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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** **APPEAL NO. OPA-PA-18-005** **TAKECARE'S REPLY IN SUPPORT OF MOTION IN LIMINE**

INTRODUCTION

The Department of Administration (hereinafter "DOA") and the Negotiating Team (hereinafter "NT") have stated plainly in their Opposition Brief that "no information contained in proposals, meetings or negotiations can be divulged to any person outside the Negotiating Team." DOA Brief, 10/19/18, at 1 (Emphasis added). Inasmuch as DOA and the NT by their own admission cannot disclose matters taking place in NT meetings, TakeCare Insurance Company, Inc. (hereinafter "TakeCare") respectfully re-asserts in this

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Reply that they also cannot disclose the alleged "reasons" the NT agreed in a meeting to include GRMC as a minimum requirement.[1]

DISCUSSION

I. DOA and the NT Do Not Dispute the Material Issues in this Motion.

The Opposition Brief of DOA and the NT is notable for what it does not dispute. For example, neither DOA nor the NT dispute that the OPA and Hearing Officer have jurisdiction to "[r]ule on motions, and other procedural items on matters pending" before it. OPA Rule 12109(d). They likewise do not dispute that the Hearing Officer has authority to "limit evidence" and "limit lines of questioning or testimony." OPA Rule 12109(f). Similarly, DOA and the NT do not dispute that a motion in limine can be used to exclude anticipated evidence before it is offered. Verburg v. Weltman, Weinberg & Reis, 295 F.Supp.3d 771, 773 (W.D. Mich. 2018). DOA and the NT also agree that "no information contained in proposals, meetings or negotiations can be divulged to any person outside the Negotiating Team." DOA Opposition Brief 10/19/18 at 1 (Emphasis added).

II. The Future Disclosure of Information is Not Relevant.

Unable to dispute the material issues in this Motion, DOA and the NT instead argue that they should nevertheless be allowed to present the alleged "reasons" that the NT agreed to include GRMC as a minimum requirement, without providing any proof of that fact, and that TakeCare is not *really* being prejudiced because at some unknown point in the future "[m]eeting information to support the determination to request GRMC as a

[1] Given the quickly approaching trial date, and the simplicity of evidentiary matter in dispute in the Motion in Limine, TakeCare waives its right to request oral argument on this motion.

minimum requirement will be made available as provided in Guam law." DOA Brief, 10/19/18, at 2.

DOA and the NT do not specify: (a) the law that purportedly allows for such future disclosure; (b) when the future disclosure may take place; (c) whether the future disclosure will take place prior to the hearing on November 13, 2018; or, (d) what information will actually be disclosed in the future.

Unfortunately for DOA and the NT, the issue before the Hearing Officer is not what evidence may be disclosed at some unknown point in the future. Rather, the issue before the Hearing Officer is what evidence DOA and the NT will be allowed to present at the hearing scheduled to commence on November 13, 2018.

Based on the admission of DOA and the NT in its Opposition Brief, "no information contained in proposals, meetings or negotiations can be divulged to any person outside the Negotiating Team." DOA Opposition Brief, 10/19/18, at 1 (Emphasis added). Hence, DOA and the NT cannot disclose the "reasons" the NT agreed in a meeting to require GRMC as a minimum requirement.

III. The Constitutional Argument of DOA and the NT Lacks Merit.

DOA and the NT also argue that TakeCare is not being denied due process if they present evidence of the alleged "reasons" the NT decided to include GRMC as a minimum requirement, without providing any actual proof of that fact, because after the appeal is over, and the contract is awarded, the events taking place in NT meetings will be disclosed, and TakeCare "will have 14 days" thereafter to file another protest. Not surprisingly, DOA and the NT have not cited any legal authority for the proposition that a party can withhold

evidentiary proof, win the case, and then satisfy due process requirements by providing the evidence to an opponent after the case is over.

"The essential requirements of due process are notice and an opportunity to respond." Cleveland Bd. of Educ. Loudermill, 105 S. Ct. 1487, 1489 (1985). Should DOA and the NT be allowed to present evidence of the alleged "reasons" they decided to include GRMC as a minimum requirement, TakeCare cannot adequately "respond" without being able to examine whether those reasons were ever actually considered during NT meetings. Due process requires that if DOA and the NT present evidence of the alleged "reasons" the NT agreed to include GRMC as a minimum requirement, in order to respond to this evidence TakeCare must be allowed to access to the evidence of what occurred during NT meetings where the inclusion of GRMC as a minimum requirement was actually discussed.

CONCLUSION

DOA and the NT agree that they cannot "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. To do otherwise will deny TakeCare of procedural and substantive due process of law.

Respectfully submitted this 26th day of October, 2018.

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By: _____
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