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PROCUREMENT APPEALS
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**OFFICE OF PUBLIC ACCOUNTABILITY
PROCUREMENT APPEALS**

IN THE APPEAL OF)	APPEAL NO. OPA-PA-18-003
)	APPEAL NO. OPA-PA-18-005
TAKECARE INSURANCE COMPANY,)	
INC.,)	TAKECARE'S MOTION IN
)	LIMINE
Appellant)	
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INTRODUCTION

On June 29, 2018 the Negotiating Team (hereinafter “NT”) and the Department of Administration (hereinafter “DOA”) argued that as a consequence of Rule IV of Public Law 32-83 “no information contained in proposals, meetings or negotiations can be divulged to any person outside the Negotiating Team.” DOA Brief 6/29/18 at 2 (Emphasis Added). The Hearing Officer agreed and on July 18, 2018, ruled that due to NT Rule IV neither the NT nor DOA could “divulge information contained in the (Negotiating Team) meetings to persons outside the negotiating team.” 7/18/18 Order at p. 6, ll. 25 to p. 7, ll. 3.

ORIGINAL

It is axiomatic that if DOA and the NT cannot divulge events taking place in a NT meeting, then they cannot divulge the reasons discussed at a NT meeting for the approval the RFP in dispute. To do so would be divulging matters taking place in a NT meeting, which, according to the Hearing Officer, is prohibited by NT Rule IV.

The purpose of this motion in limine is to prevent the NT and DOA from taking inconsistent positions and trying to have it both ways. Namely, they cannot maintain that events in NT meetings cannot be “divulged,” and, at the same time, divulge the alleged “reasons” the NT agreed to include GRMC as a minimum requirement for offerors on the government health insurance plan.

DISCUSSION

I. The OPA’s Authority to Rule on Procedural Matters.

The Office of Public Accountability (hereinafter “OPA”) has jurisdiction to “simplify” appeals and “consider matters that may aid in the expeditious disposition of the proceeding . . .” OPA Rule 12109(a). The OPA also has jurisdiction to “[r]ule on motions, and other procedural items on matters pending” before it. OPA Rule 12109(d).

II. The Purpose of a Motion in Limine.

A motion in limine is a motion to exclude anticipated evidence before it is offered. Verburg v. Weltman, Weinberg & Reis, 295 F.Supp.3d 771, 773 (W.D. Mich. 2018). Black’s Law Dictionary defines a motion in limine as “[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial.” *Motion in Limine*, *Black’s Law Dictionary* (10th 2014).

III. The Order of the Hearing Officer.

In an effort to discover the reasons that the NT decided to include GRMC as a minimum qualification of offerors for government health insurance, TakeCare sought in a Motion to Compel to obtain the evidence (audio records and records) of the NT meeting(s) approving the RFP in dispute. TakeCare's Motion to Compel 6/15/18 at 3-7 and TakeCare Reply Brief 6/15/18 at 2-3. TakeCare maintained in its Motion to Compel that it had to have access to the evidence relating to that issue in order to determine why the NT decided to require GRMC as a minimum qualification.

TakeCare noted in its Motion to Compel that NT Rule IV only references the words "confidential" and "confidentiality" in two sentences, both of which refer to "proposals" and "negotiations," and not merely "meetings." Furthermore, NT Rule IV does not require NT members to sign a Confidentiality Agreement until "prior to . . . opening proposals," which takes place after an RFP has already been approved. TakeCare respectfully submitted that the intent of NT Rule IV was only to make confidential discussions in meetings relating to proposals and negotiations relating to proposals. NT Rule IV was never intended to shield from disclosure the reasons approving an RFP for publication and there is no public policy reason for doing so.

The Hearing Officer disagreed with TakeCare. According to the Hearing Officer, NT Rule IV does not allow the NT or DOA to "divulge information contained in the (Negotiating Team) meetings to persons outside the negotiating team." 7/18/18 Order at p. 6, ll. 25 to p. 7, ll. 3.¹

¹ TakeCare reserves its right to challenge the ruling of the Hearing Officer at the appropriate time and place.

IV. DOA and NT Cannot Disclose The Reasons for Approving the RFP.

It would be inherently unjust to for the OPA to bar TakeCare from reviewing the actual evidence relating of the approval of the RFP, and, at the same time, allow DOA and the NT to present evidence of the alleged “reasons” the NT elected to include GRMC as a minimum qualification in the RFP. Doing so would deny TakeCare procedural and substantive due process by handcuffing its ability to cross-examine the DOA and NT witnesses. For example, if DOA and the NT argue that the GRMC was included as a minimum requirement for reason “X,” without examining the actual evidence of what occurred at a NT meeting, TakeCare will have no way of determining whether reason “X” was considered or even discussed at a NT meeting.

V. Redacted Minutes of NT Meetings Are Not Sufficient.

DOA and the NT apparently recognize that their interpretation of NT Rule IV is problematic because at the hearing on TakeCare’s Motion to Compel on July 9, 2018, counsel for DOA suggested that they be allowed to provide “redacted minutes” of NT meetings, instead of the actual audio recordings. This solution is constitutionally inadequate for several reasons.

First, providing minutes of NT meetings is contrary to the interpretation of NT Rule IV insisted upon DOA and the NT. Second, redacted NT minutes are second-hand incomplete hearsay accounts of what was said at a NT meeting. Third, the “best evidence” of what occurred at a NT meeting are the audio recordings, not redacted minutes. Fourth, and most importantly, if the disclosure of NT minutes relating to GRMC do not violate Rule IV, then disclosure of the audio records of NT meetings relating to GRMC should also not violate Rule IV.

CONCLUSION

The Hearing Officer has ruled that neither DOA nor the NT can “divulge” information relating to NT meetings. As a consequence, neither DOA nor the NT can be allowed to present any reasons why the NT decided to include GRMC as a minimum requirement.

Respectfully submitted this 12th day of October, 2018.

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By: 

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