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	Ms. Shannon Taitano Mr. Joseph Perez Assistant Attorney Generals C/O Marie Cruz Office of the Attorney General of Guam 590 S. Marine Corps Drive, Suite 706 Tamuning, Guam, 96913 Fax: (671) 472-2493	Pages:	8 (including cover page)
CC:	Mr. David Mair, Esq. Attorney for TakeCare Insurance Company, Inc. Mair & Mair, Attorneys at Law 238 Archbishop Flores St., Suite 801 Hagatna, Guam 96910 Fax: (671) 477-5206	Date:	October 30, 2018
	Arvin Lojo TakeCare Insurance Company, Inc. Baltej Pavilion, Suite 308 415 Chalan San Antonio Tamuning, Guam 96913 Fax: (671) 647-3559 arvin.lojo@takecareasia.com	Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

Re: OPA-PA-18-003 and 18-005 Decision and Order RE Appellant's Motion to Cancel the RFP

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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

IN THE APPEAL OF,

TAKECARE INSURANCE COMPANY,
INC.,

Appellant

APPEAL NO: OPA-PA-18-003/005

**DECISION AND ORDER RE
APPELLANT’S MOTION TO CANCEL
THE RFP**

To: **Purchasing Agency:**
Department of Administration, Government of Guam
C/O Shannon Taitano, Esq. & Joseph Perez, Esq.
Office of the Attorney General of Guam
Solicitor’s Division
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Appellant:
TakeCare Insurance Company, Inc.
C/O Dave A. Mair, Esq.
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THIS MATTER, came before the Hearing Officer on July 9, 2018 for a hearing for the Appellant’s June 15, 2018 Motion to Cancel the RFP. ARVIN LOJO, Health Planning Administrator, appeared on behalf of the Appellant and was represented by its counsel of record, DAVID A. MAIR, ESQ. The Purchasing Agency was not present and was represented by its counsels of record, SHANNON TAITANO, ESQ., and JOSEPH PEREZ, ESQ. After reviewing the record in this matter and after hearing the arguments of the Parties, the Hearing Officer hereby FINDS and ORDERS the following:

1 1. As a preliminary matter, the Hearing Officer must determine whether the issues raised in
2 the Appellant's Motion are properly before the Office of Public Accountability (Hereafter
3 Referred to as: "OPA"). Generally, The Public Auditor has the power to review *de novo* any
4 matter properly submitted to him. 5 G.C.A. §5703. Further, the Public Auditor has the
5 jurisdiction to review a purchasing agency's decision denying a protest concerning the method of
6 source selection, solicitation, or award of a contract. 5 G.C.A. §5425(e).¹ Hence, the Hearing
7 Officer finds that to be properly before the OPA, the issues raised in the Appellant's Motion to
8 Cancel the RFP must have been raised in its protest, or in the Purchasing Agency's decision
9 denying the protest. Otherwise, the OPA does not have the jurisdiction to review them. Here,
10 the appeal in OPA-PA-18-003 concerns the Purchasing Agency's April 18, 2018 Protest
11 concerning two (2) main issues: (1) DOA/HRD-RFP-GHI-19-001 (Group Health Insurance
12 Program) (Hereafter referred to as "RFP")'s requirement that, to be considered as the exclusive
13 provider, an offeror must have both Guam Regional Medical City (Hereafter Referred to as
14 "GRCM") and the Guam Memorial Hospital Authority (Hereafter Referred to as GMHA) in its
15 provider network violates 4 G.C.A. §4302(f), §4301(a), §4302(c)(2), 5 G.C.A. §5001(4) and (6),
16 and 2 G.A.R., Div. 4, Chap. 2, §2201(3) and 2 G.A.R., Div. 4, Chap. 1, §1102(5), and 5 G.C.A.
17 §5265, and denies due process, and constitutes an improper delegation of executive authority;
18 and (2) The Purchasing Agency's Negotiating Team's (Hereafter Referred to as: "NT") failed to
19 adopt rules of procedure in violation of 4 G.C.A. §4302(c) and §4301(c), and the NT's creation
20 of the RFP's requirement that, to be considered as the exclusive provider, an offeror must have
21 both GRCM and GMHA in its provider network constitutes an *ultra vires* act.
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28 ¹ On September 14, 2018, the Public Auditor recused himself from this matter and appointed the Hearing Officer to Preside over this appeal pursuant to 2 G.A.R., Div. 4, Chap. 12, §12116.

1 On May 2, 2018, the Purchasing Agency denied the Appellant's Protest on the following
2 grounds; (1) The inclusion of GRMC in the provider network is necessary because it is located in
3 the most populated area of Guam, because GRMC's inclusion would increase its use by the
4 insured members who live near it, because GRMC offered services not provided by GMHA, and
5 to avoid the limited availability of bed space at GMHA; (2) The inclusion of GRMC in the
6 provider network is authorized by 4 G.C.A. §4302; (3) The lowest cost option will be assessed
7 by the NT among the qualified proposals submitted in response to the solicitation as authorized
8 by Public Law 34-83; (4) The inclusion of GRMC in the provider network does not violate Guan
9 law; (5) There is no legal impediment preventing the inclusion of GRMC in the provider
10 network; and (6) The NT rules of procedure were enacted by P.L. 32-083 and the RFP's
11 solicitation is governed by Public Law 32-83, 4 G.C.A. §4301 *et.seq.*, and Guam Procurement
12 Laws and Regulations. Based on the foregoing, the Hearing Officer finds that none of the issues
13 raised in the Appellant's Motion to Cancel the RFP were raised in Appellant's protest or the
14 Purchasing Agency's denial of that protest, which is the subject of OPA-PA-18-003.
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18 In fact, the Purchasing Agency raises this issue in its opposition to the Appellant's
19 motion. The Purchasing Agency states that the issues raised in the Appellant's Motion to Cancel
20 the RFP were raised in the Appellant's second protest which, at the time the Purchasing Agency
21 prepared the aforementioned opposition, was still pending before the Purchasing Agency, and
22 that these issues should be addressed administratively.² Since raising these issues in its
23 opposition, the Purchasing Agency has in fact completed its administrative review of the issues
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28 ² Page 5, Purchasing Agency's Opposition to Appellant's Motion to Cancel the RFP filed in OPA-PA-18-003 on June 29, 2018 (Hereafter referred to as "Purchasing Agency's Opposition").

1 raised in the Appellant's second protest by denying it on July 26 and 27, 2018.³ Further, the
2 Appellant filed its appeal to the OPA concerning the Purchasing Agency's denial of its second
3 protest on August 1, 2018 as OPA-PA-18-005. Finally, on September 28, 2018, the OPA
4 consolidated the Appellant's appeals in OPA-PA-18-003 and OPA-PA-18-005.
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6 Accordingly, the Hearing Officer finds that the issues raised in the Appellant's Motion to
7 Cancel the RFP are properly before the OPA despite not being part of the Appellant's April 18,
8 2018 Protest or the Purchasing Agency's denial of that protest, because they are properly before
9 the OPA in OPA-PA-18-005 which was consolidated with OPA-PA-18-003.
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11 2. To decide the Appellant's motion, the Hearing Officer must now determine whether
12 any of the issues it raises are moot. The Appellant requests that the Hearing Officer determine
13 whether the procedures used by the Purchasing Agency and the NT to develop and approve the
14 RFP violated Guam law and that if such a finding is made the RFP must be cancelled pursuant to
15 5 G.C.A §5451.⁴ That statute merely states that if, prior to award it is determined that a
16 solicitation or proposed award of a contract is in violation of law, then the solicitation or
17 proposed award shall be cancelled or revised to comply with the law. 5 G.C.A. §5451.
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19 However, the Appellant cites no statutory authority for its premise that the RFP must be
20 cancelled prior to holding a hearing in this matter. In an appeal of a protest, the parties shall
21 either request a hearing in writing or waive their right to a hearing and submit the case on the
22 record and without a hearing. 2 G.A.R., Div. 4, Chap. 12, §12108(a). If a party requests a
23 hearing, a hearing shall be held at the OPA. 2 G.A.R., Div. 4, Chap. 12, §12108(b). Here, the
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27 ³ Responses to Protest dated July 26, 2018, and July 27, 2018, attached to
Appellant's Notice of Appeal filed on August 1, 2018.

28 ⁴ Page 1, Appellant's Motion to Cancel the RFP filed on June 15, 2018 in OPA-
PA-18-003 (Hereafter Referred to as "Appellant's Motion").

1 Appellant has requested a hearing in both OPA-PA-18-003 and in OPA-PA-18-005.⁵ Therefore,
2 a hearing must be held unless the parties agree to waive their right to a hearing and submit the
3 case on the record pursuant to 2 G.A.R., Div. 4, Chap. 12, §12108(a). Here, the Appellant has
4 not agreed to waive its right to a hearing and submit the case on record which requires the OPA
5 to hold a hearing in this matter.
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7 Nevertheless, the Hearing Officer can review the issues raised in Appellant's Motion to
8 determine whether any of them are moot. Generally, a hearing officer has the authority to settle,
9 simplify, or fix the issues in a proceeding, or to consider other matters that may aid in the
10 expeditious disposition of a proceeding either by consent of the parties or upon such officer's
11 own motion. 2 G.A.R., Div. 4, Chap. 12, §12109(a). An appellate tribunal has a duty to decide
12 actual controversies by a judgment which can be carried into effect, and not to give opinions on
13 moot questions, or abstract propositions, or to declare principles of rules of law which cannot
14 affect the matter in issue in the case before it. *In Re Guardianship of Ulloa*, 2014 Guam 32, ¶24.
15 A claim is moot when issues no longer live or the parties lack a legally cognizable legal interest
16 in the outcome. *Id.*, at ¶25. Accordingly, an issue should be dismissed as moot when, by virtue
17 of an intervening event, the appellate tribunal cannot grant effective relief whatever in favor of
18 the appellant. *Id.* Further, a case can become moot at any stage of litigation. *Id.*, at ¶26. On the
19 other hand, a case is not moot if the appellate tribunal has the ability to undo the effects of
20 conduct that was not prevented by the time of decision. *Sinanap, et.al., v. Cyfred Ltd., et.al.*,
21 2009 Guam 13, ¶21. Finally, even if a mootness issue is not raised by the parties, an appellate
22 tribunal is required to raise it *sua sponte* to examine jurisdictional issues. *Id.*, at ¶27. Here, if an
23 issue is moot it is not properly before the OPA. The Public Auditor's jurisdiction in this matter
24 is based on his authority to review appeals of a purchasing agency's decision denying a
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28 ⁵ See Appellant's Hearing Request attached to its Notice of Appeal filed on
filed on May 4, 2018 in OPA-PA-18-003 and its hearing Request filed on August
1, 2018 in OPA-PA-18-005.

1 procurement protest. 5 G.C.A. §5425(e) and 2 G.A.R. Div. 4, Chap. 12, §12112. In exercising
2 this jurisdiction, the Public Auditor shall determine whether a decision on the protest concerning
3 the method of solicitation, solicitation, or award of the contract, or entitlement to costs, is in
4 accordance with the statutes, regulations, and the terms and conditions of the solicitation. 2
5 G.A.R. Div. 4, Chap. 12, §12112. The Public Auditor shall have the power to review and
6 determine *de novo* any such appeals properly submitted to him. 5 G.C.A. §5703 and 2 G.A.R.
7 Div. 4, Chap. 12, §12103(a). Accordingly, the Hearing Officer finds that if an issue is moot due
8 to the Purchasing Agency's, actions, admissions, or concessions, it would not properly be before
9 the OPA because there would no longer be a need to review the issue *de novo*. To resolve the
10 Appellant's Motion, the Hearing Officer must determine whether any of the issues it raises are
11 now moot.

12 The issue of whether the Governor of Guam violated the ethical standards set forth in 5
13 G.C.A. §5628(a)(1) and §5601(g) by appointing Roy Adonay as a NT member and the issue of
14 whether Adonay had a conflict of interest are not moot.⁶ Albeit the Purchasing Agency agrees
15 that the Governor of Guam appointed Roy Adonay as a member of the NT, it argues that no
16 violation of law occurred because Adonay was replaced prior to participating in the RFP
17 process.⁷ Therefore, the parties may submit evidence and arguments in support of or in
18 opposition to these issues at the hearing in this matter.

19 The issue of whether the procurement record is complete is not moot. Specifically, the
20 Appellant argues that the procurement record is devoid of a voting sheet, an investigation
21 concerning whether someone on the NT contacted a party of interest concerning the draft RFP,
22 and a determination of need.⁸ However, the Purchasing Agency argues that voting sheets exist,
23 but, pursuant to Section IV, P.L. 32-083, they are not public records that it can disclose, the
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27 ⁶ Page 3, Appellant's Motion.

28 ⁷ Page 2, Purchasing Agency's Opposition.

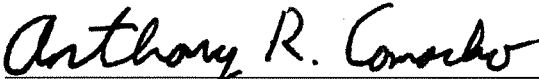
⁸ Pages 5-7, Appellant's Motion.

1 Purchasing Agency argues that it is not the proper time to conduct an investigation concerning
2 whether someone on the NT contacted a party of interest concerning the draft RFP, and it argues
3 that it submitted a determination of need.⁹ Therefore, the parties may submit evidence and
4 arguments in support of or in opposition to these issues at the hearing in this matter.
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6 Based on the foregoing, the Hearing Officer finds that the issues raised in the Appellant's
7 motion are not moot because they are being disputed by the Purchasing Agency. Pursuant to 2
8 G.A.R., Div. 4, Chap. 12, §12108(b) and in accordance with the Appellant's request for a
9 hearing, the issue raised the in the Appellant's motion shall be decided at the hearing in this
10 matter.
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12 3. Accordingly, the Appellant's Motion to Cancel the RFP is hereby DENIED.

13 **SO ORDERED** this 29th day of October, 2018 by:
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17 ANTHONY R. CAMACHO, ESQ.
18 Hearing Officer
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28 ⁹ Pages 3-5, Appellant's Opposition.

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CC:	Ms. Shannon Taitano Mr. Joseph Perez Assistant Attorney Generals C/O Marie Cruz Office of the Attorney General of Guam 590 S. Marine Corps Drive, Suite 706 Tamuning, Guam, 96913 Fax: (671) 472-2493	Pages:	8 (including cover page)
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	Arvin Lojo TakeCare Insurance Company, Inc. Baitoj Pavilion, Suite 308 415 Chalan San Antonio Tamuning, Guam 96913 Fax: (671) 647-3559 arvin.lojo@takecareasia.com	Phone: Fax:	(671) 475-0390 x. 208 (671) 472-7951

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