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	Shannon J. Taitano, Esq., Joseph Perez, Esq., & Janice Camacho, Esq. Office of the Attorney General of Guam Solicitor's Division 590 S. Marine Corps Drive, Ste. 802 Tamuning, Guam, 96913 Fax: (671) 472-2493	Pages:	8 (including cover page)
CC:	Louie J. Yanza, Esq. and Jeanette Perez TakeCare Insurance Company, Inc. 418 Chalan San Antonio Tamuning, Guam 96913 Fax: (671) 647-3551 Jeanette.perez@takecareasia.com	Date:	July 30, 2019
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Re: OPA-PA-19-005 Decision and Order RE Purchasing Agency's Motion to Dismiss

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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

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6 IN THE APPEAL OF,

) **APPEAL NO: OPA-PA-19-005**

7 TAKECARE INSURANCE COMPANY,
8 INC.,

) **DECISION AND ORDER RE
PURCHASING AGENCY'S MOTION TO
DISMISS**

9 Appellant
10
11

12 **To: Purchasing Agency:**

13 Department of Administration, Government of Guam
14 C/O Shannon J. Taitano, Esq., Joseph Perez, Esq., and Janice Camacho, Esq.
15 Office of the Attorney General of Guam, Solicitor's Division
590 South Marine Corps Drive, Suite 802
Tamuning, Guam, 96913
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16 **Appellant:**

17 TakeCare Insurance Company, Inc.
18 C/O Louie J. Yanza, Esq.
19 446 South Marine Corps Drive, Suite 201
20 Hagåtña, Guam, 96910
Facsimile: (671) 647-3551

21 **THIS MATTER**, came before the Hearing Officer for Procurement Appeals on July 18,
22 2019 for a hearing regarding the Purchasing Agency's June 14, 2019 Motion to Dismiss an
23 Appeal. The Appellant's Health Plan Administrator, ARVIN LOJO appeared on behalf of the
24 Appellant and he was represented by the Appellant's counsel of record, LOUIE J. YANZA,
25 ESQ. The Purchasing Agency was represented by its counsels of record, Assistant Attorney
26 Generals SHANNON J. TAITANO, ESQ., JOSEPH A. PEREZ, ESQ., and JANICE M.
27 CAMACHO, ESQ. After hearing the arguments of the parties and for good cause shown, the
28 Hearing Officer hereby FINDS and ORDERS the following:

1 1. The Appellant is an Interested Party. The Purchasing Agency argues that this matter
2 should be dismissed because the Appellant is not an actual or prospective bidder, offeror or
3 contractor because it is not qualified to submit an offer in response to DOA/HRD-RFP-GH-20-
4 001 (FY2020 Group Health Plan Insurance Program) (Hereafter Referred to as "RFP") because
5 the Appellant has not been able to secure an agreement with the Guam Regional Medical Clinic
6 (Hereafter Referred to as "GRMC").¹ An interested party means an actual or prospective bidder
7 offeror, or contractor, that may be aggrieved by the solicitation or award of a contract and who
8 files a protest. 2 G.A.R., Div. 4, Chap. 9, §9101(a)(1)(a). Generally, only actual or prospective
9 bidder, offeror, or contractor who may be aggrieved in connection with the method of source
10 selection, solicitation, or award of the contract, may protest to the head of a purchasing agency.
11 5 G.C.A. §5425. Hence, if a party is not an interested party as defined by Guam Procurement
12 Regulations, Guam Procurement Law bars them from filing a protest and the Hearing Officer
13 must determine whether the Appellant is an Interested Party. Here, the Appellant is not an actual
14 offeror because there is no evidence in the record in this matter that the Appellant submitted an
15 offer in response to the RFP. The Appellant is a contractor because it is one of the current
16 providers of health insurance to the Government of Guam.² The Appellant is also a prospective
17 offeror. To continue being a contractor, the Appellant would have to submit a proposal and be
18 awarded the contract for this RFP. Here, the RFP states that Phase I of the Purchasing Agency's
19 Evaluation Process would be an initial screening of the proposals submitted in response to the
20 RFP to determine, in relevant part, whether they were qualified proposals as required by 4
21 G.C.A. §4302(c).³ That statute requires, in relevant part, that beginning with the negotiations for
22 Fiscal Year 2020, the Negotiating Team shall consider only those companies or other legal
23 entities providing or applying to provide health insurance or the provision of health care to the
24 Government of Guam whose in-network coverage includes all public and private hospitals
25 operating in Guam. 4 G.C.A. §4302(c). The Appellant states that it is an intended to submit a

27 ¹ Purchasing Agency's Motion to Dismiss filed on June 14, 2019 at 2.
28 ² Agency Report filed on June 10, 2019 at 99.
³ Id., at 108.

1 response to the RFP but GRMC rejected its arrangement with another health insurance provider
2 to provide the Appellant's insureds with access to GRMC, and because the Appellant could not
3 negotiate a provider service agreement directly with GRMC.⁴

4 Based on this record, the Hearing Officer finds that the RFP's initial screening
5 provisions, cited above, would likely disqualify a proposal submitted by the Appellant because it
6 does not have in-network coverage that includes all public and private hospitals operating in
7 Guam are required by 4 G.C.A. §4302(c). This makes the Appellant an interested party as
8 defined by 2 G.A.R., Div. 4, Chap. 9, §9101(a)(1)(a) because the Appellant is an existing
9 contractor and a prospective offeror who is aggrieved by the solicitation of the contract.
10 Accordingly, the Hearing Officer finds no merit in the Purchasing Agency's argument that the
11 Appellant is not an actual or prospective bidder, offeror or contractor because it is not qualified
12 to submit an offer in response to the RFP.

13 2. The Appellant's Protest is Untimely. Protests shall be filed with the purchasing
14 agency fourteen (14) days after the protestor knows or should have known of the facts giving rise
15 thereto. 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1). Applying this standard
16 to this matter, the Office of Public Accountability (OPA) must first determine when the
17 Appellant knew or should have known of the facts giving rise to its protest. Here, the Appellant
18 is appealing the Purchasing Agency's May 21, 2019 denial of the Appellant's May 3, 2019
19 Protest.⁵ In that protest, the Appellant alleged eight arguments which were: (1) Public Law 35-2
20 "An act to add a new §4302(c)(12) to Article 3 of Chapter 4, Title 4, Guam Code Annotated,
21 relative to requiring Consideration of only those companies or entities providing health insurance
22 to the Government of Guam whose in-network coverage includes all public and private hospitals
23 operating in Guam (Hereafter Referred to as "P.L. 35-2") and the RFP are an improper
24 delegation of authority; (2) P.L. 35-2 and the RFP are inconsistent with the Organic Act of
25 Guam; (3) P.L. 35-2 and the RFP eliminate competition and deny equal protection; (3) P.L. 35-2
26 and the RFP do not create a level playing field; (4) P.L. 35-2 and the RFP will not result in the
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⁴ Notice of Appeal at 3, 12, and 11.

⁵ Notice of Appeal filed on May 23, 2019 at 1.

1 lowest cost option; (4) P.L. 35-2 and the RFP will not maximize the Government of Guam's
2 purchasing power; (5) P.L. 35-2 and the RFP discriminate against other private clinics on Guam;
3 (6) The Guam Regional Medical Center is already in-network for emergencies and sole source
4 situations.⁶ These arguments indicate that the Purchasing Agency's solicitation of services
5 through P.L. 35-2 and the RFP are what caused the Appellant to be aggrieved. The Hearing
6 Officer must determine, based on the record in this matter, when the Appellant knew or should
7 have known of P.L. 35-2 and the RFP.

8 The Appellant knew of P.L. 35-2 on or about April 3, 2019. P.L. 35-2 is the law that
9 enacted 4 G.C.A. §4302(c)(12) whether a proposal submitted a response which complies with
10 this law is made part of the RFP's initial screening process of the proposals submitted in
11 response to the RFP as set forth above. P.L. 35-2 was signed into law on March 7, 2019.⁷ On or
12 about March 14, 2019, the Appellant contacted GRMC and requested a provider services
13 agreement and a charge master rates from GRMC and the Appellant stated that it: "will consider
14 the information provided by GRMC consistent with P.L. 35-2 and other applicable statutes as
15 well as the issuance and our [Appellant's] review of the RFP."⁸ On March 29, 2019, GRMC sent
16 the Appellant the provider services agreement and rates the Appellant requested.⁹ On April 3,
17 2019, the Appellant acknowledged receipt of GRMC's provider service agreement and rates and
18 the Appellant stated that the Appellant: "will be a prospective offeror intending to respond to the
19 FY2020 Government of Guam Request for Proposal (RFP) for the GovGuam Group Health
20 Program," and "**Recently enacted Public Law 35-2 requires that all public and private
21 hospitals operating in Guam be in the networks of those applying to provide health
22 insurance to the Government of Guam (Bold Emphasis Added).**"¹⁰ Based on this record, the
23 Hearing Officer finds that the Appellant actually knew of P.L. 35-2 and its main requirement that
24 all public and private hospitals operating in Guam be in the networks of those applying to
25 provide health insurance to the Government of Guam on April 3, 2019. Therefore, the Hearing
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27 ⁶ Id., at 13-16.

28 ⁷ Id., at 24.

⁸ Id., at 29.

⁹ Id., at 35.

¹⁰ Id., at 44.

1 Officer finds that pursuant to 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1), the
2 Appellant had fourteen (14) days from April 3, 2019 to file its protest concerning P.L. 35-2 and
3 said fourteen (14) day period expired on April 17, 2019.

4 The Appellant knew or should have known of the RFP on or about April 1, 2019. The
5 Appellant actually received a copy of the RFP on April 1, 2019.¹¹ Therefore, the Hearing
6 Officer finds that pursuant to 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1), the
7 Appellant had fourteen (14) days from April 1, 2019 to file its protest concerning the RFP and
8 said fourteen (14) day period expired on April 15, 2019.

9 As set forth above, the Appellant did not file its protest concerning P.L. 35-2 and the RFP
10 until May 3, 2019. Hence, the Appellant's protest issues concerning P.L. 35-2 and the RFP were
11 filed sixteen (16) days after the April 17, 2019 deadline to file protests concerning P.L. 35-2, and
12 eighteen (18) days after the April 15, 2019 deadline to file protests concerning the RFP.

13 Accordingly, the Hearing Officer finds that the Appellant's Protest was untimely because it was
14 not filed within fourteen (14) days after the Appellant knew or should have known of the facts
15 giving rise to its protest concerning P.L. 35-2 and the RFP as required by 5 G.C.A. §5425(a) and
16 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1).

17 3. This matter is not properly before the OPA. The OPA has the power to review and
18 determine *de novo* any matter properly submitted to it. 5 G.C.A. §5703. The OPA has the
19 jurisdiction to review a purchasing agency's decision denying a protest concerning the method of
20 source selection, solicitation, or award of a contract. 5 G.C.A. §5425(e). However, such protests
21 must be filed with the purchasing agency fourteen (14) days after the protestor knows or should
22 have known of the facts giving rise thereto. 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9,
23 §9101(c)(1). Protests filed after the fourteen (14) day period shall not be considered. 2 G.A.R.
24 Div. 4, Chap. 9, §9101(c)(1). Here, as set forth above, the Appellant filed its protest after the
25 fourteen (14) day periods to do so had expired. Therefore, this matter is not properly before the
26 OPA because, in accordance with 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1), the issues being raised

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¹¹ Appellant's Acknowledgement of Receipt of RFP dated April 1, 2019, Exhibit
2, Appellant's Response to OPA Order filed on July 29, 2019.

1 in this appeal shall not be considered because they arise from the issues the Appellant raised in
2 its untimely protest to the Purchasing Agency.

3 4. The Appellant's argument that the period to file its protest began on May 1, 2019 has
4 no merit. The Appellant argues that it did not know that it would not have GRMC in its in-
5 network coverage until May 1, 2019 because that is the date that GRMC rejected its arrangement
6 with another health insurance provider to provide the Appellant's insureds with access to
7 GRMC.¹² It is a maxim of jurisprudence that acquiescence in error takes away the right of
8 objecting to it. 20 G.C.A. §15108. This maxim is applicable to this matter because the record
9 shows that the Appellant did not file a protest within fourteen (14) days after receiving the RFP
10 on April 1, 2019 or within fourteen (14) days after knowing of P.L. 35-2 on April 3, 2019
11 because it assumed that GRMC would either accept its arrangement with another health care
12 provider to give the Appellant's insured's access to GRMC or that it would succeed in
13 negotiating an agreement with GRMC that would include GRMC in the Appellant's in-network
14 coverage.¹³ This erroneous assumption does not constitute an exception to the fourteen (14) day
15 period to file a protest set forth in 5 G.C.A. §5425(a) and 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1).
16 As set forth above, the fourteen (14) day deadline to file a protest concerning the RFP expired on
17 April 15, 2019 and the fourteen (14) day deadline to file a protest concerning P.L. 35-2 expired
18 on April 17, 2019. Accordingly, the Hearing Officer finds that the Appellant's May 1, 2019
19 discovery that its assumptions concerning its inclusion of GRMC in the Appellant's in-network
20 coverage were erroneous did not extend the period to file a protest concerning the RFP beyond
21 April 15, 2019 and did not extend the period to file a protest concerning P.L. 35-2 beyond April
22 17, 2019.

23 Additionally, the Hearing Officer finds that the Appellant's remaining arguments made in
24 opposition to the Purchasing Agency's Motion to Dismiss, specifically the Appellant's
25 arguments that: (1) P.L. 35-2 is unconstitutional as applied; (2) P.L. 35-2 Subordinates the
26 Purchasing Agency's Authority to GRMC; (3) P.L. 35-2 and the RFP are Unconstitutional and
27

28 ¹² Appellant's Opposition to Purchasing Agency's Motion to Dismiss filed on
July 8, 2019 at 2.

¹³ Notice of Appeal at 11-13.

1 Inorganic; (4) P.L. 35-2 and the RFP are an Improper Delegation of Authority; (5) P.L. 35-2 and
2 the RFP deny the Appellant Due Process of Law; and (6) P.L. 35-2 and the RFP deny Equal
3 Protection, are merely extensions or repetitions of the arguments or issues the Appellant raised in
4 its untimely appeal. Pursuant to 2 G.A.R. Div. 4, Chap. 9, §9101(c)(1), the Hearing Officer will
5 not consider these arguments here because they were not raised in a timely protest.

6 5. This matter is not properly before the OPA due to the untimely filing of the
7 Appellant's May 3, 2019 protest which is the subject of this appeal as set forth above.
8 Accordingly, the OPA lacks the jurisdiction to hear it and this matter is hereby DISMISSED.

9 6. The August 12, 2019 Hearing re the Appellant's Appeal and all ancillary filing dates
10 for hearing materials are hereby VACATED.

11 7. The Purchasing Agency's Notice of Substantial Interests filed on July 11, 2019 shall
12 not be given any further consideration because the DISMISSAL of this matter makes said
13 determination MOOT.

14 This is a Final Administrative Decision. The Parties are hereby informed of their right to
15 appeal from a Decision by the OPA to the Superior Court of Guam, in accordance with Part D of
16 Article 9, of 5 G.C.A. within fourteen (14) days after receipt of a Final Administrative Decision.
17 5 G.C.A. §5481(a).

18 A copy of this Decision shall be provided to the parties and their respective attorneys, in
19 accordance with 5 G.C.A. §5702, and shall be made available for review on the OPA Website
20 www.guamopa.com.

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22 **DATED** this 30th day of July, 2019.

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26 ANTHONY R. CAMACHO, ESQ.
27 HEARING OFFICER
28

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