



2011 DEC 20 P 12: 05

OFFICE OF ADMINISTRATIVE HEARINGS HEARINGS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Protest of) PCH-2011-8
INFORMEDRX, INC.,) PCH-2011-9
Petitioner,) PCH-2011-13
) [CONSOLIDATED CASES]
v.) ORDER AMENDING CAPTION
) REGARDING DECISION ISSUED ON
STATE OF HAWAII DEPARTMENT OF BUDGET) DECEMBER 16, 2011
& FINANCE EMPLOYER-UNION HEALTH)
BENEFITS TRUST FUND;)
SANDRA L. YAHIRO, in her capacity as the)
ASSISTANT ADMINISTRATOR AND)
PROCUREMENT OFFICER of the STATE OF)
HAWAII EMPLOYER-UNION HEALTH)
BENEFITS TRUST FUND; BARBARA CORIELL,)
in her capacity as the ADMINISTRATOR of the)
STATE OF)
HAWAII EMPLOYER-UNION HEALTH)
BENEFITS TRUST FUND,)
Respondents,)
and)
CAREMARKPCS HEALTH, L.L.C.,)
Intervenor.)

ORDER AMENDING CAPTION REGARDING DECISION ISSUED ON DECEMBER 16, 2011

The caption in the Decision dated December 16, 2011 in the above-referenced matter should read Findings of Fact, Conclusions of Law and Decision in case numbers PCH-2011-8; PCH-2011-9 and PCH-2011-13.

DATED: Honolulu, Hawaii, DEC 20 2011

for David H. Burns
HONORABLE JAMES S. BURNS (RET.)
Special Hearings Officer
Department of Commerce and Consumer Affairs



DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2011 DEC 16 P 2:26

HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the Protest of	)	PCH-2011-8
)	
INFORMEDRX, INC.,)	
	)	INTERVENOR CAREMARKPCS
Petitioner,	)	HEALTH, L.L.C.'S PROPOSED
	)	FINDINGS OF FACT, CONCLUSIONS
v.	)	OF LAW, AND DECISION
)	
STATE OF HAWAII DEPARTMENT OF)	
BUDGET & FINANCE EMPLOYER-UNION)	
HEALTH BENEFITS TRUST FUND;	)	Hearing Dates:
SANDRA L. YAHIRO, in her capacity as the	)	September 21, 22, 23, 26, 27 and
ASSISTANT ADMINISTRATOR AND	)	28, 2011
PROCUREMENT OFFICER of the STATE OF)	
HAWAII EMPLOYER-UNION HEALTH	)	Hearing Location:
BENEFITS TRUST FUND; BARBARA	)	Office of Administrative Hearings
CORIELL, in her capacity as the	)	Department of Commerce and
ADMINISTRATOR of the STATE OF	)	Consumer Affairs
HAWAII EMPLOYER-UNION HEALTH	)	335 Merchant Street, Suite 100
BENEFITS TRUST FUND,	)	Honolulu, Hawaii 96813
)	
Respondents,	)	Special Hearings Officer:
	)	Honorable James S. Burns (Ret.)
and)	
)	
CAREMARKPCS HEALTH, L.L.C.,)	
)	
Intervenor.)	
)	

In the Matter of the Protest of	)	PCH-2011-9
)	
INFORMEDRX, INC.,)	
)	
Petitioner,)	
)	
v.)	
)	
STATE OF HAWAII DEPARTMENT OF)	
BUDGET & FINANCE EMPLOYER-UNION)	
HEALTH BENEFITS TRUST FUND;)	
SANDRA L. YAHIRO, in her capacity as the)	
ASSISTANT ADMINISTRATOR AND)	
PROCUREMENT OFFICER of the STATE OF)	
HAWAII EMPLOYER-UNION HEALTH)	
BENEFITS TRUST FUND; BARBARA)	
CORIELL, in her capacity as the)	
ADMINISTRATOR of the STATE OF)	
HAWAII EMPLOYER-UNION HEALTH)	
BENEFITS TRUST FUND,)	
)	
Respondents,)	
)	
and)	
)	
CAREMARKPCS HEALTH, L.L.C.,)	
)	
Intervenor.)	
_____)	

DECISION

Various Pharmacy Benefit Management organizations responded to the request by the State of Hawaii Employer-Union Health Benefits Trust Fund (EUTF) for proposals to furnish pharmacy benefit management (PBM) services (1) for a plan covering the State and Counties' Employer-Group Waiver Plan ("EGWP") retirees (i.e., medicare-eligible retirees), and (2) for a plan covering the State and counties' non-EGWP employees (i.e., active employees and non-medicare-eligible retirees).

On July 19, 2011, EUTF selected CaremarkPCS, LLC (CVS Caremark) as the awardee for both plans. One of the unsuccessful offerors, InformedRx, Inc. (InformedRx), protests the award.

The award of the contract to CVS Caremark for the non-EGWP plan is affirmed.

The award of the contract to CVS Caremark for the EGWP plan is vacated. This matter is remanded back to the EUTF to take the actions specified in this decision. After the EUTF has taken these actions, the EUTF shall recalculate the award of points and, based on the results, award the contract in writing.

INTRODUCTION

This is a proceeding pursuant to the following sections of the Hawaii Revised Statutes (HRS).

HRS § 103D-701. Authority to resolve protested solicitations and awards

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

HRS § 103D-709. Administrative proceedings for review

(a) The several hearings officers appointed by the director of the department of commerce and consumer affairs pursuant to section 26-9(f) shall have jurisdiction to review and determine de novo, any request from any bidder, offeror, contractor, or person aggrieved under section 103D-106, or governmental body aggrieved by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under section 103D-310, 103D-701, or 103D-702.

(b) The hearings officers shall have power to issue subpoenas, administer oaths, hear testimony, find facts, make conclusions of law, and issue a written decision. that shall be final and conclusive unless a person or governmental body adversely affected by the decision commences an appeal in the circuit court of the circuit where the case or controversy arises under section 103D-710.

(c) The party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. All parties to the proceeding shall be afforded an opportunity to present oral or documentary evidence, conduct cross-examination as may be required, and argument on all issues involved. Fact finding under section 91-10 shall apply.

. . .

(g) No action shall be taken on a solicitation or an award of a contract while a proceeding is pending, if the procurement was previously stayed under section 103D-701(f).

(h) The hearings officer shall decide whether the determinations of the chief procurement officer or the chief procurement officer's designee were in accordance with the Constitution, statutes, rules, and the terms and conditions of the solicitation or contract, and shall order such relief as may be appropriate in accordance with this chapter.

. . .

RELEVANT EVENTS

1. On December 6, 2010, the Chief Procurement Officer of the State of Hawaii issued a blanket procurement delegation to the heads of the purchasing agencies, via Procurement Delegation No. 2010-01, which is a public document available at the State Procurement Office's website. Ex. EUTF-S; <http://www.spo.hawaii.gov/procurement-delegation/ProcDelegation2010-01.pdf>.

2. The State of Hawaii's Director of Budget and Finance, the head of the purchasing agency to which the EUTF is administratively attached, further delegated procurement authority to Sandra L. Yahiro (Yahiro) and the EUTF Board of Trustees via form SPO-036. See J-20 at 6; EUTF Exs. A and S.

3. At its March 30, 2011 meeting, the EUTF Board approved the RFP for Pharmacy Benefit Management Services ((PBMS) with Yahiro as Procurement Officer. See Ex. EUTF-A.

4. The Evaluation Committee members were appointed, in writing. See Ex. EUTF-B. The document appointing the Evaluation Committee members, Ex. EUTF-B, was not initially placed in the contract file, but was so placed in the contract file after InformedRx raised the issue.

5. The EUTF provided InformedRx with a list of the Evaluation Committee members at its August 1, 2011 debriefing. See Ex. J-7.

6. Celeste Nip, a Union member of the EUTF Board of Trustees, recused herself in conformity with a recommendation by the State Ethics Commission. Ex. J-11.

7. On April 8, 2011, working with its consultant, the Segal Company (Segal), the EUTF issued Request for Proposal (“RFP”) 11-05, Proposal to Furnish Pharmacy Benefit Management Services, seeking offerors interested in furnishing pharmacy benefit management services to the EUTF. Ex. J-1, J-2.

8. RFP 11-05 included in its scope Pharmacy Benefit Management (“PBM) services for plans covering the State and Counties’ Employer-Group Waiver Plan (“EGWP”) retirees (i.e., medicare-eligible retirees), and the State and counties' non-EGWP employees (i.e., active employees and non-medicare-eligible retirees).

9. RFP 11-06 states:

3. CONTRACT PERIOD: The active plans are on a fiscal year basis of July - June while the retiree plans are on a calendar year basis. The term of any contracts resulting from this RFP shall commence on January 1, 2012 and will continue through June 30, 2013 for the Active plans and January 1, 2012 - December 31, 2012 for the retiree plans. At its sole discretion, the EUTF shall have (a) two separate options to extend any such contracts for additional one (1) year periods, i.e., one option covering July 1, 2013 to June 30, 2014, and one option covering July 1, 2014 to June 30, 2015 for active plans and (b) two one year contract extension on the retiree plans for calendar years 2013 and 2014.

10. In part, the procurement timetable for RFP No. 11-05 was as follows:

Pre-Proposer Conference April 18, 2011

Proposer Questions due	April 19, 2011
Complete Proposal Due	4:00 p.m., HST, Monday, May 9, 2011

11. RFPs 11-05 and 11-06 list Yahiro as the Procurement Officer. See Ex. J-1 p.IRX001724; J-4 p. EUTF001156.

12. On Monday, May 9, 2011, prior to 4:00 p.m., Yahiro decided to cancel RFP 11-05 and to issue RFP 11-06. The cancellation document was executed on May 13, 2011.

13. On May 13, 2011, Yahiro informed all proposers in writing, that in consultation with counsel, she had determined that RFP 11-05 contained a process flaw due to an ambiguity in the submission process instructions. See Ex. J-3. As a result, Yahiro cancelled RFP No. 11-05 and informed proposers that they would need to respond to RFP No. 11-06. Id.

14. Later that same day on May 13, 2011, Yahiro issued RFP No. 11-06. See Ex. J-4. RFP No. 11-06 had a submission deadline of May 27, 2011 at 4:00 p.m. Id.

15. There is no difference between the substance of RFP 11-05 and the substance of RFP 11-06.

16. There is no difference between the substance of the proposal CVS submitted in response to RFP 11-05 and the substance of the proposal CVS submitted in response to RFP 11-06

17. At the May 18, 2011, EUTF Board of Trustees meeting, EUTF Administrator Barbara Coriell (Coriell) explained that RFP No. 11-05 had been cancelled due to an ambiguity in the filing instructions. See Ex. EUTF-O. The EUTF Board of Trustees affirmed that Yahiro was authorized to cancel RFP No. 11-05 and issue RFP No. 11-06,

18. The EUTF's records indicate the proposers that submitted responses to RFP No. 11-06, including CVS Caremark and InformedRx. See Ex. EUTF-C.

19. Following receipt of proposals, the Evaluation Committee scored proposals to identify priority-listed offerors. See 9/22/11 Tr. (Vol. 2) at 220:11-13.

20. The Evaluation Committee interviewed the priority-listed offerors.

21. The Evaluation Committee requested Best and Final Offers. Id. at 220:17-21.

22. Each priority-listed offerors, including InformedRx, submitted its Best and Final Offer, including written answers to questions the Evaluation Committee had raised during the interview. See Ex. I-7A.

23. The points to be applied in the evaluation appear on page 18 of RFP No. 11-06. See J-4 at EUTF001171. For EGWP and NON-EGWP, the categories and the maximum points assigned to each of the categories are as follows: [EGWP 4569 NON-EGWP 4574]

Net Cost of Benefits	150
Adherence to RFP	25
Network Disruption	125
Ability to perform	150
Experience offering services	25
Performance Guarantees	25
TOTAL	500

24. The RFP provides the following description of the evaluation criteria used to score the proposals. Id. at EUTF001172.

Description of Evaluation Criteria:

Fees/Rates/Network Discounts: The net cost of benefits and administration will be determined from the pricing and discount and rebate guarantees included in the proposers offer applied to the historical claims that were supplied to the OFFERORS as claim data. Only guaranteed pricing, discounts, rebates and administrative expenses will be used in the evaluation. Estimated discounts and rebates will not be considered in the evaluation.

Adherence to RFP Instructions and Overall Responsiveness: This category reflects the OFFERORS thoroughness of response contained in the proposal submission, adherence to the instructions contained in this Request for Proposal and inclusion of all requested information in its proposal.

Network Disruption: Network disruption will be evaluated based upon the information that is submitted in this Request for Proposal and will be measured upon the providers, facilities, and sources of care and services

used by the active and retired participants in the plans for which a proposal is being submitted, as measured from the experience of the plan over the past 3 years (or the existence of the plan if less than 3 years). Special evaluation will be made of the OFFERORS ability to provide a network of providers for all of the Islands on which EUTF plan participants reside. The census files submitted to OFFERORS include residence zip code locations. Network disruption will be analyzed on two basis:

The percentage of pharmacy dispensing facilities that are in the Proposers network that dispensed prescriptions that are included in the claim data provided in the Request for Proposal, and

An evaluation of the number of facilities that are available to participants based upon a distribution per Island within the State.

Ability to Perform Services Requested in RFP (. . .):

This category will [be] evaluated based upon the responses contained in the proposal with respect to the OFFERORS agreement to perform all of the services required in a manner and to the specifications outlined in this RFP. The OFFERORS thorough explanation of how it will complete the required tasks outlined in the RFP will be evaluated based upon its understanding of the tasks, the demonstrated ability to perform the tasks and agreement to dedicate the necessary resources to perform the tasks.

Experience offering services to similar sized entities and References; the analysis of this category will be the result of reviewing the list of referred Entities for which the OFFEROR is providing identical or very similar services that are comparable in number of enrolled participants, benefit plan comparability, complexity of administration and a similar form of administrative entity (Trusted (sic) Board with dedicated Administrative Organization) and geographic dispersion of participant population. Each supplied reference will be interview (sic) for an evaluation of the performance of the OFFERORS with respect to the contracted services performed for the referenced Entity.

Performance Guarantees: This category will be evaluated upon the agreement of the OFFEROR to be held accountable for each of the category of performance guarantee as stipulated in this RFP and the overall penalty agreed to for each category of performance that is being guaranteed.

24. Each Offeror's total points determined is ranking. See 9/28/11 Tr. (Vol. 6) at 997:7-16; Ex. J-7. Pre-protest, the relevant scores were as follows:

EGWP		
CATEGORY	CVS Caremark	Informed RX
Net Cost of Benefits	147.5	138.5
Adherence to RFP	22	22
Network Disruption	120.5	105.5
Ability to perform	150	141
Experience offering services	25	25
Performance Guarantees	25	15
TOTAL	490	447

NON-EGWP 4574		
Net Cost of Benefits	150	134.5
Adherence to RFP	22	22
Network Disruption	120.5	105.5
Ability to perform	150	142
Experience offering services	25	25
Performance Guarantees	25	15

TOTAL

492.5

444

25. The Net Cost of Benefits and Network Disruption categories were analyzed by Segal's pharmacy consultants and actuaries who provided the comparative scoring for these fields in accordance with the scoring methodology specified in RFP 11-06. [4564] Segal also supplied the EUTF with the decisive advice re the Performance Guarantees category.

26 On July 19, 2011, the EUTF selected CVS Caremark as the awardee.

27. InformedRx sought a debriefing, which took place August 1, 2011. See Stipulation of Facts and Exhibits, filed September 20, 2011 ("Stipulated Facts") at ¶ I.

28. At the debriefing, the EUTF provided InformedRx with a document entitled "Hawaii Employer Union Trust Fund RFP 11-06 Debriefing Pharmacy Benefit Management" (the "Debrief Memo"). See J-7.

29. By agreement, as part of the debriefing process, the EUTF allowed InformedRx to pose questions to the EUTF regarding the RFP, to be submitted to the EUTF in writing by noon on August 3, 2011, and the EUTF agreed to provide answers by August 5, 2011. Stipulated Facts at ¶ L.

30. The EUTF further agreed that the debriefing would remain open and not be deemed concluded until the EUTF provided its answers on August 5, 2011. See J-9.

31. On August 3, 2011, InformedRx submitted its list of written questions to the EUTF. See Ex. I-15. The EUTF responded in writing on August 5, 2011. See Ex. 10 to the Request for Hearing.

32. On August 8, 2011, InformedRx submitted to the EUTF its protest of the award of RFP No. 11-06 to CVS Caremark. See J-12.

33. On August 9, 2011, InformedRx submitted an Errata to its protest letter dated August 8, 2011. See J-13.

34. On August 12, 2011, InformedRx submitted a supplemental letter of protest. See J-16. (the August 8, 2011, August 9, 2011 and the August 12, 2011 protests shall hereinafter collectively be referred to as the "Protest").

35. On August 24, 2011, the EUTF responded to InformedRx's Protest, denying in part and sustaining in part InformedRx's Protest. See J-18.

36. The Procurement Officer corrected InformedRx's score by an additional 10.5 points for the Network Disruption criteria. Id.

37. On August 31, 2011, InformedRx submitted its Request for Hearing to the Department of Commerce and Consumer Affairs Office of Administrative Hearings, which request was assigned case number PCH-2011-8 ("Request for Hearing").

38. A Stipulation Permitting Intervention by CVS Caremark in InformedRx, Inc.'s Request for Administrative Relief and Order was filed on September 12, 2011.

39. InformedRx filed a Motion Requesting Recusal of Hearings Officer and Appointment of Special Hearings Officer on September 14, 2011 ("Motion to Recuse").

40. InformedRx filed a Motion to Compel Production of Documents and Information on September 14, 2011 ("Motion to Compel").

41. On September 14, 2011, InformedRx submitted a second supplemental protest ("Second Protest").

42. After InformedRx protested that the contract file lacked documentation of this delegation, the EUTF placed the proper documentation in the contract file.

43. On September 9, 2011, the EUTF responded to InformedRx's Request for Hearing.

44. The Hearings Officer heard oral argument on the Motion to Recuse on September 16, 2011. The Hearings Officer granted the motion to avoid any appearance of impropriety and agreed to appoint a Special Hearings Officer.

45. The Procurement Officer denied the Second Protest on September 19, 2011.

46. On September 20, 2011, the Hearings Officer held a telephonic status conference to advise the parties that the Honorable James S. Burns (Ret.) had been appointed Special Hearings Officer (SHO).

47. On September 20, 2011, the parties filed a Stipulation and Order Governing Confidentiality of Documents, which limited the disclosure of certain material and information deemed proprietary and/or confidential, and certain documents were designated as protected material pursuant to the stipulation.

48. On September 20, 2011, the parties filed a Stipulation of Facts and Exhibits (J-1 to J-22).

49. The evidentiary hearing took place on September 21, 22, 23, 26, 27, and 28, 2011.

50. The SHO heard argument on the Motion to Compel on September 21, 2011 and took the matter under advisement.

51. Over the course of the evidentiary hearing, the following individuals testified: Greg Buscetto, Joel Saban, Sandra Yahiro, Barbara Coriell, Derek Mizuno, Dean Hirata, Everett Kaneshige, George Kahooohanohano, Sean Brandle, and Thomas Morrison.

52. The following exhibits were admitted into evidence: Joint Exhibits J-1 – J-22; InformedRx Exhibits I-3, 4, 5, 7A, 8 (redacted), 15, 26(A)-(M), 29, 32, 37(A), 44, 45(A), 47-52; EUTF Exhibits A, B, C, D, E, F, I, J, K, L, M, O, R, S, T; and EUTF Confidential Exhibits A, C, D, E, F.

53. Informed Rx filed a Second Request for Hearing on September 26, 2001, which request was assigned case No. PCH-2011-09 (“Second Request for Hearing”).

54. The EUTF responded to InformedRx's Second Request for Hearing on October 6, 2011.

55. On October 7, 2011, the Parties stipulated that (i) InformedRx's Request for Hearing (Case No. PCH-2011-8) and InformedRx's Second Request for Hearing (Case No. PCH-2011-9) be consolidated for purposes of evidence and decision by the SHO, and (ii) Exhibits C and D to InformedRx's Second Request for Hearing be stipulated into evidence of the consolidated proceedings.

56. On October 7, 2011, the Parties hereto also stipulated to CVS Caremark's intervention into InformedRx's Second Request for Hearing (Case No. PCH-2011-9).

57. After InformedRx presented all of its evidence, CVS Caremark orally moved for dismissal of all matters in InformedRx's Request for Hearing, pursuant to Hawaii Administrative Rule ("HAR") section 3-126-70, which motion was taken under advisement.

58. At the conclusion of the hearing, the SHO requested that the parties submit post-hearing memoranda. The SHO asked InformedRx to identify in its post-hearing memorandum any claims it was no longer pursuing, the claims it was continuing to pursue and asked EUTF and CVS Caremark to identify any claims they thought should be dismissed for lack of evidence, or as *de minimis* errors.

THE BASIC STAGES IN THIS PROCUREMENT PROCESS

The following are the basic stages in this procurement process:

1. the solicitation of a contract between the EUTF and an offeror via a request for proposals (RFPs);
2. the filing of proposals by the offerors;
3. meetings between the Evaluation Committee and offeror the Evaluation Committee has identified as a "priority listed offeror";
4. the filing of Best and Final Offers (BAFOs) by each priority listed offeror;
5. the Evaluation Committee recommends the acceptance of a specified priority listed offeror's BAFO;
6. the EUTF's award of a contract in writing; and
7. the signing/execution of a contract by the EUTF and the OFFEROR...

RFP 11-06 DIFFERENTIATES BETWEEN AN AWARD (STAGE "6") AND A CONTRACT (STAGE "7")

The following statements are in Section 1, sub-section 19, of RFP 11-06:

“The EUTF reserves the right to award a contract based upon the written responses received and without prior discussion or negotiations. If award is made, each successful OFFEROR will be required to enter into a formal written contract with the EUTF. The RFP and the successful proposal will be incorporated in the resulting contract by reference. To the extent that the successful proposal conflicts with the RFP, the terms of the RFP shall govern unless otherwise agreed upon by the EUTF in the contract. . . . Each successful OFFEROR that enters into a contract that result from this RFP is hereinafter referred to as the ‘contractor’.”

“The successful OFFEROR will be notified by letter that its proposal has been accepted and that the OFFEROR is being awarded the contract.”

”The EUTF shall forward a contract to the successful OFFEROR for execution. The contract shall be signed by the successful OFFEROR and returned within ten days after receipt by the OFFEROR or within such further time as may be allowed by the EUTF.”

“Appendix D is the contract form that will be used by the EUTF. “

“No contract shall be considered binding upon the EUTF until the contract has been fully and properly executed by all parties thereto.

INSTANCE WHERE RULE AND STATUTE DIFFERENTIATE BETWEEN AN AWARD AND A CONTRACT

The following rule and statute recognize the difference between an “award” and a “contract”.

HAR § 3-126-1 defines “Award” as follows:

“Award” means the written notification of the State’s acceptance of a bid or proposal, or the presentation of a contract to the selected offeror.

HRS § 103D-104 defines “Contract” as follows:

“Contract” means all types of agreements, regardless of what they may be called, for the procurement or disposal of goods or services, or for construction.

IN THIS CASE, STAGE 6 HAS BEEN COMPLETED BUT NOT STAGE 7

The instant case completed stage 6. The “award” was made by “the written notification of the State’s acceptance of a bid or proposal[.]” The instant case has not reached stage “7”.

STATUTES WHERE “AWARD” MEANS POST-STAGE 6 AND PRE-STAGE 7

HRS § 103D-701(a) states:

(a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. Except as provided in sections 103D-303 and 103D-304, a protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract under section 103D-302 or 103D-303, if no request for debriefing has been made, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.

HRS § 103D-303(h) states:

(h) In cases of awards made under this section, non-selected offerors may submit a written request for debriefing to the procurement officer within three working days after the posting of the award of the contract. Thereafter, the procurement officer shall provide the non-selected offeror a prompt debriefing. Any protest by the non-selected offeror pursuant to section 103D-701 following debriefing shall be filed in writing with the procurement officer within five working days after the date upon which the debriefing is completed.

When HRS § 103D-701(a) states: "within five working days after the posting of award of the contract", “award means the completion of stage 6. Similarly, when HRS § 103D-701(a) states “within three working days after the posting of the award of the contract”, “award” means the completion of stage 6.

WHEN HRS § 103D-706 AND HRS § 103D-707 USE THE WORD “AWARD”, DO THEY MEAN THE COMPLETION OF STAGE 5 OR STAGE 6 OR STAGE 7?

HRS § 103D-706 states:

Remedies prior to award. 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:

- (1) Cancelled; or
- (2) Revised to comply with the law.

HRS § 103D-707 states, in part:

Remedies after an award. If after an award it is determined that a solicitation or award of a contract is in violation of law, then:

(1) If the person awarded the contract has not acted fraudulently or in bad faith:

(A) The contract may be ratified and affirmed, or modified; provided it is determined that doing so is in the best interests of the State; or

(B) The contract may be terminated and the person awarded the contract shall be compensated for the actual expenses, other than attorney's fees, reasonably incurred under the contract, plus a reasonable profit, with such expenses and profit calculated not for the entire term of the contract but only to the point of termination;

HRS § 103D-707 does not say what the options are when the decision on the protest is made after the completion of stage 6 but prior to the completion of stage 7.

The opinion in CARL Corp. v. State, Dept. of Educ., 85 Hawai'i 431, 946 P.2d 1 (1997), states, in fn. 14, that “where the determination that the solicitation or award was in violation of law is made *prior* to the award of the contract, one of the remedies is to revise the solicitation or award to comply with the law. Later in its opinion, the court states that:

the award of the contract before it has been determined whether the solicitation or proposed award is in violation of law effectively limits the relief available to the person aggrieved by the solicitation or award. Where the contract has not yet been awarded, it is still possible to cancel the solicitation and proposed award, or to correct the violation. Once the contract has been awarded, whether or not

it is in violation of law, and notwithstanding the prejudice to the aggrieved person or the public, the contract may still be ratified, providing it is "in the best interests of the State." . . .

85 Hawai'i at 449, 946 P.2d at 19. In other

It appears that, in CARL Corp. v. State, Dept. of Educ., the Hawaii Supreme Court interpreted the confusing language in HRS § 103D-707 as saying that it applies after the completion of stage 7 - the signing/execution of a contract. Implicitly, the court concluded that HRS § 103D-706 applies prior to the completion of stage 7.

FINDINGS, CONCLUSIONS AND DECISIONS REGARDING PROTEST POINTS INFORMEDRX CONTINUES TO PURSUE POST-HEARING

FIRST PROTEST POINT

InformedRx contends that the EUTF Administrator lacked authority to cancel RFP No. 11-5, the cancellation allowed CVS Caremark to circumvent the procurement rules, and the cancellation was not supported by proper documentation.

On April 8, 2011, after working with its consultant, the Segal Company (Segal), the EUTF published Request for Proposal 11-05 - Pharmacy Benefit Management (PBM) Services (RFP 11-05).

On Monday, May 9, 2011, prior to 4:00 P.M., Yahiro decided to cancel RFP 11-05 and to issue RFP 11-06. The cancellation document was executed on May 13, 2011. Yahiro credibly testified, in relevant part, as follows:

- Q. And what was the reason that RFP 11-05 was cancelled?
- A. It was brought to our attention that in 11-05 there was ambiguity in one of the sections, and when it was brought to our attention and we looked into it we felt that there was some merit to that. So we felt in order to have a fair, the most fair process we could that it would be in the best interests of the state to cancel 11-05 and reissue.
- Q. And who notified you of that issue?
- A. Segal.
- Q. And did they say why they were bringing this to your attention?
- A. Yes.
- Q. What did they say?
- A. They said that they received an email from HMSA, I believe it was over the weekend, asking questions about the section of the RFP that had to do with submission of the proposals, and pointed out in their email that it was unclear what was being required. And so when Segal and Tom Morrison, our benefit -- the lead benefit consultant for us, responded to that email, when I got in to work, I

believe it was that morning, he contacted me and said that he had responded to HMSA, and did we have time to let the other proposers know before the due date. And by that time it was sometime in the morning of the -- I believe it was May 9th the proposals were due, and there was no time. So he said that was, to me, a problem.

HRS § 103D-308 states:

Cancellation of invitations for bids or requests for proposals. An invitation for bids, a request for proposals, or other solicitation may be canceled, 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 governmental body which issued the invitation, request, or other solicitation, in accordance with rules adopted by the policy board. The reasons therefor shall be made part of the contract file.

Both Informed and CVS timely submitted proposals in response to RFP 11-05. Yahiro had two concerns: (a) had CVS submitted or would it submit its proposal in all of the specified forms to all of the specified places, and, (b) if not, would it be because of the wording of RFP 11-05?

It is argued that InformedRx is time-barred from presenting this challenge because HRS § 103D-701 (a) states that

[a]ny actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or the head of a purchasing agency. The protest shall be submitted in writing *within five working days* after the aggrieved person knows or should have known of the facts giving rise thereto.

The question presented cannot be answered because the record does not answer the question of when InformedRx knew or should it have known that it was aggrieved by the cancellation of RFP 11-05. Although InformedRx is not time-barred from presenting this challenge, it is without merit.

When there is an ambiguity in the specification of the type of forms to be submitted and the places the types of forms are to be submitted, an offeror satisfies the filing requirements when the offeror complies with any one of the reasonable interpretations of the relevant requirements. CVS Caremark complied with one of the reasonable interpretations of RFP 11-05's ambiguous filing requirements. Consequently, the applicable law authorized the Procurement Officer and the EUTF to proceed with RFP 11-05

The only relevant change RFP 11-06 made to RFP 11-05 is the addition of the following language:

You must submit a Hard Copy according to the instruction in this RFP to the offices listed below.

If you have previously submitted a Proposal under RFP 11-05 IN HARD COPY TO THE EUTF OFFICE LISTED BELOW and wish to resubmit that Proposal as a response to this request, a signed letter authorizing the EUTF to accept the material submitted under that RFP 11-05 to be considered as your complete response to this RFP 11-06 may be submitted in lieu of a complete response to this RFP.

IF YOU HAVE NOT SUBMITTED A MASTER, SIGNED AND TWO SIGNED COPIES OF A RESPONSE and ELECTRONIC COPIES TO RFP 11-05 YOU MUST SUBMIT A HARD COPY, SIGNED MASTER AND TWO SIGNED COPIES PLUS ELECTRONIC COPIES BY THE SUBMISSION DEADLINE.

If you wish to modify in any way the proposal submitted under RFP 11-05 for this RFP 11-06, you must submit an entirely new proposal under this request including the Signed Master and Two Signed copies according to the instructions in this RFP and also submit a new electronic proposal in the E-RFP web site.

For the following reasons, it is concluded that InformedRx was not aggrieved by the cancellation of RFP 11-05 and the publication of RFP 11-06:

- (a) CVS Caremark complied with one of the reasonable interpretations of RFP 11-05's ambiguous filing requirements;
- (b) there is no material difference between the substance of RFP 11-05 and the substance of RFP 11-06;
- (c) there is no material difference between the proposal CVS Caremark submitted in response to RFP 11-05 and the proposal CVS Caremark submitted in response to RFP 11-06; and
- (d) both RFP 11-05 and RFP 11-06 state that an Offeror "may" be disqualified for the following non-exclusive reason: "The delivery of the proposal after the deadline specified in the timetable."

SECOND PROTEST POINT

InformedRx contends that it was hampered by its role as the incumbent who implemented EUTF's mandatory mail order service. This protest point is without basis in fact. There is no evidence that such hampering occurred anywhere in the process.

Specifically regarding the actions of the Evaluation Committee, Yahiro credibly testified that,
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[a]s the procurement officer, on more than one occasion when I met with the evaluation committee I advised them in order to have a level playing field for all the proposers, any complaints, concerns or issues they may have heard in their past regarding Informedrx should not be considered.

THIRD PROTEST POINT

InformedRx contends that the Evaluation Committee unlawfully favored CVS and deducted points from InformedRx in the Ability to Perform category because (a) InformedRx did not provide mail order services from an Oahu location and CVS Caremark promised to do so, and (b) CVS Caremark promised to provide daytime call center services from an Oahu location.

HRS § 103D-303(c) requires that “The request for proposals shall state the relative importance of price and other evaluation factors.”

HAR § 3-122-52(a) specifies that “Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered.”

Yahiro credibly testified [215] that “in the scoring process the evaluation committee took into consideration the fact that CVS could provide local mail order as well as local customer service.” Her testimony was supported by the credible testimony of other evaluation committee members.

RFP 11-06 states:

Prospective proposers are to offer comprehensive PBM services including but not limited to the following:

....

Mail service pharmacy

....

Customer services

Proposer agrees to provide Retail/Mail Order unit cost equalization to the EUTF, that is, Mail Order unit costs prior to enrollee cost-sharing, dispensing fees, and sales taxes charged to the EUTF will be no greater than those at Retail. . . .

RFP 11-06 asks the following two questions regarding mail order services:

- a. Where will the mail-order facility location for the EUTF be?
- b. What are the days and hours of operation for this facility?

RFP 11-06 also states:

During the entire term of the contract, the contractor may be required to maintain a customer service office located in the State of Hawaii. Personnel, systems, and equipment at the customer service office shall be reasonably sufficient to provide all the customer services proposed by contractor and required under the contract.

When asked about this statement, the EUTF's April 29, 2011 Response to Written Question No. 30 was:

The existence of a local service office is not a requirement, however, a dedicated staff in a service office must be provided that is accessible [sic] to the EUTF Administration Office during its normal hours of 7:45AM - 4:30PM HST M-F, except holidays, and customer service telephone access to participants from 7AM - 7PM is a requirement.

When asked to "confirm this is a potential (i.e. 'may be') requirement [,]" the EUTF's response to Written Question No. 5 was:

The requirements and scope of work require support offices be available to the EUTF Administrative Staff during its business hours of from 7:45AM -4:30PM HST. In addition, participant telephone service is to be provided from 7AM - 7PM HST on an M-F basis.

EUTF's April 29, 2011 Response to Written Questions also contains the following questions and answers:

91. What was the Average Speed to Answer in 2010 with the State's current vendor?

This information is not relevant to this Request for Proposal and cannot be answered.

92. Page 21 #2 - Customer Service Office; Where is the current customer service location for PBM services? Will a designated team located outside of Hawaii be acceptable to the State if available 24/7[?]

Please see the answer to the previous question concerning the requirements for customer service and support to the EUTF Administrative office [.]

Kaneshige credibly testified as follows:

- A. My recollection is that in the initial review of the bids that the information was not available to us. That any particular bidder would be providing customer service or mail order medication fulfillment through an on-island facility, which is why, frankly, I believe I may have scored all of the bidders in this category equally, if that -- well, equally.

Subsequently, when we were reviewing the best-and-final offers, that was brought to our attention that CVS would be performing those services through an on-island facility and, therefore, I changed my scoring to provide them with the maximum number of points and everyone else with less than the maximum number of points.

Coriell credibly testified as follows:

- Q. Turning to the next page, under Ability to Perform Services?

A. Uh-huh.

- Q. Could you read your response there -- or your comment? Excuse me.

A. Includes in-store mail order and Hawaii-based customer service and mail order fulfillment.

- Q. And what was your basis for that statement?

A. The fact that the EUTF has a mandatory mail order provision. It had been pointed out to me by Informedrx that we realized significant savings by having mandatory mail order, so it was very important to continue to provide that program, but we had heard from a number of members who were having difficulty with mail order being provided from the Mainland. So, therefore, an organization who could provide mail order from Oahu represented a significant improvement in ability to perform the service.

- Q. And what was the customer service that you were referring to in your comment?

A. Customer service in my years in the group insurance field refers to the customer service that is provided to the member, namely, the call center. Informedrx has a call center in Florida, and, again, we have heard from people that they've had difficulty because, particularly, the 6-hour time difference between the two areas. Being able to provide a Hawaii-based customer service to the EUTF population would also represent a significant improvement in service.

- Q. So I take it it was your understanding that CVS was going to provide a Hawaii-based call center?

A. They said that they would, and we had no reason to doubt that they wouldn't be able to.

Q. Again, the reasons you felt that this was a disadvantage for Informedrx's proposal was because of the issues that you had mentioned earlier that you're aware of from members?

A. Yes. Issues that had been raised by members, but also the fact that, if you can mail drugs from Oahu to another address in Oahu, it is just common sense that it takes less time and has less chance of error than if you mail it from Florida.

BY HEARINGS OFFICER:

Q. I have a question. Is it my understanding from your testimony that you had a negative view of mail order from Florida before even the RFP went out?

A. Yes.

Q. And that you had a preference for local mail order?

A. Yes.

Q. In other words, quicker?

A. I saw that as an improvement.

Q. Okay. It didn't change price, did it, or savings?

A. No. I mean, the price would be dealt with in the, in the pricing points and the fees.

Q. Okay. So is there any, in your mind, was there any other benefit to having local mail order versus Mainland mail order, especially for [sic] Florida?

A. Yes, because we were receiving pressure from, particularly, retirees, and the legislature because of their concerns, and the main thing that they mentioned was the mail order. And if we had a way to improve the service to the members to take that pressure off, then I felt that we could maintain the mandatory mail order program, which was a significant cost savings to this organization. If we lost our ability to do mandatory mail order because the legislature decided that they didn't want to hear from retirees anymore, we would have to increase our rates. So it was member service and it was also concern about maintaining that, that cost advantage.

Q. Was any of this placed in the RFP? These understandings, in other words, we would prefer local mail order versus Mainland mail order? In other words, were the bidders told that it would be preferential to have local mail order?

A. No.

Q. Okay, were the bidders told the legislature was concerned with Mainland mail order?

- A. A number of the vendors were aware that the legislature was concerned. Whether it was specifically regarding mail order, I don't know.
- Q. Can you tell me why this was not put in the RFP?
- A. I think -- well, I, I don't, I can't say that we specifically discussed this item when we were putting together the RFP. But I don't remember being aware that there was anybody who could provide - - that we, we were aware of anybody who could provide on-island mail order. There's also the concern that to specify a service like that could restrict your ability to receive -- we couldn't make it a requirement of the RFP because it would limit the, the number of PBMs who could fulfill the requirements of the RFP.
- Q. I understand the requirement --
- A. -- yeah --
- Q. -- my question is . . . why the RFP didn't tell people that if they could it would be advantageous to the EUTF. In other words, you feel better about them, you give them a higher score, or...
- A. Well, I, again, I don't think we discussed that when we were putting together the RFP.

...

BY MR. SHIKUMA:

- Q. Ms. Coriell, the complaints you received, were they about the fact that there was mandatory mail?
- A. They weren't phrased in that way, but -- and I have always maintained this, that when you have a mandatory mail order program people will be upset by the fact that it is mandatory, and that would 873 apply to Informedrx or Medco or anyone.
- Q. So, some of these complaints were about the fact that that was a feature or requirement of the plan that maintenance medications had to go on this mandatory mail program, correct?
- A. People compound -- that was an element of it.
- Q. Fair enough, fair enough. So the difference between a complaint about the plan design and a complaint about the service being provided, correct?
- A. If people are unhappy about the plan design, frequently it causes them to have a negative experience with customer service.

HRS § 103D-303(g) mandates that:

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

As noted above, the evaluation factors applicable to mail order services and customer services were the following:

Ability to Perform Services Requested in RFP (. . .):

This category will [be] evaluated based upon the responses contained in the proposal with respect to the OFFERORS agreement to perform all of the services required in a manner and to the specifications outlined in this RFP. The OFFERORS thorough explanation of how it will complete the required tasks outlined in the RFP will be evaluated based upon its understanding of the tasks, the demonstrated ability to perform the tasks and agreement to dedicate the necessary resources to perform the tasks.

Understandably, the EUTF wanted Oahu based mail order services and Oahu based customer services without incurring any increase in cost. But in RFP 11-06, the EUTF did not specify these as evaluation factors. Coriell admitted that “I don’t remember being aware that there was anybody who could provide – that we, we were aware of anybody who could provide on-island mail order. There’s also the concern that to specify a service like that could restrict your ability to receive – we couldn’t make it a requirement of the RFP because it would limit the, the number of PBMs who could fulfill the requirements of the RFP.”

HRS § 103D-303(g) prohibits consideration of these factors. The Evaluation Committee violated this prohibition.

FOURTH PROTEST POINT

InformedRx contends that the Evaluation Committee unlawfully awarded CVS Caremark points for unsubstantiated claims regarding its Mililani retail pharmacy’s demonstrated ability to perform. This protest point has no merit.

When RFP 11-06 says that “[t]he OFFERORS thorough explanation of how it will complete the required tasks outlined in the RFP will be evaluated based upon . . . the demonstrated ability to perform the tasks[,]” it does not mean exactly what it says.

The statements by each priority listed offeror regarding its ability to perform are deemed credible and no “demonstration” is required unless and until there is reasonable doubt. In this instance, when the award was made to CVSCaremark, there was no reasonable doubt.

FIFTH PROTEST POINT

InformedRx contends that, “[i]n direct violation of RFP No. 11-06, the EUTF allowed CVS Caremark to make its pricing contingent and to alter the current level of benefits.” It is concluded that this point has no merit.

In its proposal, CVS Caremark noted that it “may need to revise pricing in the event the EUTF chooses not to adopt the CVS Drug List.”

RFP 11-06 allows the EUTF discretion to disqualify a proposal if it “is conditional, incomplete, or irregular in such a way as to make the proposal incomplete, indefinite, or ambiguous as to its meaning.”

RFP 11-06 states its purpose as follows:

2. **PURPOSE:** The EUTF is soliciting proposals from qualified companies to provide Pharmacy Benefits management to the EUTF’s active and retired employees and their dependents for PPO, HMO and HDHP plans. A key requirement of the EUTF is to maintain current level of benefits and through this proposal request process, produce the most competitively priced provider with as little disruption as possible. Carriers will have to indemnify the EUTF that they will exactly duplicate the benefits if they assume these plans from a previous carrier and hold the participants in a no loss, no gain position.

Buscetto credibly testified as follows:

Q. Can you explain to us what the formulary is as it relates to PBM plans.

A. Certainly. A formulary, commonly referred to as a prescription drug list or a preferred drug list, is merely a listing of drugs at the -- typically at the -- what's called the NDC level, which is the lowest common denominator level for a drug. And it allows for PBMs to manage the drug benefit by placing the drugs in the correct and proper tier, whether it be a brand or generic drug or specialty item. And plan benefits can be anywhere from two tiers where you just have brands and generics, all the way up to five and six tiers, where you have brands, preferred brands, generics, preferred generics, specialty medications and other items as well.

Q. We'll get more into this later, but does each plan provider such as InformedRx, CVS, HMSA, do they use the same formulary or do they have different formularies?

A. Typically each PBM has their own formulary[.]

Coriell credibly testified as follows:

A. The drug list is tied to the drug plan through the tiers, the co-pay tiers. The EUTF plan has, oh, dear, four or five co-pay tiers. Primarily we have the lowest co-pay is for generic drugs, tier one drugs. The next co-pay dollar amount is tier two, usually brand name drugs that are on the formulary. Tier one and tier two would be on the formulary. And then the third tier would be for drugs that are not on the formulary. They're still available, but the member would pay more. So, on one hand you have the formulary,

which changes as the market changes for drugs. On the other you have the plan design, which is what is set and does not change. That plan design, the dollar co-pays per tier of drug is what's determined by the EUTF board as the plan. The drugs that are actually in each one of those tiers may change as the formulary changes.

Q. So, with respect to the RFP requiring that the benefits be maintained --

A. -- yes --

Q. -- can you describe which part of that plan design is the benefit that has to be maintained?

A. The benefit that has to be maintained is the co-pay arrangement, the \$5 generic co-pay, \$15 brand name co-pay. It's, it's the plan that dictates the co-pays that apply to the tiers.

...

Q. Do formularies change regularly from time to time based on drugs no longer being available or new drugs coming out on the market?

A. Formularies change if there are changes in drugs, particularly if a brand name drug goes generic. So that then there are usually changes to a formulary at that time. And most PBMs review their formulary at least annually, some may do it more frequently, but at least annually they review their formulary so that they can determine whether or not the, the, the drugs are in the appropriate tiers.

EUTF's April 29, 2011 Response to Written Questions contains the following question "80" and answer:

The RFP states in multiple places that vendor is required to maintain the current level of benefits - does this mean the State's current formulary will be utilized or may the PBM base its offer upon its own formulary?

The RFP requires a continuation of the benefits as they currently are. A transition period from the current formulary to a new formulary of at least 90 days is an acceptable transition of benefits to the OFFERORS formulary.

Clearly, the requirement that "Carriers will have to indemnify the EUTF that they will exactly duplicate the benefits if they assume these plans from a previous carrier and hold the participants in a no loss, no gain position" does not forbid changes in the formularies outside of the ninety-day window. RFP 11-06 anticipated and permitted changes in the applicable formulary.

Assuming it was within the EUTF's discretion to disqualify CVS Caremark's proposal because CVS Caremark indicated that "may need to revise pricing in the event the EUTF chooses not to adopt the CVS Drug List", EUTF's decision not to disqualify CVS Caremark's proposal on this ground is not an abuse of discretion.

SIXTH PROTEST POINT

InformedRx contends that “CVS Caremark’s proposal was incomplete, indefinite and ambiguous because it gave no explanation of pricing during the initial 90-day period when the current formulary would be used. This contention has no merit because there was no need for such an explanation. RFP 11-06 mandates that “21. Proposer agrees to grandfather the current formulary for up to 90 days following the contract effective date.”

SEVENTH PROTEST POINT

InformedRx contends that although RFP 11-06 did not ask for alternatives, the EUTF allowed CVS Caremark to provide alternatives to the current programs and gave CVS Caremark extra points based on such alternatives. InformedRx asserts that Retail 90, Maintenance Choice and Generic Step Therapy Plans are alternative plans that should not have been considered. Alternatively, InformedRx contends that the additional points awarded to CVS Caremark failed to account for limitations and conditions to Maintenance Choice.

Retail 90 is described as a program that allows members to pick up a 90 day supply of their medications at a retail pharmacy within CVS Caremark’s Retail 90 network but at a price higher than the mail order rate.

Maintenance Choice is described as a program where members have the option to pick up their 90 day maintenance medications at a CVS Caremark/Longs’ pharmacy without losing any of the mail order discount benefit.

The record supports InformedRx’s assertion that “[t]he evidence clearly shows that the Evaluation Committee awarded CVS Caremark higher points than InformedRx on the Ability to Perform Services criteria due to Retail 90 and Maintenance Choice.” This is an additional reason for increasing the points awarded to InformedRx in the “Ability to Perform” category.

EIGHTH PROTEST POINT

InformedRx contends that “in violation of the RFP, the consultant estimated a Total Projected Retail 90 Drug Costs for the non-EGWP program. . . . These costs played a factor in each proposers’ ultimate score for the ‘Net Costs of Benefits and Administration’ score for the non-EGWP program.” This point has no merit. The record supports the following August 24, 2011 response by the EUTF:

Under the current contract there are “Retail 90” fills for non-EGWP. Claims are filled for 90 days, but the claimant pays three co-pays. For the RFP, no credit for Retail 90 was given beyond the responses for 30-day retail fills: the pricing is the same for 30-day or 90-day retail fills of medications. Accordingly, this was not a factor in the overall scoring of the RFP.

NINTH PROTEST POINT

InformedRx contends that the EUTF and Segal erroneously calculated InformedRx's Network Disruption by using website data instead of accepting InformedRx's response. It argues that:

for the network disruption scoring, the proposer with the highest percentage in network pharmacies was awarded 12.5 points. If InformedRx had been assigned the correct percentage, 99.93%, it would have had the highest percentage. Thus, InformedRx should have been given 12.5 instead of 10.7 points, per evaluator. There were five (5) evaluators so: $(12.5-10.7) \times 5 = 9$ points. At the same time, each proposer who had a lower percentage was given proportionately lower points. CVS Caremark's points should have been $(12.5 \times 86.3)/99.93 = 10.8$ instead of 11.6 points, per evaluator. $(11.6-10.8) \times 5 = 4$ points. So, CVS Caremark's points should have been reduced by 4 points. . . .

RFP 11-06 asked InformedRx:

Please submit with your proposal, the claim data file . . . adding the following information appended to each claim record:

- a. An indication whether the dispensing retail pharmacy, based upon the NABP number is in your proposed network or retail dispensing facilities.

InformedRx responded: "As the incumbent, we provided the claims data file for this RFP. Therefore, the data references the dispensing retail pharmacy network." Exhibit 18 to InformedRx's proposal provided the following information:

Count of Valid Pharmacies	4,387
Count of Disrupted Pharmacies	0
Count of Invalid NABP's	40
% of Non-Contracted Pharmacies	0.07%

CVS Caremark's response to InformedRx's protest point is as follows:

Each Offeror was required to submit a claims data file, in Excel or MS Access format, which added data fields for each claim indicating whether the claim was filled by a pharmacy in the offeror's retail pharmacy network. See J-4 p.EUTF001218.

InformedRx, in its RFP response, indicated that because it had submitted the claims information used by all vendors to respond to the RFP, it had already complied with the RFP requirement. See Ex. I-4 at IRX000493.]

In its August 24, 2011 response, the EUTF noted:

It appears the protest is arguing that because InformedRx is the current program manager, it should be assumed that almost all claims would be from pharmacies in InformedRx's network. In actuality, however, the offerors' networks were compared to those pharmacies used by the participants over the past three years, and enough of those pharmacies were not in InformedRx's network to result in a lower score than other offerors.

Furthermore, InformedRx did not include the pharmacy network indicator in the file submitted for repricing, and therefore its score for network disruption should have been zero. However, the consultant attempted to compare InformedRx's network listed in its electronic directory to what was used by EUTF participants over the past three years to award InformedRx some points. This was all the information the consultant had to go on because InformedRx did not properly respond to this portion of the RFP. It is too late now, and would be unfair to other offerors, to allow InformedRx to supplement or otherwise revise the information it wishes the EUTF to consider for this portion of the RFP.

CVS Caremark states its position as follows:

InformedRx deviated from the requirements and basically told the EUTF to provide InformedRx with special consideration and figure it out itself. Given the evidence, EUTF went beyond anything required of it and attempted to recreate InformedRx's network. . . . In fact, InformedRx's failure to conform to the RFP requirements in response to this questions [sic] could have resulted in InformedRx receiving zero points for network disruption or rejection of proposal in its entirety.

Sean M. Brandle (Brandle), Segal's national pharmacy practice leader who provides direction and guidance to Segal's regional offices regarding pharmacy benefit issues, credibly testified as follows:

- Q. This is the first page. This is the submission from Informedrx, correct?
- A. I'm not sure. It appears to be, yes.
- Q. Can you read the response to 10.1.5.18(a)?
- A. As the incumbent, we provided the claims data file for this RFP. Therefore, the data references the dispensing retail pharmacy network.
- Q. Did you review that note at the time that you did the review of the disruption analysis?

- A. I believe so, yes.
- Q. Doesn't that note indicate that the pharmacies and the claims data are the pharmacies within Informedrx's network?
- A. I'm not sure what that, I'm not sure what that, what that response is.
- Q. Did you ask anyone for clarification?
- A. As in whom?
- Q. As in anyone.
- A. No, I did not.
- Q. Did you direct anyone to get clarification on what the note -- I'm sorry, what the response meant?
- A. No. This, this to me was a non -- I mean, non-conformance with what we asked for, which was an indicator. Of course, I mean, this is, this is common sense. We know the claim data came from them, and we know that the data would reference any -- the dispensing retail pharmacy network. But there was no, how, is there a network indicator on the file? Is there something we should have been looking at? I mean, you know, it just didn't -- we didn't get back what we asked for.
- Q. Are you aware that in this process there was an opportunity for the EUTF and its consultant to ask questions of the proposers?
- A. I was not aware, no.
- Q. Did you actually look at the claims data file as to the network - I'm sorry - as to the pharmacies in that data?
- A. Be more specific. I'm not sure what you're referring to.
- Q. You said that your answer on whether or not 619 the claims data would include more than 10 percent of non-network claims would depend on utilization and the structure of the network, correct?
- A. That's correct.
- Q. Did you actually look at the claims data to see the actual structure and utilization of the network at issue in this case?
- A. No, we would not have done that in any case.
- Q. Were you aware that for the network disruption Informedrx, the incumbent, was calculated at 79.5 percent?
- A. I believe I was aware of that, yes.
- Q. Did you question that number with anyone?
- A. I believe we discussed it.
- Q. Who did you discuss it with?
- A. James Chiaravino.
- Q. And what did you and Mr. Chiaravino discuss?
- A. We discussed the submission by Informedrx, the non-compliance regarding that question, and in its stead the submission of a pharmacy network listing, which we then used to compare to the claims data to isolate claims that were filled at pharmacies included on that submitted network listing.
- Q. Okay. And you were also asked about the network disruption calculations, and do you recall that the vendors were required to submit the claim data file and appended to each claim record

indication whether the dispensing retail pharmacy is in their network?

A. Yes.

Q. And as far as you know did Informedrx do that?

A. They did not.

Q. And their failure to follow that instruction could have resulted in a different calculation for them than if they had followed the instruction?

A. That's my understanding, yeah.

Q. And did Segal actually attempt to give them some points rather than zero points for that category?

A. We did.

A reasonable offeror would not have answered the question as InformedRx answered it. InformedRx did not provide a reasonable explanation for answering the question as it did. The evaluation committee could have used this as a ground for validly deducting points from InformedRx. It is not a ground authorizing Segal and the Evaluation Committee to do what they did and did not do.

Regarding RFPs, the primary purpose of the Hawaii Public Procurement Code is stated in following parts of HRS § 103D-303:

(f) Discussions may be conducted with responsible offerors who submit proposals determined to be reasonably likely to be selected for a contract award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

(g) Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous, taking into consideration price and the evaluation factors set forth in the request for proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made.

Discussions “may” be conducted. If discussions are conducted, it is the Evaluation Committee’s duty during these discussions to point out deficiencies and ambiguities in the proposal that are known or should be known. This is “for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements.” The Evaluation Committee is obligated to use these discussions to assist in obtaining a BAFO from each priority listed offeror that needs no clarification.

InformedRx was a priority listed offeror. Prior to the pre-BAFO discussions with InformedRx, the Evaluation Committee and Segal knew or should have known that

InformedRx had not done exactly what RFP 11-06 asked it to do. The record contains no valid explanation why, during the discussions prior to InformedRx's submission of its BAFO, the Evaluation Committee did not question InformedRx about this deficiency and ask for exact compliance in the BAFO.

The ultimate question is whether InformedRx provided the requested information. Segal and the Evaluation Committee are required to review the information submitted by InformedRx to determine if, as represented by InformedRx, it contained the required information. It appears they did not do that. Segal did not "actually look at the claims data to see the actual structure and utilization of the network at issue in this case" but it did go outside of the record to compare InformedRx's network listed in its electronic directory to what was used by EUTF participants over the past three years.

On remand, the Evaluation Committee shall review the information provided by InformedRx and decide whether or not it contains the required information. It shall decide whether the information provided by InformedRx shows that its percentage is 99.93%. If, upon such review, the Evaluation Committee is able to determine a percentage, it shall use that percentage to calculate InformedRx's EGWP points. If, upon such review, it is unable to determine a percentage, it shall explain why it is unable to do so and use "0%" in computing InformedRx's points.

TENTH PROTEST POINT

InformedRx contends that the EUTF miscalculated InformedRx's performance guarantees. This protest point has merit.

Upon review of the scoring for the EGWP program, the EUTF partially sustained InformedRx's protest and increased InformedRx's EGWP score up from fifteen to seventeen.

There are five separate categories of performance guarantees. The categories are "Implementation", "Payment Accuracy & System Performance", "Account Management", "Enrollee Services" and "Allowances". Each of the five categories has two or more items expressly labeled as "Standards"

RFP 11-06 sought "flat dollar (\$) performance guarantee amounts. Indicate the amount you are willing to place at risk for each item listed below." Each "[s]tandard" is a separate "item".

InformedRx contends that the EUTF erred in the evaluation of InformedRx's Performance Guarantee score for the EGWP and non-EGWP programs. Informed Rx asserts that in its calculation of the dollar amounts of InformedRx's Performance Guarantees, the EUTF used the wrong dollar amounts. It should have used "Implementation" (\$2,000,000), "Payment Accuracy & System Performance" (\$250,000), "Account Management" (\$230,000), "and Enrollee Services" (\$250,000). See Ex. J-12 at 7. It contends that "in the Performance Guarantees criteria, InformedRx should have been given 25 out of 25 points because it provided the highest guarantees increasing its score by 10 points. . . . In turn,

CVS Caremark, which provided lower guarantees that [sic] InformedRx, should have their Performance Guarantees reduced by 8 points[.]”

“Implementation” has four standards. InformedRx committed \$500,000 to each of the four standards. The total is \$2,000,000.

“Payment Accuracy & System Performance” has six standards/items. InformedRx guaranteed “\$250,000 annually, with no more than 20% allotted to each standard.” Thus, it guaranteed one sixth of \$250,000 for each of the six standards. The total is \$250,000.

“Account Management” has five standards. InformedRx guaranteed “\$250,000 annually, with no more than 20% allotted to each standard.” It guaranteed \$30,000 for one standard of the five standards. The total is \$230,000.

“Enrollee Services” has ten standards. InformedRx guaranteed “\$250,000 annually, with no more than 20% allotted to each standard.” InformedRx committed \$1,000 for each of two standards, \$30,000 for one standard, and \$31,142.85 for each of the other standards. The total is \$250,000.

“Allowances” has two standards. One is the “Implementation Allowance” which is the subject of the Eleventh Protest Point. The second is “Audit Allowance” and InformedRx guaranteed \$30,000 for this standard.

CVS Caremark writes the following in support of the EUTF’s decision:

92. The RFP stated in plain terms that the EUTF wanted flat dollar performance guarantee amounts, but InformedRx did not comply with the clear requirements of the RFP. Instead, InformedRx materially deviated from the RFP and spread its guarantees as percentages across numerous criteria.

93. The Evaluation Committee did not make a mistake in evaluating InformedRx’s performance guarantees. InformedRx’s deviant RFP response left the EUTF in a position requiring it to translate and interpret InformedRx’s response as best it could. The Evaluation Committee interpreted InformedRx’s offer in good faith based upon the information InformedRx provided.

94. The evidence was un rebutted that the EUTF sought clarification as to whether it could go back to InformedRx and seek clarification, and that the EUTF received direction that it could not; rather it could only give its best interpretation of InformedRx’s proposal or deem the proposal non-responsive. There was no evidence that EUTF’s interpretation was unreasonable, and at this stage of the process, InformedRx cannot try to recast its proposal into something it is not.

The record is not clear as to when “the EUTF sought clarification as to whether it could go back to InformedRx and seek clarification[.]” Apparently, this occurred post-BAFO.

A reasonable offeror would not have responded to the “Account Management” and “Enrollee Services” categories in the way that InformedRx did. InformedRx did not provide a reasonable explanation for answering the question as it did. This is a ground for validly deducting points from InformedRx in the Adherence to RFP category.

InformedRx asserts that “InformedRx was not asked to clarify its performance guarantees at the interview for the BAFO[.]”

The EUTF states that it “evaluated this confusing and ambiguous proposal the best it could. It would be unfair to the procurement process to allow InformedRx to clarify/amend/modify its proposal during this protest process.” It fails to acknowledge that at the time of the pre-BAFO discussions with InformedRx, the Evaluation Committee knew or should have known that the information provided by InformedRx was not as clear as it could be. The record contains no reasonable explanation why, during the discussions prior to InformedRx’s submission of its BAFO, InformedRx was not asked to provide clearer information in its BAFO.

Informed, the EUTF and CVS Caremark all ignore Kahooahanohano’s uncorroborated testimony that during the Evaluation Committee’s pre-BAFO discussion with InformedRx, InformedRx was asked to submit a clearer response and did not do so in its BAFO. Kahooahanohano testified in part as follows:

- Q. So the numbers in the performance guarantee you say didn't jive?
A. Right.
Q. And what were you looking at when you looked at those numbers?
A. What was proposed by Informedrx, what was asked for in the proposal, and what the consultants and, and the discussion we had, the numbers didn't jive as to how it came about. We had a difficult time. I really did have a difficult time picking out what Informedrx meant by some of the numbers they put out.
Q. So you were looking at a chart of the guarantee information, is that right?
A. Right.
Q. That was the one that was part of the RFP, the chart?
A. Part of the RFP, and then they were asked to address that in the best-and-final.
Q. Right. But the chart given to them was part of the original RFP that was actually issued by EUTF, right? The chart itself, the form. Not the information side but the form itself.
A. Yeah, because, yeah, when you said chart, I'm talking numbers.
Q. Yeah --
A. -- the form was given out.

- Q. The form was given out. So all Informedrx did was fill out the form, right?
- A. That's correct.
- Q. And then you covered the form with the consultant?
- A. I'm sorry, what is that again?
- Q. You indicated that you went over the form with the consultant, right?
- A. We all went over the form, basically, with the information that was provided with the consultant.
- Q. All right, and what did the consultant say about it?
- A. We -- the consultant, along with all of us, I believe, thought that the numbers didn't, didn't make sense the way it was proposed by Informedrx. The numbers were contradicting in certain areas. They, if they guarantee so much, but at, at 25 percent, and not to exceed this much. It was confusing and that's why I, I put down the score I did.
- Q. Well, okay, granted, you may have had some questions about the form, but did you ever ask 760 Informedrx for an explanation of it?
- A. I just told you earlier that I, they had -- they were asked in the best-and-final to clarify the number that they would put across.
- Q. Okay.
- A. And they came across with their best-and-final, and they didn't clarify those numbers.
- Q. So, how did you determine what was being guaranteed?
- A. I couldn't. I myself could not.
- Q. So, who did you rely on to determine what was being guaranteed?
- A. We got the information from Segal and the other board members. Basically, in my opinion, came up with the best idea as to what was guaranteed. Different, and talked as to what different members of the panel had as to what the guarantees was. That's why it was so confusing.
- Q. You know, with regard to your question of cost and guarantees with respect to ability to perform, did you ask Informedrx any questions regarding issues you had with cost?
- A. I know I asked Informedrx questions. I, I believe I asked them about cost. I can't remember exactly what was asked.
- Q. You can't remember what was asked so you can't remember what was answered?
- A. I cannot remember exactly what was asked, but I did -- I can tell you that it was asked in the area of clarification of numbers and guarantees.
- Q. So, the cost issue was with respect to numbers and guarantees?
- A. Wait, are we, are we going back now?
- Q. Yeah, I'm sorry; I did go back to the prior criteria, Mr. Kahooohanohano. I went back to the Ability to Perform Services criteria where you gave Informedrx a 28 out of 30. And I asked --

my question was, did you [ask] Informedrx to clarify the questions you had on the cost?

A. Yes, I did.

Q. Okay. And what did you ask them?

A. Asked them -- I won't be able to give you word-for-word, but one of my questions was very simply to explain as to what your cost is that we have such a difference in your pricing. And I could not make -- my recollection, they didn't answer me at that time, and they said it was part of the RFP -- I mean, the final proposal.

In light of the record, Kahoohanohano's testimony identifying questions he and/or other members of the Evaluation Committee's asked InformedRX during the pre-BAFO discussion with InformedRx lacks credibility.

On remand, the Evaluation Committee shall use the dollar amounts stated above in calculating InformedRx's performance guarantees.

ELEVENTH PROTEST POINT

InformedRx contends that the EUTF and Segal ignored and did not consider InformedRx's offer of a \$4.5 million "early renewal credit". This Protest Point has no merit.

As noted above, one of the five separate categories of guarantees is "Allowances". One of the "specific performance guarantees" it sought was an "Implementation Allowance". The instructions were to "[p]lace the . . . flat dollar amount you are offering EUTF." In its BAFO, InformedRx changed what it had offered in its proposal and wrote:

Finally, if selected as the vendor of choice for both the active and EGWP populations, we would increase our early renewal credit from \$1,000,000 to \$1,500,000, contingent upon the contract for both groups being extended an additional 12 months and the new pricing being implemented either on September 1, 2011 or October 1, 2011. Should the EUTF decide to postpone implementation of the new pricing until January 1, 2012 InformedRx would increase the early renewal credit from \$4,000,000 to \$4,500,000 with the same contingency mentioned above."

InformedRx states that "[I]n its BAFO, InformedRx referred to these credits as 'early renewal credits' "Although it changed the name of the credit, the purpose or intent of the credit remained the same."

Thomas M. Morrison, Jr., Segal's senior vice president who is a client relationship manager and the manager of Segal's Los Angeles office testified as follows:

Q. Okay, Mr. Morrison, you were asked about the implementation allowance, and what is your understanding of how an implementation allowance comes into play?

- A. It is common in proposals that a proposer might offer to offset the expenses of implementing the plan as a means of reducing the contractor's expense of changing vendors, or just an annual opener

--

THE REPORTER: Just an annual what?

- A. Pardon?

THE REPORTER: Just an annual what?

- A. Reimbursement of annual open enrollment expenses. But it is, it is not a net cost gain or loss. It's simply the reimbursement of expenses.

BY MS. HIRAKAMI:

- Q. And would an incumbent have the same implementation costs that a new contractor would have?

- A. No. The incumbent would have less expenses and, therefore, one of the analysis and recommendations for not including that is that would naturally give an incumbent an unfair bias in a public bid, which was to say that, since they didn't have that expense and if others did, to consider that allowance would imbalance the field.

- Q. So, for example, if CVS had \$4 million in implementation costs, the EUTF could use their \$4 million allowance to offset it?

- A. Correct.

- Q. But if Informedrx had no implementation costs as the current vendor, there's no \$4 million that EUTF could take into account?

- A. That's correct. So the bias works both ways, depending upon who's proposing and who's the incumbent, how the response is structured. But it generally is intended, an implementation allowance is intended to offset an expense.

CVS Caremark notes that an implementation credit “is commonly requested and used to offset reasonable expenses of EUTF in transitioning between vendors.” and then, without any citation to the record or support from the EUTF, alleges that “In its calculations, EUTF would not have considered implementation credits by any Offerors under any circumstances, because such credits simply offset EUTF’s expenses.” The question, however, is not what the EUTF would have considered. The question is did it fail to consider what it should have considered.

The record does not explain how an offer of an “Implementation Allowance” can be scored when one of the offerors is the incumbent who would generate significantly lower implementation costs than non-incumbent offerors. But that is not the issue.

The question presented is whether the Evaluation Committee and Segal erred when they did not consider InformedRx’s offer of a \$4.5 million “early renewal credit”. For the following reasons, the answer is no:

- A. RFP 11-06 did not request an early renewal credit/cash payment in exchange for the award of the contract;

- B. In essence, InformedRx made the following offer: if selected as the vendor of choice for both the active and EGWP populations, we will increase our early renewal credit to \$4,500,000, contingent upon the contract for both groups being extended an additional 12 months and the new pricing being implemented on January 1, 2012. RFP 11-06 did not authorize the EUTF to consider or accept such an offer.

TWELFTH PROTEST POINT

InformedRx contends that Segal erroneously calculated InformedRx's proposed EGWP administrative fee of \$9.33 by treating it as Per Member Per Month (PMPM) and not as Per Employee Per Month (PEPM).

InformedRx also contends that even though CVS Caremark's EGWP administrative fees were substantially higher than InformedRx's EGWP administrative fees, Segal calculated CVS Caremark as having lower administrative fees than InformedRx and scored CVS Caremark higher.

Members are all individuals covered by the plan. The total of a \$9.33 Per Member Per Month (PMPM) administrative fee is higher than \$9.33 Per Employee Per Month (PEPM).

InformedRx initially proposed \$9.33 PMPM. During the pre-BAFO discussions, InformedRx was asked to reconsider this proposal. In its BAFO, InformedRx changed its offer to \$9.33 PEPM.

On remand, the EUTF shall provide InformedRx and CVS Caremark with the numbers Segal used in calculating the amount of the EGWP administrative fees for both InformedRx and CVS Caremark and the result of the calculations. It is not required to provide the actual calculations. Unless agreed otherwise by the parties, it shall provide this information on a confidential basis. It shall then allow the parties to argue in favor or in opposition to the numbers used. Finally, it shall decide either to affirm what had been done or to revise the numbers, recalculate using the revised numbers, and determine the revised scores.

THIRTEENTH PROTEST POINT

InformedRx contends that preprinting the inaccurate scores for "Net Cost Benefit and Administration" and "Network Disruption" onto the evaluators scoring sheets tainted the rest of the scoring as the Evaluation Committee scored the other criteria knowing the cost. This point has no merit. The alleged "taint" did not occur.

FOURTEENTH PROTEST POINT

InformedRx contends that the EUTF violated the Procurement Code by allowing a representative from Longs to attend the CVS Caremark interview.

This protest point is based entirely on the following testimony by Hirata:

- Q. You were at the interview with CVS, correct?
A. Yes.
Q. Do you recall who from CVS attended that meeting?
A. No.
Q. Do you recall how many people from CVS attended that meeting?
A. Five or six.
Q. Do you remember if they told you what departments they were from?
A. Yes.
Q. Do you recall what departments were represented?
A. There were individuals representing management, individuals representing the specific PBM group.
...
Q. Did you take down the names and positions of the people who attended the interview?
A. No.
Q. Do you recall whether the individuals stated they were from CVS or from Longs?
A. The individuals did state they were from CVS, and I believe there was one individual that was from Longs.
...
A. ... [B]ut I don't recall what this individual's position is.

There is insufficient evidence in the record to conclude that someone other than a “priority-listed offeror” attended the CVS Caremark interview.

Assuming someone other than a “priority-listed offeror” attended the CVS Caremark interview, there is nothing on the record indicating that InformedRx was aggrieved thereby.

FIFTEENTH PROTEST POINT

InformedRx contended and contends that the EUTF violated the Procurement Code by not providing documents appointing Yahiro in the contract file. The Procurement Officer agreed and caused the relevant document to be placed in the contract file. In other words, what once was a violation is no longer a violation. Consequently, this point has no merit.

SIXTEENTH PROTEST POINT

InformedRx contended and contends that the EUTF violated the Procurement Code by not providing documents appointing the Evaluation Committee in the contract file.

HAR § 3-122-45.01 requires that

[p]rior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

The Procurement Officer agreed and caused the relevant document to be placed in the contract file. In other words, what was once a violation is no longer a violation. Consequently, this point has no merit.

SEVENTEENTH PROTEST POINT

InformedRx contends that the EUTF violated the Procurement Code by not providing documents setting forth the qualifications of the Evaluation Committee in the contract file.

HAR § 3-122-45.01 requires that

Prior to the preparation of the request for proposals, a determination shall be made by the procurement officer that the procurement officer or an evaluation committee selected in writing by the procurement officer shall evaluate the proposals. A copy of the document identifying any committee members and any subsequent changes thereto shall be placed in the contract file.

(1) The evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured;

(2) Private consultants may also serve on the committee and shall:

(A) Have sufficient knowledge to serve on the committee;

...

(3) The contract administrator shall serve as a member of the committee;

(4) The contract administrator or a designee shall serve as chairperson, and the procurement officer or a designee shall serve as advisor.

More precisely, InformedRx's objection is that "the EUTF failed to provide Evaluation Committee members who possessed the requisite know-how to fulfill their

fiduciary duties to the EUTF, thereby tainting the RFP process and resulting in an uninformed contract award to CVS Caremark[.]” This point has no merit. The Evaluation Committee members, assisted by its consultant, “possessed the requisite know-how”.

The following statement in the EUTF’s 8-24-11 letter states facts:

Pharmacy Benefit Management pricing is a very complex arrangement involving networks of providers, discounts which vary by prescription drug, administration charges and rebates. For a responsible, impartial analysis of the technical aspects of the proposals, the committee relied on the pharmacy specialists and the computer systems of the Segal Company, a national firm which was hired through a competitive sealed proposal process to provide consulting services to the EUTF. Evaluation committee members were not expected to have extensive knowledge of the intricacies of PBM pricing models; however, they all had knowledge of the critical plan design, service and cost issues surrounding EUTF drug plans which affect the members of the EUTF, in addition to respect for their responsibilities as Trustees to provide quality prescription drug coverage at a responsible cost.

It is required that (1) the evaluation committee shall consist of at least three governmental employees with sufficient qualifications in the area of the goods, services, or construction to be procured, and (2) private consultants may also serve on the committee and shall have sufficient knowledge to serve on the committee;

What are “sufficient qualifications”? Precedent indicates what is not insufficient. Evaluation Committee members are not required to have “the technical qualifications to conduct an independent evaluation of the proposals and to determine, based on their relative merits in comparison with the requirements of the RFP, which proposal was most advantageous to the State.” CARL Corp. v. State, Dept. of Educ., 85 Hawai’i 431, 946 P.2d 1 (1997).

A description of the qualifications of each member of the Evaluation Committee is stated below. Obviously, all of them have “sufficient qualifications”.

Coriell is a Certified Employee Benefit Specialist. See Ex. J-20 at 9. She has over 30 years experience in group insurance, including claims, plan administration and underwriting. See 9/22/11 Tr. (Vol. 2) at 351:24 to 352:20; 352:4-10. She also served as Plan Administrator for the Southwestern Educational Purchasing Council (EPC) for over 24 years, managing medical drug, dental, vision and life benefits for a pool of 53 school districts with 10,000 covered employees. Id. at 352:13 to 353:10. Coriell’s work for EPC was very similar to her work as Administrator for the EUTF. Id. at 354:2-5. After joining the EUTF, Ms. Coriell participated in training on contract administration and RFPs. Id. at 362:6-18.

Dean Hirata (Hirata): Hirata is currently the Chief Financial Officer of Tetris Online, Inc. See 9/23/11 Tr. (Vol. 3) at 502:13-16. Hirata is the former Deputy Director of the State of Hawaii, Department of Budget and Finance. Id. at 502:17-20. He was formerly the Chief

Financial Officer of Central Pacific Financial Corporation, the primary subsidiary of which was Central Pacific Bank, where he was responsible for the company's human resources department. Id. at 505:21-24. In this role Hirata negotiated contracts involving medical benefits for employees. Id. at 505:1-506:11. Hirata was Chairperson of the EUTF from January 2011 until June 30, 2011, id. at 503:18 to 504:12, and is currently the EUTF Secretary. Id. at 504:11-15. In his capacity as former Deputy Director of Budget and Finance, Hirata was involved with putting together the State's budget and addressing longer-term obligations such as the State EUTF, and thus he became familiar with health benefits for State employees, including their prescription drug coverage. Id. at 504:20 to 506:5. Additionally, after becoming Deputy Director of Budget and Finance, Hirata attended training put on by the State Procurement Office. Id. at 506:18-25.

Everett Kaneshige (Kaneshige): Kaneshige is the Deputy Director of the State of Hawaii, Department of Commerce and Consumer Affairs. See 9/26/11 Tr. (Vol. 4) at 671:17-23. Kaneshige has been a licensed Hawaii attorney since 1993, and has worked for the Department of the Attorney General (Deputy Attorney General), Alston Hunt Floyd & Ing (associate and partner), and Ekimoto & Morris (of counsel). Id. at 672:7-11; 734:11-25. He also served as a consultant to the real estate firm Monarch Properties, Inc. Id. Kaneshige previously served on the evaluation committee for the State of Hawaii's procurement for its information technology baseline contract. Id. at 673:22-674:8. Kaneshige also received the general procurement training provided by the State Procurement Office. Id. at 674:14-21.

George Kahoohanohano (Kahoohanohano): Kahoohanohano is a EUTF Trustee and SHOPO representative. Id. at 740:1-5. Kahoohanohano served on the EUTF Board for several years, and has served on the evaluation committee for the following four EUTF requests for proposals: medical, PBM, life insurance and dental and vision. Id. at 741:5742:1. Kahoohanohano was on the Evaluation Committee in which NMHC (now InformedRx) became the incumbent. Id. Since 2005, Kahoohanohano attended an international foundation which provides special classes on procurement. Id. at 743:5-13. In 2006, he received RFP training conducted by the State of Hawaii. Id. at 743:14-20.

Derek Mizuno (Mizuno): Mizuno is the Employee Trustee and Deputy Executive Director of the Hawaii Government Employees Association ("HGEA"). See 9/23/11 Tr. (Vol. 3) at 441:1-4. Mizuno is a Certified Public Accountant. Id. at 491:4-8. Previously, Mizuno served as the controller for the Estate of Samuel Mills Damon and its \$800 million investment portfolio Id. at 491:11-24 and assisted in the real estate dispositions relating to the termination of the estate. Id. Mizuno also served as a senior manager with KPMG LLP from September 1992 to October 2002, preparing financial statements and audits for KPMG clients. Id. at 491:13-14; 491:25 to 492:7. Those audits included audits of the State of Hawaii and County of Hawaii for procurement code compliance. Id. at 491:25 to 492:7.

The Segal Company (Segal) has been a consultant to the State in various capacities since 1957. (9/27/11 Tr. Vol. 5 at 882:14-21) The EUTF retained Segal to consult with the EUTF Board and the Evaluation Committee. Mr. Thomas Morrison (Morrison), Senior Vice President of Segal, credibly testified that Segal was the "consultant to the EUTF board in its process of preparing and releasing and evaluating the RFP for all of the benefits for the EUTF." 9/27/11 Tr. (Vol. 5) at 880:9-12. Morrison has been involved in "hundreds" of

RFPs for pharmacy benefit management services. Id. at 880:16-21. Morrison has been consultant to the State and the EUTF since 1999.

What is “sufficient knowledge”? It is knowledge provided by experience and education. Before the Evaluation Committee begins its work, its members must be properly instructed about the process, the purposes of the process, and the duties and obligations of each Evaluation Committee member as he or she functions within that process. In this case, the information provided satisfied the minimum requirements. Clearly, however, the educational process can and should be improved.

EIGHTEENTH PROTEST POINT

HAR § 3-122-51(a) requires that “[p]roposals and modifications shall be time-stamped upon receipt and held in a secure place by the procurement officer until the established due date. Purchasing agencies may use other methods of receipt when approved by the chief procurement officer.” InformedRx contends that the proposals did not have time-stamps to evidence when they were received. This point has no merit.

The EUTF time stamped each proposal upon arrival. Due to the large boxes that it received from the Offerors and the type of time stamp EUTF uses, EUTF had to either (i) stamp the box tops or, (ii) stamp separate pieces of paper, which EUTF then maintained in a file: When possible, EUTF stamped the master proposal, but if the box was too big, EUTF would time stamp a blank piece of paper and make a notation indicating the Offeror.

The EUTF credibly explained that it did, in fact, time stamp each proposal upon arrival. The EUTF’s time stamp is not capable of stamping a box, so when a box is received, the EUTF time-stamped a sheet of paper for that proposal and entered it into the roster.

NINETEENTH PROTEST POINT

InformedRx notes that the scoring sheets contain few handwritten comments and insufficient explanations to comply with HAR § 3-122-52 which states in part:

- (a) Evaluation factors shall be set out in the request for proposals and the evaluation shall be based only on the evaluation factors. Evaluation factors not specified in the request for proposals may not be considered.
- (b) A numerical rating system shall be used. The relative priority to be applied to each evaluation factor shall also be set out in the request for proposals.
- (c) The points to be applied to each evaluation factor shall be set out in the request for proposals.
 - (1) The procurement officer, or each member of the evaluation committee, as applicable, shall explain his or her ranking

determination in writing which shall be placed in the procurement file;

(2) The written ranking evaluations or explanations shall be available for public inspection after the award of the contract is posted.

The scoring sheets state that “categories that do not receive the maximum points available must have supporting comments justifying the reason.” The Evaluation Committee was instructed that written comments were unnecessary when no deductions were made.

As noted by the EUTF in its August 24, 2011 letter, “[w]ith respect to the Fees and Network Disruption areas, no comments appear from the evaluators because those were based upon calculations performed by the consultant; comments may not appear if the offeror received the maximum score possible in a category.”

For the categories not calculated by Segal, each offeror started with the maximum number of points in each category and each Evaluation Committee member deducted points based upon that member’s assessment of the offeror’s BAFO. The Evaluation Committee members were instructed that, were deductions were made, they were required to write on their individual score sheets the reason(s) for the deduction(s). Although it was a simple process not requiring much effort by the members of the Evaluation Committee, no less than some of them failed their duty.

Offerors who are not awarded the contract should not be required to have a protest hearing to examine the members of the Evaluation Committee to know and understand the reasons for their scoring. At this time, the law does not authorize an alternative. In this case, there was a protest hearing at which it was established that InformedRx was not aggrieved by the Evaluation Committee’s instances of non-compliance with HAR § 3-122-52.

TWENTIETH PROTEST POINT

InformedRx contends that although Kaneshige’s scoring sheets do not include scores for CVS Caremark in the Experience Offering Services and Performance Guarantees criteria and for InformedRx in the Experience Offering Services criteria, the calculations were made as if he had given the highest scores possible.

Kaneshige credibly testified as follows:

- Q. I’m asking you specifically with regards to the PBM RFP for EUTF, what was your understanding of your duty as a member of the evaluation committee?
- A. Okay, I understood my duty was to basically review the material that had been submitted by the bidders, to review the reports and summaries prepared by our consultant, and then to exercise my judgment as a board member to evaluate those materials and 676 come up with a reasonable score per bidder.

- ...
- Q. Do you recall why you awarded Informedrx three out of five points for performance guarantees?
- A. My recollection was that their performance guarantees, based on the information that was provided to us, was less than some of the other guarantees submitted by the other bidders.
- Q. What information are you referring to?
- A. I am referring primarily to the information given to us, provided to us by Segal, which was a summary of information, having gone through all of the various bids.
- Q. On the same sheet, do you know why you left the Experience Offering Services to Similar-Sized Entities and References, why you left that criteria blank?
- A. The answer is, I'm not exactly sure. I could speculate, if you're willing to hear my speculation?
- Q. No. Only if you recall the reason you left it blank.
- A. I don't recall the specific reason why I left it blank other than to say that the instruction that was given that I recall was that if we were going to award the maximum number of points that we didn't have to fill in an explanation.
- Q. So your recollection is it was your intent to give Informedrx five out of five points for that criteria?
- A. Again, it is -- it's, it's blank and it speaks for itself. But that, based on that information that I -- or that instruction that I just told you, that's the only reason why I can think of why I would have left it blank.
- ...
- Q. And under the paragraph: Experience offering services.
- A. Yes.
- Q. There's the maximum point of five, and next to that it's blank and you did not fill it in. I think you testified that your instructions were you would need to make a comment only if you were not giving the maximum amount?
- A. That's correct.
- Q. So, is it your best explanation that you can recall today, if you had to explain why it's blank, that you had most likely intended to give Informedrx the full amount?
- A. Yes.
- Q. Do you recall if that happened with any other vendor? And could you turn to page 240, please?
- A. Okay, I'm at 240.
- Q. And is this your score of CVS's offer?
- A. Page 40 appears to be part of the scoring sheet for the CVS non-EGWP, correct.
- Q. And under Experience Offering Services, again, that box is blank?
- A. That's correct.

- Q. Although there's a maximum of five points?
 A. Right.
 Q. And below that Performance Guarantees the box is blank, although there's maximum of five points?
 A. That's correct.
 Q. So, for the same reason your best explanation would be if you were asked to describe why that's blank it's because you intended to give them the full score on both those boxes?
 . . .
 Q. So, is your explanation for the blanks in CVS's score your same explanation as for Informedrx's blank?
 A. Yes, it is.

This protest point by InformedRx's is without merit. Unless and until there is an expressed reason for giving a lesser score, the maximum score is awarded. Kaneshige intended to but neglected to insert the maximum scores.

TWENTY-FIRST PROTEST POINT

InformedRx contends that the EUTF should have kept a written record of discussions with each offeror and that, “[a]t a minimum, the EUTF should have kept a record of all questions asked of each offeror during interviews.”

Such a practice would be most helpful in the event of a protest. This case is a good example. As indicated by InformedRx's use of the word “should”, however, the desired act is not required by law or rule. HAR § 3.122.53(b) requires only that “[t]he procurement officer shall establish procedures and schedules for conducting discussions and keep a record of the date, place, purpose of meetings, and those attending.”

TWENTY-SECOND PROTEST POINT

InformedRx contends that the EUTF should have but did not investigate whether CVS Caremark engaged in anti-trust/anti-competitive practices.

HRS Section 103D-310(b) states:

(b) Whether or not an intention to bid is required, the procurement officer shall determine whether the prospective offeror has the financial ability, resources, skills, capability, and business integrity necessary to perform the work. For this purpose, the officer, in the officer's discretion, may require any prospective offeror to submit answers, under oath, to questions contained in a standard form of questionnaire to be prepared by the policy board. Whenever it appears from answers to the questionnaire or otherwise, that the prospective offeror is not fully qualified and able to perform the intended work, a written determination of nonresponsibility of an offeror shall be made by the head of the purchasing agency, in

accordance with rules adopted by the policy board. The unreasonable failure of an offeror to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of nonresponsibility with respect to such offeror. The decision of the head of the purchasing agency shall be final unless the offeror applies for administrative review pursuant to section 103D-709.

In its proposal, CVS Caremark wrote, in relevant part, as follows:

4. Various lawsuits have been filed alleging that Caremark has violated applicable antitrust laws in establishing and maintaining retail pharmacy networks for client health plans. . . .

6. In August 2009, the Company was notified by the FTC that it is conducting a non-public investigation under the FTCA into certain of the Company's business practices. . . . At this time, 24 states, the District of Columbia, and the County of Los Angeles, are known to be participating in this multi-state investigation. . . .

In her August 24, 2011 letter responding to InformedRx's August 8, 2011 Protest and August 12, 2011 Protest Supplement, Yahiro describes InformedRx's protest point as follows:

The EUTF and CVS Caremark have committed antitrust violations; CVS Caremark may have engaged in price discrimination, monopolization, predatory pricing and other anti-competitive behavior. An investigation should be conducted to determine whether CVS Caremark committed serious antitrust violations. If so, EUTF might possibly be deemed to be complicit.

In its October 7, 2011, filing in this proceeding, InformedRx describes Informed's protest point as follows:

The EUTF should have performed an investigation to determine if CVS Caremark was a responsible offeror based on the lawsuits and the FTC/multi-state investigations which were referenced in CVS Caremark's proposal.

...

Based on the foregoing, an investigation is warranted as to whether CVS Caremark and Longs' plans result in price discrimination, monopolization, predatory pricing and/or other anti-competitive behavior in violation of applicable antitrust and unfair competition laws. . . .

Citation and footnote omitted.

If InformedRx is asking the EUTF to check the record in Hawaii, the EUTF did so. In her August 24, 2011 letter, the Procurement Officer stated that, upon inquiry by the Procurement Officer, the Hawaii Attorney General responded that there is no “investigation of CVS Caremark by the State of Hawaii regarding these types of issues[.]”

If InformedRx is asking the EUTF to check the record in the United States, it appears that CVS Caremark has provided the relevant information.

If InformedRx is asking the EUTF to conduct its own investigation into whether “[t]he EUTF and CVS Caremark have committed antitrust violations”, the request is unreasonable.

If InformedRx is asking the EUTF to join the other States now participating in the multi-state investigation, the EUTF is not authorized to take such action. Moreover, such an investigation would not be a ground for delaying action in this case.

The record and the allegations do not constitute a reasonable basis compelling the EUTF to disqualify CVS Caremark or to postpone this procurement process.

PROTEST POINT NUMBER 24

InformedRX contends that Coriell failed to disclose her prior business relationship with CVS Caremark and she “did not seek an opinion from the State [E]thics [C]ommission prior to working on RFP No. 11-06 as to whether or not she needed to make a disclosure[.]”

InformedRx notes that prior to coming to EUTF, Coriell was employed as Administrator of the Southwestern Ohio Educational Purchasing Council (SOEPC). In 2010, the SOEPC’s Insurance Commissioner issued an RFP for prescription drug coverage. The SOEPC utilized the consultant services of AON to handle the RFP. Coriell was not on the EPC’s evaluation committee and had no vote in the selection process. CVS Caremark was selected to replace AnthemRx and coverage was transferred to CVS Caremark effective October 1, 2010. Coriell left SOEPC for EUTF three and a half months later, on or about January 15, 2011.

Assuming Coriell should have sought an opinion from the State Ethics Commission and/or made the disclosure, the question is how has InformedRx been adversely affected by Coriell’s failure to do so. Significantly, InformedRx does not contend that Coriell should have recused herself from membership on the Evaluating Committee. Neither does it contend that her impartiality might reasonably be questioned. Clearly, the error, if any, is harmless.

PROTEST POINT NUMBER 25

InformedRX contends that the EUTF did not treat InformedRx equally with other offerors with respect to a retail dispensing location on Lanai. The Procurement Officer

sustained this protest by InformedRx's Protest concerning whether each Offeror had a retail dispensing facility on Lanai. The Procurement Officer decided that "an additional 1/6th of the 12.5 points, multiplied by 5, should be granted to InformedRx, for a total of 10.5 additional points. This would bring InformedRx's total in this category to 116, compared to CVS Caremark 120.5." Thus, InformedRx is no longer aggrieved.

PROTEST POINT NUMBER 26

InformedRx contends that the myriad of errors indicates that the EUTF's procurement process was defective, the denial of the EUTF's protest was discriminatory, unfair, arbitrary and capricious, and the entire procurement process should be redone in a fair and just manner. More simply stated, InformedRx contends that the multitude of non-reversible errors in this case add up to one reversible error. This contention has no merit. Assuming such is ever a possibility, it did not occur in this case.

OPTIONS

As noted above, in CARL Corp. v. State Dept. of Educ., the Hawaii Supreme Court implicitly concluded that HRS § 103D-706 is applicable prior to the completion of stage 7 – the signing/execution of a contract.

HRS § 103D-706 states:

Remedies prior to award. 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:

- (1) Cancelled; or
- (2) Revised to comply with the law.

In Arakaki v. State, 87 Haw. 147, 152, 952 P.2d 1210, 1214, the Hawaii Supreme Court stated;

We, therefore, hold that the term "revise" in the context of HRS § 103D-706 includes remand and reconsideration. Because cancellation under the circumstances of this case is contrary to the purposes underlying the Procurement Code, we further hold that the Hearings Officer's selection of cancellation of the solicitation was an abuse of discretion.

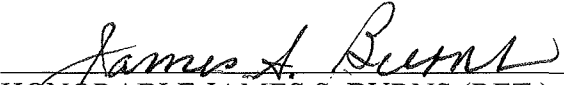
DECISION

The award of the contract to CVS Caremark for the non-EGWP plan is affirmed. In light of this opinion, it is not possible for InformedRx's score to be higher than CVS Caremark's score.

The award of the contract to CVS Caremark for the EGWP plan is vacated. This matter is remanded back to the Evaluation Committee/EUTF to take the actions specified in this decision's response to the Third, Ninth, Tenth and Twelfth Protest Points. After the Evaluation Committee/EUTF has taken these actions, the EUTF shall recalculate the award of points and, based on the results, award the contract in writing.

The parties will bear their own attorneys' fees and costs incurred in pursuing this matter.

DATED: Honolulu, Hawai'i, DEC 16 2011.


HONORABLE JAMES S. BURNS (RET.)
Special Hearings Officer
Department of Commerce and Consumer Affairs