotiating Team member rankings were conducted in such a manner so as not to improperly influence each other;
(10) the procedures pertaining to when and how individual Negotiating Team members could disclose their rankings to each other;
(11) the procedures pertaining to when or how individual Negotiating Team members could correct or modify their rankings; and
(12) the procedures relating to the disclosure of the identity of individual Negotiating Team members so that offerors could challenge their participation in the process because of potential or actual conflicts of interest.

Indeed, Courts have cautioned that "[t]he effect of an agency's failure to promulgate a regulation in accordance with these various statutory requirements is to have the regulation declared a nullity." Borough of Bedford v. Com., Dept. of Envtl. Prot., 972 A.2d 53, 62 (Pa. Commonwealth Ct. 2009). Thus, where a statute contains a clear

command that the agency proceed by rulemaking, failure to promulgate regulations specifying comprehensive and complete standards coupled with an application of informal standards on a case-by-case basis, may lead to the agency action being stricken as arbitrary, capricious, and otherwise not in accordance with law. *See, e.g.*, Ethyl Corp. v. E.P.A., 306 F.3d 1144, 1149–50 (D.C. Cir. 2002).

Inasmuch as DOA failed to develop any rules of procedure in accordance with the AAL, DOA committed a *per se* violation of P.L. 31-197, which requires that "[t]he Negotiating Team *shall* develop its rules of procedure in accordance with the Administrative Adjudication Law." As result, DOA's cancellation of the solicitation was certainly proper pursuant to 2 G.A.R. §9105, as its failure to develop such rules of procedure was "not in accordance with law." Ethyl Corp., 306 F.3d at 1149–50.

Based on the foregoing, the only reasonable, and "[t]he only fair and equitable course" was to cancel the solicitation and re-issue the RFP.[23] As DOA stated, "[i]t is not possible at this stage to revise the solicitation to comply with the law."[24] Hence, "[u]nder the circumstances, what is fair and equitable to all offerors is to reissue the RFP and initiate the process again."[25] Accordingly, DOA's determination that "[c]ancellation is the proper remedy in these circumstances" was completely appropriate and warranted under these circumstances.[26]

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[23] Agency Report, Exhibit C ("Notice of Decision"), p. 7.

[24] Agency Report, Exhibit C ("Notice of Decision"), p. 7.

[25] Agency Report, p. 21.

[26] Agency Report, Exhibit C ("Notice of Decision"), p. 6.

2. DOA Failed to Properly Determine Whether the Proposals Were Qualified before Proceeding to Phases II and III

Pursuant to the RFP, DOA in Phase I was required to screen all proposals to determine whether "the minimum requirements specified in the RFP were met, including submission of qualified proposals as required by P.L. 31-197, submission of all disclosure forms, and whether the proposals were signed as required."[27] DOA, however, has admitted that it failed to do so.

Based on the record, DOA initially issued letters to TakeCare, SelectCare and StayWell, advising them that the Government of Guam had concluded Phase II, Evaluation of Information, and that they were invited to "the Negotiations Process."[28] TakeCare was invited to negotiate on July 27, 2012.[29] Right before negotiations were to commence, however, Attorney Weisenberger and Ms. Manglona informed TakeCare that negotiations with TakeCare were being cancelled and that DOA's July 26, 2012 letter inviting TakeCare to negotiate was being withdrawn. As advised, DOA retracted its July 26, 2012 letter to TakeCare and also retracted DOA's letter of rejection to Aetna/NetCare.[30] Despite the fact that DOA had previously stated that it had concluded Phase II of the RFP process, DOA re-opened evaluations and continued Phase II of the RFP process.[31]

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[27] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000550.

[28] *See* Agency Report, Exhibit C ("Notice of Decision"), p. 4; *See also* Procurement Record (Oct. 9, 2012), Bates Stamped No. 001541; Amendment to Procurement Record (October 19, 2012), Bates Stamped Nos. 004011 and 004013.

[29] *See* Procurement Record (Oct. 9, 2012), Bates Stamped No. 001541.

[30] *See* Procurement Record (Oct. 9, 2012), Bates Stamped Nos. 001546 and 001549.

[31] Errata to Agency Report, Exhibit A ("Evaluation Memorandum"), pp. 4-6; Agency Report, Exhibit C ("Notice of Decision"), pp. 4-5.

Thereafter, DOA informed TakeCare that the Government of Guam had concluded its review of the proposals received and that TakeCare "did not place amongst the top three in the overall rating."[32] During the August 6, 2012 meeting, Attorney Weisenberger informed TakeCare that at the time negotiations were scheduled with TakeCare, he determined it was necessary for DOA to go back and "competently" review the offers, since until that point, DOA had not reviewed the offers competently.

Indeed, DOA has admitted this failure. The record reflects that DOA concedes that the "determination of whether proposals were responsive and qualified did not take place in Phase I" as required under the RFP procedures and P.L. 31-197.[33] In its Agency Report, DOA states that "the government has some flexibility in the RFP process to determine that a proposal is responsive and qualified."[34] With respect to the subject solicitation, however, DOA concedes that "[i]n this procurement the government was prevented from finally resolving this requirement and to complete a full review [of] each proposal until the process had moved into the Negotiation stage, Phase III of the process set out in the RFP."[35] It further concedes that "a failure in Phase I of the process set out in the RFP, to review and evaluate offers to determine if those offers are responsive and qualified (as this term is used in the Group Benefits law), resulted in a convoluted evaluation process that was not contemplated for in the RFP."[36]

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[32] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped No. 004010.

[33] Agency Report, Exhibit C ("Notice of Decision"), p. 6.

[34] Agency Report, p. 9.

[35] Agency Report, p. 9.

[36] Agency Report, p. 20.

In addition, DOA further concedes that it improperly furnished copies of its draft Evaluation Memorandum to two offerors only, and that "[t]his may have presented two offerors with information that gave those offerors an advantage, or at the least, the appearance of an advantage over other offerors."[37] DOA submits that these errors were not made "in order to give the government an advantage over the offerors, to give one offeror an advantage over another, or to place any offeror at a disadvantage"—"[t]hey were just mistakes."[38] What is clear, however, is that these errors are irreversible.

Based on the record, even if some type of determination of which offerors may have been responsive and qualified was made during Phase II, any such determination would have occurred well beyond the period permitted under the RFP procedures and Guam law. As stated in the Decision, "[i]t was questionably too late in the Phase II process for that to occur."[39] Thus, the procurement process was too far along, and tainted from the beginning with these errors, that any attempt to correct these errors would have been impossible. The only way for DOA to correct its errors in this solicitation in order to comply with the law would have required DOA to go back in time, so that it could have properly and timely made determinations of which offerors were responsive and qualified.

C. DOA Changed Scores and "Sanitized" the Voting Record

After the completion of Phase II, DOA scored the insurers who had offered exclusive and non-exclusive plans.[40] According to an email from a DOA representative to the head of the Hay Group, TakeCare was at that time ranked second for exclusive plans

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[37] Agency Report, Exhibit C ("Notice of Decision"), pp. 3, 7.

[38] Agency Report, Exhibit C ("Notice of Decision"), p. 11.

[39] Agency Report, Exhibit C ("Notice of Decision"), p. 6.

[40] Procurement Record (Oct. 9, 2012), Bates Stamped Nos. 000809-001525.

and third for non-exclusive plans.[41] Suddenly, after TakeCare had already been ranked in the top three for both exclusive and non-exclusive plans, DOA decided to conduct a "second round" of scoring that included Aetna/NetCare as an insurer to be considered.[42]

Nothing in the RFP authorized DOA to conduct a "second round" of voting after insurers had already been scored and ranked. To the contrary, under Guam law, DOA was required to have fully and thoroughly evaluated all proposals ***prior*** to ranking. 2 G.A.R. §3114(i)(1) and 2 G.A.R. §3114(j).

In any event, after the unauthorized "second round" of scoring, TakeCare suddenly went from being ranked second for the exclusive plan, to being ranked fourth.[43] As noted in the factual discussion above, this is a mathematical impossibility inasmuch as TakeCare had already been ranked ahead of another bidder, namely StayWell, before Aetna/NetCare was considered as an additional offeror.[44] Hence, even assuming, arguendo, that Aetna/NetCare in the "second round" of scoring had been ranked ahead of TakeCare for the exclusive plan scoring, TakeCare should nonetheless have still been ranked at least 3rd since it had already been ranked ahead of StayWell for the same type plan. When TakeCare's protest was filed on August 8, 2012, DOA then took steps to "sanitize" the identity of offerors for the first round of scoring.[45]

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[41] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004086-004087.

[42] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004086-004087.

[43] Errata to Agency Report, Exhibit A ("Evaluation Memorandum"), pp. 6-7.

[44] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004086-004087.

[45] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004086-004087.

D. DOA Violated Guam Law when it Improperly Excluded Certain Members from Meetings

The Members of the Negotiating Team for the Government of Guam in the group health insurance negotiations are defined by statute. 5 G.C.A. §4302(c). Pursuant to Section 4302(c), Ms. Manglona wrote to Senator Dennis G. Rodriguez, Jr. on February 8, 2012 and requested his confirmation as a Member of the Negotiation Team.[46] On April 3, 2012, Senator Rodriguez confirmed his attendance and also designated his director, Mr. Ronald Teehan, Jr., as one of the Guam Legislature's designated Members of the Negotiating Team, in the event he would be unable to attend.[47]

There are no provisions in Section 4302(c) that permit the exclusion of any of these Members from the meeting of the Negotiating Team. However, after TakeCare filed its protest on August 9, 2012, the Negotiating Team conducted a meeting on August 13, 2012 and refused to allow Mr. Teehan, Jr. to participate in the meeting.[48] The next day, August 14, 2012, Senator Rodriguez, Jr., protested this action in a letter to Ms. Benita Manglona and stated: "I must object to any position being taken now or in the future by counsel which would split up the Team membership provided for pursuant to law, or exclude them from the attorney-client group. Any exclusion of myself or my designee is a ***clear violation of P.L. 31-024***."[49]

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[46] Procurement Record (Oct. 09, 2012), Bates Stamped No. 000219.

[47] Procurement Record (Oct. 09, 2012), Bates Stamped No. 000220.

[48] Amendment to Procurement Record (Oct. 19, 2012), Bates Stamped Nos. 004476-004477.

[49] Amendment to Procurement Record (Oct. 09, 2012), Bates Stamped No. 004476-004477 (emphasis added).

IV.

REJECTION OF ALL THE OFFERS IS IN THE BEST INTEREST OF THE TERRITORY

In its Appeal, SelectCare argues that DOA made "no specific finding or statement in the Decision that cancellation is determined to be in the best interests of the Territory" and that "no reasons" were "set forth to support such finding."[50] This argument is completely without merit. DOA clearly cancelled the solicitation because it was in violation of law *and* it was in the best interest of the Territory.

A. DOA Properly Rejected all Proposals in the Best Interest of the Territory

Under Guam Procurement Law, a solicitation may be cancelled when it is in the best interest of the Territory. Specifically, 5 G.C.A. §5225 provides:

> An Invitation for Bids, a Request for Proposals, or other solicitation ***may be cancelled, or any or all bids or proposals may be rejected in whole or in part as may be specified in the solicitation, when it is in the best interests of the Territory*** in accordance with regulations promulgated by the Policy Office. The reasons therefor shall be made part of the contract file. [51]

DOA in its Decision made specific reference to Title 2 Guam Administrative Rules and Regulations Section 3115(d)(2)(A), which expressly allows for rejection of all bids or proposals when it is in the "territory's best interest."[52] This regulation, in part, states:

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[50] Appeal, p. 4.

[51] 5 G.C.A. §5225 (emphasis added).

[52] Agency Report, Exhibit C ("Notice of Decision"), p. 8.

> After opening, but prior to award, all ***bids or proposals may be rejected*** in whole or in part when the Chief Procurement Officer, the Director of Public Works, or the head of a Purchasing Agency determines in writing that ***such action is in the territory's best interest*** . . .[53]

After issuing its Decision noting that bids or proposals could be rejected when it was in the "territory's best interest,"[54] and finding that "there are meritorious claims"[55] that permitted DOA to "cancel this solicitation,"[56] DOA did in fact reject all bids and proposals.[57] This was most certainly in the "best interest" of Government of Guam employees and retirees, who will benefit from competition among health care insurers.

SelectCare would have the OPA simply ignore the tainted procurement process, and instead order DOA to proceed negotiating with ***only two*** offerors, thereby excluding additional insurers that would undoubtedly respond to a new RFP. As such, SelectCare's proposed course of action is directly contrary to the legislative intent behind P.L. 30-227, which was to "foster vigorous competition."[58] It is also at odds with the negotiation strategy suggested by the Hay Group, which urged the Government of Guam to get at least "***three [bidders] in a sort of bidding war*** and get the best possible deal for Guam."[59]

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[53] 2 G.A.R. §3115(d)(2)(A) (emphases added).

[54] Agency Report, Exhibit C ("Notice of Decision"), p. 8.

[55] Agency Report, Exhibit C ("Notice of Decision"), p. 2.

[56] Agency Report, Exhibit C ("Notice of Decision"), p. 2.

[57] Agency Report, Exhibit D ("Rejection of all offers and Notice of Cancellation"), p. 1.

[58] Public Law 30-227, Section 1, *Legislative Findings and Intent*; *See also* Agency Report, p. 16.

[59] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000412 (emphasis added).

B. Multiple Providers will Result in Increased Competition and Lower Prices

The published *Legislative Findings and Intent* in Public Law 30-227 expressly decried limiting negotiations to only one health insurance provider:

> For the past three years only one offeror of health insurance services. The public is suspect of insurance rates and coverage options. ***In order to promote a more competitive market for health insurance providers, . . . foster vigorous competition in the health care arena, and promote negotiations for fair rates and adequate services, new policies must be adopted through this measure.***[60]

The author of P.L. 31-197, Senator Vicente (Ben) Pangelinan, noted that limiting health insurance coverage to one single offeror "does not maximize competition, which has resulted in the highest increase in the cost of health insurance for the government and its employees."[61] Additionally, according to Senator Pangelinan, the intent of the legislation was that ***the government should negotiate with multiple carriers because this "maximizes competition and as we know from experience, when you limit business to one company we get higher prices, not lower prices.***"[62]

DOA agreed and clearly stated in the Agency Report that "[t]here can be no doubt that the policy of the Territory . . . ***is to increase competition and maximize benefits.***"[63] Further, the Hay Group also acknowledged that competition among health care providers will result in lower prices to the consumers and suggested that the

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[60] Public Law 30-227, Section 1, *Legislative Findings and Intent* (emphasis added); *See also* Agency Report, p. 16.

[61] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000461.

[62] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000461 (emphasis added).

[63] Agency Report, p. 17 (emphasis added).

Government of Guam "negotiate for the exclusive contract first so that [it] can ***get the three in a sort of bidding war and get the best possible deal for Guam.***"[64]

C. The Size of the RFP Underscores the Need for an Untainted Procurement Process

The Government of Guam recognizes that this matter is of great public importance. Attorney Weisenberger stated that for "the government of Guam this is a $73,000,000 solicitation affecting 16,000 government employees, retirees and families. For us, in this small community, and this small government, ***that is a large matter.***"[65] Even the Hay Group agreed that due to its great size of the proposed contract, more than one health insurance company is likely needed to fulfill all the obligations of the contract: "Perhaps ***SelectCare is just not big enough to have all of these situations handled as effectively as we would like.***"[66]

D. Public Policy and Guam Law Support DOA's Cancellation of the RFP and Rejection of all Offers

Courts have expressed that the purpose of competitive bidding is to enable a public contracting authority to obtain the best work at the lowest possible price while guarding against favoritism and fraud. Cedar Bay Contr. Inc. v. Fremont, 552 N.E.2d 202 (Ohio 1990). Moreover, the policies that underpin Guam's procurement laws and regulations include the following: To increase public confidence in the procedures followed in public procurement and purchasing; to foster "effective broad-based competition within the free enterprise system"; and to "provide safeguards for the

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[64] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000412 (emphasis added).

[65] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000525 (emphasis added).

[66] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000331 (emphasis added).

maintenance of a procurement system of quality and integrity." *See* 5 G.C.A. §5001(b); 2 G.A.R. §1102.

E. The Territory's Interest will be Furthered by the Prompt Denial of the Appeal

SelectCare's Appeal halted DOA's plans to issue another RFP and thereby proceed with the solicitation process. During this delay, SelectCare maintains its status as the ***sole provider*** of health insurance coverage for Government of Guam employees and retirees. As noted by numerous authorities discussed below, it is ***not*** in the interest of the employees and retirees of the Government of Guam, who would benefit from health insurance competition. Finally, as noted by the Office of the Attorney General, health insurance coverage is a "large matter," impacting up to "16,000 government employees," and thereby deserves an untainted procurement process, sooner rather than later.

V.

SELECTCARE'S ALLEGATIONS OF "UNFAIRNESS" DO NOT JUSTIFY PROCEEDING WITH A TAINTED PROCUREMENT PROCESS

SelectCare makes no effort in the Appeal to explain, dispute or justify the numerous violations of law that occurred during the solicitation process. Instead, SelectCare argues that "unfairness" resulted from the cancellation of the solicitation. As noted above, the OPA may overturn agency actions only if they are found to be "arbitrary" and "irrational," which is not even alleged by SelectCare in the Appeal. Even if SelectCare had gone through the trouble of making such an allegation, given the discretion accorded to agency action, it can hardly be deemed "arbitrary" or "irrational" for DOA to cancel a solicitation when it has concluded that the procurement process had been tainted from the beginning, that DOA had followed the wrong procedures not authorized by the RFP, and that rehabilitation of the solicitation was simply impossible. When these types of

events take place, it is "unfair" to ***all*** offerors who have gone through the trouble of participating in such a "tainted" process. However, the proper remedy is to cancel the tainted process, start over, and do it right; and not simply barge ahead with a solicitation procedure which, by all accounts, was riddled with problems and errors at every stage.

VI.

DOA RELIED UPON THE PROPER REGULATION WHEN REJECTING ALL THE OFFERS

SelectCare further argues that DOA's rejection of its proposal was improper because it failed to follow the procedures set forth in 2 G.A.R. §3115(e)(3)(B).[67] However, SelectCare's reliance on Section 3115(e) is misplaced. DOA properly rejected all proposals pursuant to 2 G.A.R. §3115(d)(2)(A), which is the provision that governs the rejection of ***all*** bids.

As noted in Section 3115(e), this regulation only "applies to the rejection of individual bids or proposals," not to the cancellation of solicitations or the ***rejection of all proposals*** as in this instance. Consequently, DOA was not required to make the findings listed in Section 3115(e)(3)(B) as advanced by SelectCare.

VII.

THE RESPONSIVENESS OF OFFERORS WAS NOT PROPERLY DETERMINED BY DOA

In its Appeal, SelectCare argues that "[c]ancellation is unfair to the two offerors who submitted responsive proposals" and that "[c]ancellation provides an unfair advantage to and demonstrates bias in favor of the two offerors [TakeCare and Aetna/Net Care] that submitted materially deficient proposals."[68] However, DOA has admitted that it

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[67] Appeal, pp. 5-6.

[68] Appeal, p. 5.

failed to properly determine "whether proposals were responsive and qualified" during "Phase I" as required under the RFP procedures and P.L. 31-197.[69] In addition, as has been admitted by DOA, it failed to "complete a full review [of] each proposal until the process had moved into the Negotiation stage, Phase III of the process set out in the RFP."[70]

DOA's failure to assess "responsiveness" during Phase I as required by Guam law justifies cancellation of the RFP, ***not*** proceeding with negotiations and award. *See* 5 G.C.A. §5451, 2 G.A.R. §9104, 2 G.A.R. §9105(a); *See also* Fleet Services, Inc. v. Department of Administration, 2006 Guam 6, at ¶ 36.

SelectCare also complains that after the offers of TakeCare and Aetna/NetCare were received, DOA requested that they provide supplemental information.[71] This argument is without merit because "[u]nlike solicitations proceeding by virtue of an Invitation for Bids, the process for Requests for Proposals allows for flexibility, to the advantage of the procuring authority, to seek clarification of offers, and, when in the interest of the Territory, to allow for the amendment of proposals."[72] DOA had the right to conduct "discussions" and properly requested "clarification, documentation, data, or any other additional information,"[73] with the intent of determining "in greater detail such offeror's qualifications," as well as to "explore with the offeror the scope and nature of the required services, the offeror's proposed method of performance,

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[69] Agency Report, Exhibit C ("Notice of Decision"), p. 6.

[70] Agency Report, p. 9.

[71] *See* Appeal, pp. 4-5.

[72] Agency Report, p. 11.

[73] Procurement Record (Oct. 9, 2012), Bates Stamped No. 000552.

and the relative utility of alternative methods of approach," which is permitted under Guam law. 2 G.A.R. §3114(i)(1).

VIII.

SELECTCARE DOES NOT HAVE A VESTED OR CONTRACTUAL RIGHT TO THE CONTRACT

It is well-established that offerors "do not necessarily have a vested or contractual right to be awarded a state contract." The Computer Shoppe, Inc. v. Tennessee, 780 S.W.2d 729, 737 (Tenn. Ct. App., 1989); *See also* Network Technical Services, Inc. v. D.C. Data Company, 464 A.2d 133, 135 (D.C. Ct. App., 1983) (finding that there is no constitutional right to a hearing before the award and execution of a contract since no property interest exists prior to execution). This is true where statutory provisions are in place that permit agencies to "reject all bids and to cancel a solicitation without awarding a contract." The Computer Shoppe, Inc., 780 S.W.2d at 737. Courts have expressed that while competitive bidding statutes require the government to "give fair consideration" to all the proposals submitted, they do not require the government to "award a contract" where the solicitation is "defective." *See Id.* at 737.

Accordingly, SelectCare should not be heard to complain that the cancellation of the solicitation was unfair since it never had a vested or contractual right to the group health insurance contract, or any such property interest, in the first place. In this instance, Guam's procurement laws and regulations permit agencies to reject all bids, as well as permit agencies to cancel a solicitation. As stated above, a government agency is not required to award a contract, especially where the solicitation is defective. Indeed,

"[t]he government has conceded to errors in the subject solicitation."[74] These defects support DOA's cancellation of the solicitation.

CONCLUSION

The prompt and timely dismissal or denial of SelectCare's Appeal will allow the solicitation process to proceed, as well as allow Government of Guam employees and retirees to have the health care options they deserve. For that reason, as well as the others discussed herein, the OPA should dismiss or deny the instant Appeal in its entirety.

Respectfully submitted this 9th day of November, 2012.

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DAVID A. MAIR

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[74] Agency Report, Exhibit C ("Notice of Decision"), p. 11.