

DEPT. OF COMMERCE
AND CONSUMER AFFAIRS

2012 MAR -9 P 2: 20

HEARINGS OFFICE

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

In the Matter of)	PCY-2012-4
)	
INFORMEDRX, INC.)	HEARINGS OFFICER'S FINDINGS OF
)	FACT, CONCLUSIONS OF LAW, AND
Petitioner,)	DECISION
)	
vs.)	
)	Hearing Date: February 28, 2012
STATE OF HAWAII DEPARTMENT OF)	Hearings Officer: David H. Karlen
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.)	
)	
)	

**HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND DECISION**

I. INTRODUCTION

On February 7, 2012, Petitioner InformedRx, Inc. (“Petitioner” or “InformedRx”) filed its Request for Administrative Hearing (“RFAH”) in this matter, which Request was assigned case number PCY-2011-4. Respondents were the State of Hawaii Department of Budget & Finance Employer-Union Health Benefits Trust Fund, Sandra L. Yahiro, in her capacity as Assistant Administrator and Procurement Officer of the State of Hawaii Employer-Union Health Benefits Trust Fund, and Barbara Coriell, in her capacity as the Administrator of the State of Hawaii Employer-Union Health benefits Trust Fund (hereinafter referred to collectively as “Respondents” or “EUTF”).

Pursuant to a stipulation of the parties and an order filed February 16, 2012, Caremarkpcs Health, L.L.C. (“Intervenor” of “Caremark”) intervened in this case.

On February 21, 2012, the EUTF filed its Motion to Dismiss or in the Alternative for Summary Judgment. On February 21, 2012, Caremark filed its Motion for Summary Judgment. On February 21, 2012, InformedRx filed its Motion for summary Judgment.

On February 21, 2012, Caremark filed a joinder in the EUTF’s Motion. On February 27, 2012, the EUTF filed a statement of no opposition to Caremark’s Motion.

Oral argument on all of the above motions was held on February 28, 2012. Sarah R. Hirakami, Esq., and Kyle K. Chang, Esq., Deputy Attorney Generals, appeared on behalf of the EUTF. Craig K. Shikuma, Esq., and Kenneth M. Nakasone, Esq., appeared on behalf of InformedRx. David J. Minkin, Esq., Kenneth J. Mansfield, Esq., and Jesse J.T. Smith, Esq., appeared on behalf of Caremark.

During the course of the hearing on the EUTF’s Motion and Caremark’s Motion, the Hearings Officer orally denied a portion of both motions. In addition, the Hearings Officer took under advisement the remainder of EUTF’s Motion, the remainder of Caremark’s

Motion and all of InformedRx's motion. The Hearings Officer requested additional written submittals from all parties by 9:00 a.m. on February 29, 2012. This Decision, based on the record as of the conclusion of oral argument on February 28, 2012, as well as the additional written submissions from the parties on February 29, 2012, more fully sets forth the oral rulings on February 28, 2012, sets forth the rulings on the motions, or portions thereof, taken under advisement, and stands as the formal order with respect to the entirety of the aforesaid motions.

As a result of the ruling herein on the motions, all issues in the case are resolved, and there is no need for an evidentiary hearing.

II. FINDINGS OF FACT

To the extent that any Findings of Fact are more properly construed as Conclusions of Law, they shall be so construed.

General Background

1. This hearing involves a protest arising out of the remand to the EUTF by the Special Hearings Officer, the Hon. James S. Burns (Ret.), in prior procurement protests, InformedRx, Inc., v. State of Hawaii Department of Budget & Finance Employer-Union Health Benefits Trust Fund, et al., PCH-2011-8, PCH-2011-9, and PCH-2011-13..

2. On December 16, 2012, the Special Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision (hereinafter "Decision") in Cases PCH-2011-8, PCH 2011-9, and PCH-2011-13. The Decision was a final written decision pursuant to HRS §103D-709(b).

3. On December 23, 2011, InformedRx filed an appeal of the Decision to the First Circuit Court.

4. Part of the Decision vacated the award to Caremark of the contract for the EGWP (Medicare eligible retirees) employee group and remanded the matter back to the EUTF for further consideration of some of the protest points raised by InformedRx.

5. Upon remand, the EUTF Evaluation Committee sought to re-evaluate and re-score the award of the EGWP Plan Contract.

6. On December 20, 2011, the EUTF provided to the parties the revised EGWP administrative fee calculations and requested arguments in favor of, or in opposition to, the calculations.

7. Caremark and InformedRx submitted their respective position statements to the EUTF.

8. The EUTF Evaluation Committee conducted the rescoring for InformedRx and Caremark on December 28, 2011.

9. The EUTF announced at its Board of Trustees meeting on January 10, 2012 that Caremark was the awardee on RFP 11-06 with respect to the EGWP Plan Contract. Also on January 10, 2012, the EUTF posted on its website that Caremark was awarded the EGWP contract.

10. Pursuant to a request by InformedRx, the EUTF conducted a debriefing with InformedRx on January 23, 2012.

11. On January 27, 2012, InformedRx submitted a protest of the award of the EGWP plan contract to Caremark.

12. On January 31, the EUTF submitted a response to InformedRx's protest which denied the protest in its entirety.

A. Issue No. 1: Compliance with the Requirements of HAR §3-126-7

13. InformedRx filed its appeal with the Office of Administrative Hearings ("OAH") of the Department of Commerce and Consumer Affairs ("DCCA") of the EUTF's

final decision denying InformedRx's written procurement protest on February 7, 2012, which date was within seven (7) calendar days of the EUTF's final decision. The appeal is otherwise known as a Request for Hearing.

14. On February 7, 2012, InformedRx personally served its Request for Hearing in this matter on the EUTF's attorneys, including Deputy Attorney General Sarah Hirakami, Esq. InformedRx provided EUTF's attorneys with an additional copy of its Request for Hearing for the use of Respondent Yahiro.

15. Ms. Hirakami had represented the EUTF throughout the course of the proceedings in the prior procurement protest that culminated in the December 16, 2011 Decision by Judge Burns referred to above.

16. Counsel for InformedRx communicated extensively with Ms. Hirakami on January 13, 2012 with respect to the scheduling of a debriefing by the EUTF on the EUTF's decision on remand to award the EGWP contract to Caremark. Said communications also concerned a confidentiality agreement between the EUTF and InformedRx. A debriefing is usually requested as a preparatory step in protesting an agency procurement decision.

17. There was an additional communication between counsel for InformedRx and Ms. Hirakami concerning the debriefing schedule on January 17, 2012.

18. There was an additional communication between counsel for InformedRx and Ms. Hirakami concerning confidentiality of documents pertaining to the EUTF's decision on remand on January 20, 2012.

19. There was an additional communication between counsel for InformedRx and Ms. Hirakami concerning documentation read by Respondent Yahiro on January 25, 2012. Counsel for InformedRx sought this information "before we have to decide whether to protest."

20. On January 26, 2012, Ms. Hirakami sent counsel for InformedRx a copy of Respondent Yahiro's debriefing summary.

B. Issue No. 2: Rescoring the Network Disruption Category

21. Pursuant to the terms of the RFP, InformedRx was supposed to submit the following information pertaining to each claim in its claim data file:

An indication whether the dispensing retail pharmacy was in InformedRx's proposed network or retail dispensing facilities

22. For the Network Disruption category scoring, the relevant information was the first area—whether the dispensing retail pharmacy was in InformedRx's proposed network or retail dispensing facilities.

23. InformedRx did not comply with the terms of the RFP in that regard.

24. In the original scoring of the Network Disruption category, Segal had looked at information outside of the information provided by InformedRx with its RFP. By doing this, Segal had come up with a lower utilization rate which resulted in a score of 105.5 points for InformedRx for the Network Disruption category.

25. InformedRx contended that its utilization rate was 99.93% as set forth in Exhibit 18 to its response to the RFP. Such a utilization rate would most probably have led to a maximum score of 125 points for InformedRx on the Network Utilization category.

26. The scoring of the Network Disruption category was the subject of the Ninth Protest Point of Judge Burns' Decision.

27. The Decision held that Segal's method of calculating the utilization rate was inappropriate.

28. With respect to the Ninth Protest Point, the Decisions states at pages 32-33:

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.

29. After remand, the EUTF reviewed the information supplied by InformedRx with its original proposal.

30. In particular, the EUTF reviewed a sample of 33 entries from InformedRx's claim data file.

31. None of the samples reviewed by the EUTF had any information about whether the dispensing retail pharmacy was within InformedRx's proposed network or retail dispensing facilities.

32. Accordingly, on remand the EUTF gave InformedRx a score of "0" for the Network Disruption category.

33. Upon remand, Segal, the EUTF's consulting firm, did not participate in the EUTF's review of the Network Disruption category in response to Judge Burns' decision on the Ninth Protest Point.

34. InformedRx complains that, upon remand, the EUTF did not review the electronic version of InformedRx's claim data file that InformedRx had provided to the EUTF. However, InformedRx has not provided any evidence that this electronic version contained the required information.

35. The maximum number of points for the Network Disruption category was 125.

36. InformedRx had originally received a score of 105.5 points on the Network Disruption category. After the EUTF decision on remand, InformedRx's score on the Network Disruption category was reduced to 62.5. This meant that its total score for all categories was reduced by 43 points.

C. Issue No. 3: No Reduction of Caremark's Score for the Performance Guaranty Category

37. Pursuant to Judge Burns' Decision on the Tenth Protest Point, on remand the EUTF raised InformedRx's points on the Performance Guaranty category from 15 points to 25 points.

38. The maximum number of points available for this category was 25.

39. In scoring the responses to the RFP, the EUTF had previously given Caremark a score of 25 points for this category. It had also previously given HMSA, another offeror, 25 points for this category.

40. On remand, the EUTF did not lower Caremark's or HMSA's points for this category.

41. While Caremark's total of performance guarantees was almost \$400,000 higher than HMSA's figure, they both received the maximum number of points for this category.

42. The difference between InformedRx's revised total and Caremark's total was about \$230,000, i.e., less than the Caremark-HMSA difference in performance guarantees.

D. Issue No. 4: Rescoring Other Proposals

43. On remand, the EUTF did not rescore proposals from offerors other than InformedRx and Caremark.

44. Judge Burns Decision, at page 39, with regard to the Twelfth Protest Point ordered a review of both InformedRx's and Caremark's administrative fees, including the possibility that the numbers would be revised and consequently their scores would be revised.

45. On December 20, 2011, counsel for EUTF sent an e-mail to counsel for InformedRx and counsel for Caremark attaching the revised EGWP administrative fee calculations for InformedRx and Caremark pursuant to Judge Burns' decision on the Twelfth Protest Point.

46. In connection therewith, later on December 20, 2011, counsel exchanged e-mails on these recalculated fees, particularly on the subject of allowing InformedRx and Caremark to see each other's recalculated fees.

E. Issue No. 5: Rescoring the Net Cost of Benefits and Administration Category

47. In its Twelfth Protest Point in the prior procurement protest, InformedRx contended that Segal, the EUTF's consultant, had erroneously calculated InformedRx's proposed EGWP administrative fee. It also contended that Caremark's EGWP administrative fees were substantially higher than InformedRx's fees but that Segal calculated Caremark as having a lower fee and thus Caremark had a higher score than InformedRx on this category. Decision at 39.

48. Judge Burns Decision, at page 39, remanded this issue with the following instructions:

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.

49. Per another portion of page 39 of that Decision, the term “member” refers to all individuals covered by the EGWP plan. A member is not necessarily a retired employee—a member could be a spouse or other person covered by a retiree’s insurance. If the same dollar figure is used for a per member per month (PMPM) administrative fee and a per employee per month (PEPM fee), the total fees would be higher if the PMPM fee is used because there are more members than employees.

50. In the prior proceeding, InformedRx complained that Segal had calculated InformedRx’s fees on a \$9.33 PMPM basis when InformedRx’s proposal was \$9.33 on a PEPM basis, thus overstating InformedRx’s proposed total fees.

51. Upon remand, by e-mail dated December 20, 2011, the EUTF informed counsel for InformedRx and Caremark of Segal’s revised EGWP administrative fee calculations for those two offerors. Those calculations were done on a per retiree per month (PRPM) basis.

52. Since a retiree must be a former employee, for the EGWP contract a PRPM basis for administrative fees is the same as a PEPM basis for administrative fees.

53. The new Segal calculations listed InformedRx’s fees as \$9.33 per retiree per month, which was the same as InformedRx’s original proposed \$9.33 per employee per month figures.

54. This new calculation corrected the error in the calculation of InformedRx's fees that was the subject of InformedRx's Twelfth Protest Point in the original protest hearing.

55. Informed RX confirmed its offer to the EUTF on the basis of Segal's new calculation of InformedRx's administrative fees.

56. The Segal calculations attached to the December 20, 2011 e-mail showed that Segal had calculated the administrative fees for both Caremark and InformedRx on a per retiree per month (PRPM) basis.

57. In its proposal, Caremark had initially calculated its fees on a PMPM basis, with PMPM standing for per member per month. Those monthly fees were the same as the PRPM fees utilized in the Segal calculation attached to the e-mail of December 20, 2011.

58. Prior to the offerors submitting their BAFOs, the EUTF had requested offerors to confirm that their administrative fees were on a PEPM basis. If they were not submitted on that basis, offerors were requested to provide revised administrative fees on a PEPM basis. InformedRx confidential Exhibit 13 to its Motion for Summary Judgment.

59. In response, Caremark converted its EGWP PMPM administrative fees to "updated" EGWP administrative fees on a PEPM basis. Caremark letter of July 8, 2011, part of Confidential Exhibit 13 to InformedRx's Motion for Summary Judgment.

60. As part of that July 8, 2011 submittal to the EUTF, Caremark also included a chart entitled "EGWP PBM RFP PROPOSED PRICING BY YEAR." On the left column of this chart, it listed the category of "Administrative Fees PMPM." However, for the data in the right hand column of this charge, the actual dollar charges were listed as being on a PEPM basis. The dollar figures in the right hand column, however, do not correspond to the PEPM dollar figures confirmed in the earlier portion of the letter of July 8, 2011. They are significantly lower than the PEPM figures in the beginning of the submission. Instead, they

correspond exactly to the PRPM figures used by Segal in the calculations attached to the e-mail of December 20, 2011.

61. InformedRx complains that the Segal calculation on remand and the EUTF decision on remand should not have ignored Caremark's higher PMPM figures in the July 8, 2011 submission. It also claims the EUTF should not have used the lower figures in the chart and resolved any ambiguity in that chart by assuming those figures were PEPM figures.

62. Since the PMPM dollar figures in Caremark's July 8, 2011 submission were higher than the figures in the chart found in a later part of that submission, it was reasonable for Segal and EUTF to consider the lower figures in the chart to be PEPM figures even if there was some ambiguity in the chart.

63. The attachment to the e-mail of December 20, 2011 correctly used Caremark's PEPM figures as the attachment's PRPM figures.

64. Caremark confirmed its offer to the EUTF based upon Segal's calculations on remand.

65. InformedRx has not submitted any evidence showing that Caremark's PRPM dollar figures as stated in the attachment to the December 20, 2011 are inaccurate.

66. It was reasonable for the EUTF to compare the two offerors' PRPM figures when considering on remand whether to modify the scoring points for the Net Cost of Benefits and Administration Category.

67. The maximum number of scoring points on the Net Cost of Benefits and Administration category was 150 points.

68. In the original scoring, InformedRx received 138.5 points and Caremark received 147.5 points for this category.

69. In the revised scoring after remand, InformedRx received 138.65 points and Caremark received 144.7 points.

F. Issue No. 6: Rescoring InformedRx on the Adherence to RFP Category

70. As part of its deliberations on remand, the EUTF reduced InformedRx's points on the Adherence to RFP category from 22 points to 17 points.

G. Miscellaneous

71. As part of its deliberations on remand, the EUTF increased InformedRx's points on the Ability to Perform category from 141 points to 150 points. .

72. As a result of the EUTF's decisions on remand, InformedRx's total of scoring points was reduced by a net of 28.85 points from 447 to 418.15.

73. As a result of the remand, the EUTF reduced Caremark's total scoring points from 490 to 487.2.

III. CONCLUSIONS OF LAW

If any of the following Conclusions of Law shall be deemed Findings of Fact, the Hearings Officer intends that every such Conclusion of Law shall be construed as a Finding of Fact.

1. InformedRx's appeal of Judge Burns' Decision to the First Circuit Court does not operate as a stay of that Decision. HRS §103D-710(b).

2. Summary judgment is appropriate if the record herein shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence, and all reasonable inferences from the evidence, must be viewed in the light most favorable to the non-moving party. Koga Engineering & Construction, Inc., v. State, 122 Haw. 60, 78, 222 P.3d 979, 997 (2010).

3. Bare allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact. Reed v. City & County of Honolulu, 76 Haw. 219, 225, 873 P.2d 98, 104 (1994).

A. Issue No. 1: Compliance with the Requirements of HAR §3-126-7

4. The EUTF asserts that InformedRx failed to comply with the requirements of HAR §3-126-7 because it did not inform Respondent Yahiro of InformedRx's appeal to the OAH within seven (7) calendar days after the EUTF decision to deny InformedRx's procurement protest.

5. HAR §3-126-7 provides in relevant part:

Decision by the chief procurement officer or designee

(a) A decision on a protest shall be made by the chief procurement officer or designee as expeditiously as possible after reviewing all relevant information, and shall be final.

* * *

(c) The protestor shall inform the head of the purchasing agency within seven calendar days after the final decision if an administrative appeal will be filed. An appeal shall be filed with seven calendar days of the final decision in accordance with subchapter 5. (Emphasis supplied)

With respect to the procurement in question in this proceeding, Respondent EUTF is the "purchasing agency," and Respondent Yahiro is the "head of the purchasing agency" as referred to in HAR §3-126-7.

6. HAR §3-126-7 does not require service of the administrative appeal on the head of the purchasing agency. Service of the administrative appeal, i.e., the request for hearing, is governed instead by HAR §3-126-48(b), which states:

The hearings officer may cause each party to be served with a copy of the request for hearing, or the hearings officer may require the party

requesting the hearing to serve each other party with a copy of the request for hearing and to file a certificate of service.

7. Pursuant to this rule, service of the request for hearing on the purchasing agency is not required at the time that the request for hearing is filed with the OAH. Instead, the rule provides that service may be accomplished by one of two means which would occur after the request for hearing was filed. In addition, there is no requirement that this service be accomplished within the seven (7) day period after the procuring agency denies the procurement protest.

8. The means or method of how a procurement protestor “shall inform” in compliance with HAR §3-126-7 is not specified by the rule.

9. The content of a communication to “inform” under that rule is likewise not specified. Nothing in the rule requires delivery of a complete copy of the appeal in order to “inform” the procuring agency that an appeal will be filed.

10. The Hearings Officer concludes that the rule requires only that the head of the purchasing agency be notified in a reasonable manner that an administrative appeal will be filed. Furthermore, the Hearings Officer concludes that the rule does not preclude informing a representative of the head of the purchasing agency, such as an attorney representing that agency, rather than directly informing the head of the purchasing agency.

11. The purpose and goal of the rule is to make sure the purchasing agency is aware of an appeal being filed so that the agency, and its attorney, can adequately respond to the appeal whether that be in the area of a stay of the procurement, a response to the OAH, or otherwise.

12. In the situation presented herein, Ms. Hirakami had a long history of representing the EUTF in the prior procurement protests as well as in connection with the

debriefing and decision on the instant procurement protest. Notice to Ms. Hirakami of the appeal and filing with the OAH was sufficient under the circumstances to inform the head of the purchasing agency and timely satisfy all of the purposes behind the “shall inform” requirement of HAR §3-126-7(c).

13. The parties have debated whether the “shall inform” requirement discussed above is jurisdictional such that a failure to comply with that requirement requires dismissal of InformedRx’s request for hearing. In view of the Hearings Officer’s decision that the “shall inform” requirement was met, there is no need to reach this jurisdictional question (or the other defenses InformedRx has raised with respect to this portion of the EUTF’s motion).

14. In addition to relying on HAR §3-126-7(c), Caremark’s motion makes an additional argument not made by EUTF. Caremark asserts that the failure to serve Ms. Yahiro with a copy of the request for hearing in accord with the provisions of HAR §3-126-61(a) requires dismissal of InformedRx’s appeal.

15. There is no time limit on the service referred to in HAR §3-126-61(a), and as discussed above in connection with HAR §3-126-48(b), service on Ms. Yahiro was not a prerequisite to subject matter jurisdiction over InformedRx’s procurement protest. .

16. Not being concerned with subject matter jurisdiction, Caremark’s claim here is akin to a claim of lack of personal jurisdiction. Cf. Hawaii Rule of Civil Procedure, Rule 12(b)(2). This defense is personal to the EUTF and can be waived. Rearden Family Trust v. Wisenbacker, 101 Haw. 237, 65 P.3d 1029 (2003).

17. The EUTF did not sufficiently specify this defense in its response to the request for hearing filed February 17, 2012, in its prehearing statement filed February 21, 2012, or in its Motion to Dismiss or in the Alternative for Summary Judgment filed February

21, 2012. The Hearings Officer therefore concludes that the EUTF has in fact waived this defense.

18. Accordingly, the EUTF's Motion for Summary Judgment and Caremark's Motion for Summary are both denied with respect to the above-discussed issues.

B. Issue No. 2: Rescoring the Network Disruption Category

19. InformedRx has divided this issue into four sub-issues:

a. The EUTF Evaluation Committee Did Not Use Its Consultant Segal to Rescore and/or otherwise Assist It In Evaluating and Rescoring the Network Disruption Category. See Protest Point A, argued at pages 7-9 of its Memorandum in support of its motion for summary judgment. It is listed as Protest Point A in InformedRx's protest letter to the EUTF of January 27, 2012.

b. The EUTF Erred by Limiting Its Review to a Determination Whether InformedRx Appended an Indicator to Each Claim Record. See Protest Point B, argued at pages 9-10 of its Memorandum in support of its motion for summary judgment. It is not listed as a protest point in InformedRx's protest letter to the EUTF of January 27, 2012.

c. The EUTF Erred Because the EUTF Evaluation Committee Was Provided With Incomplete Documentation to Evaluate and/or to Rescore the Network Disruption Category. See Protest Point C, argued at pages 10-12 of its Memorandum in support of its motion for summary judgment. It is listed as Protest Point B in InformedRx's protest letter to the EUTF of January 27, 2012, but it will be referred to herein as Protest Point C in accord with the identifying system in InformedRx's Motion for Summary Judgment.

d. The EUTF Erred and Did Not Treat InformedRx Equally with Respect To the Score for the Network Disruption Category Where InformedRx Should Not have Been Given 0% for that Category. This is listed as Protest Point C in InformedRx's protest letter to the

EUTF of January 27, 2012. It is not listed as a protest point for which InformedRx is seeking summary judgment. Its motion, at pages 1-2, lists Protest Points A through C and E through H as the protest points for which InformedRx moved for summary judgment, but none of those points corresponds to this point. For purposes of this decision, the Hearings Officer will call it Protest Point D, corresponding to the missing letter of the protest points listed in InformedRx's motion.

20. This section of the Hearings Officer's Conclusions of Law will apply to the entire issue, including the aforesaid sub-issues, without necessarily referring to a particular sub-issue in its individual conclusions.

21. As noted above, the portion of Judge Burns' decision of December 16, 2011, pertaining to the Network Disruption Category is found at pages 32-33 of that decision and states as follows:

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.

22. Pursuant to Judge Burns’ Decision, the information to be reviewed on remand was limited to the information provided by InformedRx in connection with its response to the Request for Proposals.

23. The Decision did not require Segal to participate in this review. InformedRx relies on the reference to Segal in the second paragraph of the above portion of the Decision. However, that was a reference to what Segal was supposed to have done when the original review of the response to the RFP took place. The Decision’s instructions on remand are contained in the next paragraph of the Decision and do not require any action by Segal.

24. For this reason alone, the EUTF and Caremark are entitled to summary judgment dismissing InformedRx’s Protest Point A, and, correspondingly, InformedRx’s motion for summary judgment on Protest Point A is denied.

25. With respect to Protest Point B, Caremark points out that it was not included in InformedRx’s protest letter to the EUTF of January 27, 2012.

26. Under the Procurement Code, the hearings examiner has the jurisdiction to consider and decide InformedRx’s protest. Pursuant to HRS §103D-709(a), the hearings officer:

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-702.¹

27. This jurisdiction, however, is not unlimited. Instead, it is specifically limited by HRS §103D-709(h), which provides:

¹ This hearing involves Section 103D-701.

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.

In other words, the hearings officer can only make a decision about the "determinations" of the chief procurement officer, and the chief procurement officer can only make "determinations" about complaints brought before that officer. The statute literally leaves no room for the hearings officer to make decisions about matters that were not previously the subject of a determination by the chief procurement officer. Kiewit Infrastructure West co. v. Dept. of Trans., State of Hawaii (PCX-2011-2), Goodfellow Bros., Inc. v. Dept. of Trans., State of Hawaii (PCX-201103) (Consolidated Cases) Exhibit "B," Order Denying Without Prejudice Department of Transportation's Oral Motion for Partial Dismissal Based on Lack of Jurisdiction.

28. While the EUTF did not assert a lack of subject matter jurisdiction with respect to Protest Point B in its Motion for Summary Judgment, that does not make a difference in the context of this proceeding. The question of lack of jurisdiction can be raised at any time in these proceedings. If not raised by the parties, it can be raised by the hearings officer *sua sponte*, as jurisdiction cannot be conferred by the stipulation, agreement, or waiver of the parties. Captain Andy's Sailing, Inc. v. Department of Natural Resources, 113 Haw. 184, 193-194, 150 P.3d 833, 842-843 (2006); Koga Engineering & Construction, Inc., v. State of Hawaii, *supra*, 122 Haw. at 84, 222 P.3d at 1003.

29. InformedRx responds that the Hearings Officer has jurisdiction over claims that are subsumed or are "rhetorical extensions" of claims set forth in the protest letter, citing the final decision in Kiewit Infrastructure West co. v. Dept. of Trans., State of Hawaii (PCX-

2011-2), Goodfellow Bros., Inc. v. Dept. of Trans., State of Hawaii (PCX-201103) (Consolidated Cases), filed June 6, 2011 at pages 46-47.

30. Although this is a close question, the Hearings Officer concludes that Protest Points B and C deal essentially with the same issue—review of the claims data file for information regarding network utilization. Protest Point C is more specific in its complaint about the limited number of samples reviewed, but that protest point still boils down to a claim, similar to the claim in Protest Point B, that the EUTF did not do an appropriate review of the pertinent information.

31. At this point in the decision herein, the pertinent question is whether the EUTF followed Judge Burns' Decision in reviewing the information provided by InformedRx and deciding on InformedRx's EGWP points for the Network Disruption category.

32. With respect to the Network Disruption category, the RFP required information to be added to InformedRx's claim data file. That information was whether the dispensing retail pharmacy was in InformedRx's proposed network or retail dispensing facilities. The information was to be appended to each claim record in the claim data file.

33. It was established in the previous procurement protest hearing, and was stated in Judge Burns' Decision, that InformedRx did not append any such information to the claim records in the claim data file.

34. On remand, the EUTF Evaluation Committee reviewed a sample of 33 claim records from the InformedRx claim data file and concluded that InformedRx had not provided information to determine a score for InformedRx on the network disruption category. InformedRx points out that this was, in essence, a useless exercise because it was already established that the information was not there. (However, InformedRx does not

explain why it is complaining that a sample size of 33 is inadequate when even a sample of 100% would find the same result, i.e., there was no information).

35. That being the case, it was InformedRx's obligation to point out what information was available upon remand to justify InformedRx's claim that it should be scored based on a 99.93% network utilization figure for this category. While InformedRx was not moving for summary judgment on its Protest Point D, in opposing the EUTF and Caremark motions on Protest Point D, InformedRx had to produce some evidence that its score should be something other than 0%. Reed v. City & County of Honolulu, supra.

36. InformedRx had to do more than claim the EUTF's procedure on remand was flawed. It had to demonstrate that using the correct procedure would have made a difference. Otherwise, any evaluation errors upon remand would be of no consequence.

37. At page 6 of its response to InformedRx's Motion, the EUTF asserted that:

InformedRx had *multiple* opportunities to direct the Evaluation Committee's attention to the location of the required information in its proposal: following the first debriefing; in its first Request for Hearing; during the first protest hearing; during its post-hearing arguments to Judge Burns; following the second debriefing; in its current Request for Hearing; and in its Motion for Summary Judgment. InformedRx has *never* identified the location where the required information can be found. (Emphasis in original)

38. Of those opportunities listed by the EUTF, the one relevant to this proceeding is InformedRx's Motion for Summary Judgment. To this must be added InformedRx's responses to the EUTF and Caremark motions for summary judgment. Each will be examined in turn.

a. InformedRx's Motion for summary judgment.

At page 11, InformedRx highlights the statement at page 33 of Judge Burns' decision that the EUTF consultant did not actually look at the claims data to see the actual

structure and utilization of the network at issue. This is repeated at page 16 of its Motion. InformedRx never describes what information in the claims data would provide sufficient information on the structure and utilization of the network

At page 16, InformedRx complains that the EUTF did not give its Evaluation Committee “complete information to conduct the rescoring. More specifically, the EUTF did not provide the EUTF Evaluation committee with the electronic version of InformedRx’s claim data file that InformedRx provided to the EUTF.” This is repeated at page 23 and at page 26 of its Motion. To the extent this differs from the statements cited in the Conclusion of Law immediately above, InformedRx still does not identify what in its electronic version of its claim data would supply the necessary information.

This is not sufficient to meet InformedRx’s burden to establish that it had submitted the required information. Merely asserting that such was the case does not establish that such was in fact the case.

b. InformedRx’s Opposition to the EUTF’s Motion for Summary Judgment

At page 12, InformedRx refers to the statement at page 33 of Judge Burns’ Decision to look at the claims data to see the actual structure and utilization of the network. Again, there is no description of what information in the claims data would provide sufficient information on the structure and utilization of the network.

This, even when combined with the statements in InformedRx’s motion, is not sufficient to withstand the EUTF’s motion for summary judgment.

c. InformedRx’s Opposition to Caremark’s Motion for Summary Judgment

Although lengthier than its opposition to the EUTF’s Motion for Summary Judgment, InformedRx’s opposition to Caremark’s Motion for Summary Judgment provides no new information. Instead, it focuses on the statement from Judge Burns’ Decision cited above

(e.g. at pages 20-21 of its memorandum) without any description of what information in the claims data would provide sufficient information on the structure and utilization of the network.

39. It was InformedRx's obligation to point out in this record where the information was that would support its claim that it was entitled to a utilization rating of 99.93% as it claims. Its memoranda failed to do so.

40. Nevertheless, at oral argument on February 28, 2012, the Hearings Officer gave counsel for InformedRx another opportunity to fill in the gap in InformedRx's memoranda and identify the specific information that supported InformedRx's claim. In response, the only portion of the record that was identified by InformedRx was Exhibit 18 to its RFP.

41. Exhibit 18 contains four lines purporting to show that there was a disruption rating for InformedRx of 0.07%, from which a utilization rating of 99.93% could be calculated. Exhibit 18 was available at the time of the original hearing before Judge Burns and is specifically referred to at page 29 of the Decision. This reference is contained in the portion of the Decision discussing the Ninth Protest Point.

42. The summary contained in Exhibit 18 had no corroborating information and was insufficient to justify a new Network Disruption score for InformedRx in Judge Burns' Decision. If it had been sufficient, there would have been no need for a remand. That same summary remains insufficient to justify a Network Disruption score of other than "0" in the present proceeding.²

² The EUTF makes a strong argument at pages 14-15 of its Memorandum in Opposition to InformedRx's Motion that other information submitted with InformedRx's response to the RFP pertaining to the number of pharmacies on each island in InformedRx's network demonstrates that the summary in InformedRx's Exhibit 18 is inaccurate. A decision on that point is not necessary to resolution of the motions under consideration.

43. Under these circumstances it makes no difference that the EUTF did not, on remand, consult with Segal, that the EUTF looked at only a small sample of records from the claims data file, or that the EUTF looked at those records only to determine if there was a network indicator attached to the small number of claims records it reviewed. Assuming for the sake of argument that those actions were not appropriate, those actions still do not establish entitlement to summary judgment in favor of InformedRx because they did not make any difference to the ultimate question on remand with respect to the Ninth Protest Point.

44. The Hearings Officer concludes the EUTF is correct in its assertion at page 6 of its Motion. The only logical conclusion is that the required information does not exist within InformedRx's proposal.

45. Therefore, the Hearings Officer concludes with respect to the Network Disruption issues, which are identified herein as Issues A, B, C, and D, that InformedRx's Motion for Summary Judgment is denied, the EUTF's Motion for Summary Judgment is granted, and Caremark's Motion for Summary Judgment is granted.

C. Issue 3: No Reduction of Caremark's Score for the Performance Guarantee Category

46. Judge Burns' decision found merit in InformedRx's Tenth Protest Point alleging EUTF miscalculation of Informed Rx's performance guarantees. His decision found that specific dollar amounts should be used for four sub-categories of performance guarantees: (1) Implementation - \$2,000,000; (2) Payment Accuracy & System Performance - \$250,000; (3) Account Management - \$230,000; and (4) Enrollee Services - \$250,000.

47. The sub-category of Allowances has two standards or components. In his discussion of the Tenth Protest Point, Judge Burns found that the amount for the standard of "Audit Allowance" was \$30,000. Judge Burns' Decision on the standard of "Implementation

Allowance” postponed discussion of that standard to the discussion of the Eleventh Protest Point.

48. At pages 37- 39 of Judge Burns’ Decision concerning the Eleventh Protest Point, he found that InformedRx was not entitled to any “early renewal credit.” InformedRx therefore received no scoring credit for its proposed “implementation credit” under the standard of “Implementation Allowance.

49. At page 27 of its Motion, InformedRx complains that Judge Burns’ decision “does not clearly provide a dollar amount for the Implementation Allowance Standard.” The Hearings Officer concludes, however, that Judge Burns’ Decision on the Eleventh Protest Point holds that InformedRx is not entitled to a dollar amount for the Implementation Allowance Standard. Whether the decision on the Eleventh Protest Point should have allowed InformedRx some alternative dollar amount on the Implementation Allowance is a matter reserved solely for an appeal of that Decision to the Circuit Court.

50. On the Tenth Protest Point, the Decision requires the EUTF to use the dollar amounts stated in the decision on the Tenth Protest Point for the various sub-categories.

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

Decision at 37. The total dollar amount of the items specifically listed in the decision on the Tenth Protest Point is \$2,760,000.

51. InformedRx’s advocacy of a total dollar amount of \$6,760,000 on pages 13 and 14 of its Motion for Summary Judgment is unwarranted. That total includes \$4,000,000 for an Implementation Allowance that was not listed in Judge Burns’ decision on the Tenth Protest Point. If InformedRx believes that Judge Burns erred in that regard and should have included an additional \$4,000,000 in the Decision’s recognized amount of the Performance Guarantees, its sole remedy was an appeal of the Decision in that regard to Circuit Court..

52. Using the correct total dollar amount determined the Tenth Protest Point, the EUTF determined on remand that InformedRx should receive the maximum amount of 25 points (an increase of 10 points) but did not lower Caremark's previous score of 25 points. In addition, it did not lower HMSA's score of 25 points. InformedRx obviously agrees with its new score but claims that Caremark's score should have been lowered on remand because only the offeror with the best proposal in this category could receive the highest points and the remaining offerors were awarded points relative to the best proposal.

53. On Performance Guarantees, however, InformedRx admits that two offerors, Caremark and HMSA, originally received the maximum number of points even though their total dollar amounts were not the same. This is not relative scoring. While Caremark's total was almost \$400,000 higher than HMSA's figure, they both received the maximum number of points. The difference between InformedRx's revised total and Caremark's total was about \$230,000, i.e., less than the Caremark-HMSA difference. It was therefore reasonable not to rescore Caremark.

54. Moreover, this issue has already been decided by Judge Burns' Decision. In his discussion of the Tenth Protest Point, at pages 33-34 of the Decision he recites the contentions of InformedRx. In relevant part, he states:

It [InformedRx] contends that "in the Performance Guarantee 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 [.] (Emphasis supplied)

55. Judge Burns clearly recognized that InformedRx was claiming Caremark's score should be reduced. In response, Judge Burns clearly stated that only InformedRx's score should be re-evaluated when he said at page 37 of the decision regarding the Tenth Protest Point:

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

56. Only the Network Disruption and Net Cost of Benefits and Administration categories were scored on a relative value basis.

57. Being under no requirement to reevaluate Caremark's Performance Guarantees score, the EUTF did not err when it did not do so.

58. Moreover, in view of the decision on the Network Disruption issues, any change of score pursuant to this portion of InformedRx's motion would not result in InformedRx's total scoring points exceeding Caremark's total scoring points.

59. For these reasons, the Hearings Officer concludes with respect to the Performance Guarantee issue, which is identified in InformedRx's Motion for Summary Judgment as Issue E, that InformedRx's Motion for Summary Judgment is denied, the EUTF's Motion for Summary Judgment is granted, and Caremark's Motion for Summary Judgment is granted.

D. Issue 4: Rescoring the Other Proposals

60. InformedRx's Protest Point F is that the EUTF should have rescored the proposals submitted by the other offerors, particularly HMSA.

61. Caremark maintains that InformedRx has no standing to advocate the rescoring of HMSA's proposal because InformedRx has no standing to claim that HMSA should have received the award of contract. However, as of the date of the hearing, InformedRx was not claiming that HMSA should have received the contract. It appeared to be claiming only that rescoring HMSA was necessary in order to obtain a proper comparison of Caremark's and InformedRx's stores. With such a limitation on its request, InformedRx would have standing to seek rescoring of HMSA's proposal.

62. Caremark also maintains that this claim by InformedRx is time barred. Based upon the e-mails of December 20 and 21, 2012, it asserts that InformedRx was on notice as of December 20, 2011 that the EUTF was not rescoring other offerors. However, the Hearings Officer concludes that the e-mails refer only to revising the administrative fees calculation for both InformedRx and Caremark. They cannot reasonably be read as stating, one way or another, that the scores of other offerors would or would not be revised. Since they do not provide notice that the scores of HMSA would not be revised, they cannot trigger any time limit imposed on InformedRx to file its protest before the end of December, 2011.

63. The e-mails, however, refer to the rescoring the Administrative Fee category pursuant to the Decision's Twelfth Protest Point. The Decision, at page 39, required recalculation of the administrative fees for both InformedRx and Caremark. Providing the proposed recalculations for those two offerors did not put InformedRx on notice that the scores for other offerors would not be rescored in light of the new calculations for InformedRx and Caremark. Accordingly, Caremark's claim that this protest point was not filed with the OAH in a timely manner is denied.

64. InformedRx claims that the following highlighted language from a portion of the Decision on the Twelfth Protest Point does not limit the rescoring to just InformedRx and Caremark:

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 to either affirm what had been done or to revise the numbers, recalculate using the revised numbers, and determine the revised scores.

65. The Decision, however, refers only to InformedRx and Caremark and rescoring them if their numbers changed (which was not a foregone conclusion) and cannot be interpreted to refer to rescoring the proposals of other offerors whose numbers would not be changed by the Decision on the Twelfth Protest Point.

66. Finally, InformedRx relies on two prior decisions where the hearings officer explicitly required rescoring all bids upon remand, Hawaiian Dredging Construction Co. v. Dept. of Budget and fiscal services, City & County of Honolulu, PCH 99-6 (Aug. 9, 1999), and Fletcher Pacific Construction Co., Ltd. V. DOT, PCH 98-2 (May 19, 1996).

67. Those decisions, however, are specific to those cases. Judge Burns specifically did not order rescoring of proposals from HMSA and/or the other offerors. InformedRx does not point to any principle of law that requires rescoring of all offerors, including those who did not protest, when one offeror's score is recalculated. In any event, even assuming for the sake of argument that Judge Burns was legally incorrect on this point, InformedRx's remedy was to appeal Judge Burns' Decision and not attempt to change that Decision through the present procurement protest.

68. Finally, InformedRx has not demonstrated any errors in the scores of HMSA or other offerors. Further, if its claim here is really that rescoring Caremark might make its score lower than HMSA's score, it has not demonstrated that such would be the case. Moreover, if the offerors were rescored on the Performance Guarantee category as InformedRx incorrectly claims should be done, HMSA's rescore on that category would be lower than Caremark's rescore because the amount of its guarantees was lower than the amount of Caremark's guarantees.

69. There being no basis in Judge Burns' Decision for rescoring other proposals, no basis in the law for requiring such rescoring (which, in any event, would have to be established by an appeal of Judge Burns' Decision), and no demonstration that there is a

rescoring that will actually make a difference, this claim of InformedRx must fail. For all of the reasons stated above, the Hearings Officer concludes with respect to the Rescoring of Other Proposal issue, which is identified in InformedRx's Motion for Summary Judgment as Issue F, that InformedRx's Motion for Summary Judgment is denied, the EUTF's Motion for Summary Judgment is granted, and Caremark's Motion for Summary Judgment is granted

E. Issue No. 5: Preferential Treatment Given to Caremark

70. InformedRx alleges that the EUTF erred in rescoring the Net Cost of Benefits and Administration category by making certain assumptions to give Caremark preferential treatment. The EUTF contends that the revised administrative fee calculation is consistent with Caremark's best and final offer.

71. Caremark asserts that InformedRx's claim is time-barred. It is based on Caremark's EGWP Fee Pricing which was in Caremark's BAFO. That BAFO was, in turn, an exhibit to the hearings in 2011. However, InformedRx is not protesting the contents of the BAFO. It is protesting the rescoring done by EUTF upon remand. Accordingly, InformedRx's protest on this point was timely.

72. Based upon the findings of fact above pertaining to this issue, InformedRx has not presented any evidence that the scoring of Caremark on remand was inappropriate.

73. In addition, in light of the decision herein on the Network Disruption category issues, InformedRx has not demonstrated a decision favorable to it on this issue would have resulted in InformedRx receiving more scoring points than Caremark.

74. The Hearings Officer concludes with respect to the rescoring of Net Cost of Benefits and Administration issue, which is identified in InformedRx's Motion for Summary Judgment as Issue G, that InformedRx's Motion for summary Judgment is denied, the EUTF's Motion for Summary Judgment is granted, and Caremark's Motion for Summary Judgment is granted.

F. Issue No. 6: Rescoring of InformedRx on the Adherence to RFP Category

75. InformedRx alleges that the EUTF Evaluation Committee, after remand, rescored the Adherence to RFP category. The EUTF deducted points from InformedRx's score on that category. InformedRx argues that rescoring this category was required or directed by Judge Burns' decision.

76. In connection with the Tenth Protest Point, Judge Burns' Decision stated that InformedRx did not answer the Network Disruption criteria correctly and that this failure would have been a valid basis for reducing its score for Adherence to RFP:

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.

Decision at 35 (emphasis supplied)

77. The Tenth Protest Point concerns InformedRx's claim that the EUTF miscalculated InformedRx's performance guarantees. The EUTF had partially sustained InformedRx's protest on this point, and Judge Burns' Decision found in further favor of EUTF: "This protest point has merit." Decision at 33. The Decision went on to assign dollar values to the separate categories of performance guarantees, including "Account Management" and "Enrollee Services." As discussed earlier, the total of these dollar values assigned by the Decision resulted in an increase in InformedRx's score on the Performance Guarantee criteria to the maximum possible score. In concluding the discussion of the Tenth Protest Point, the Decision directed a specific result concerning performance guarantees: "On remand, the Evaluation Committee shall use the dollar amounts stated above in calculating InformedRx's performance guarantees." Decision at 37.

78. The Adherence to RFP criteria was not the subject of the Tenth Protest Point. The Decision concerning the Tenth Protest point provides no direction about rescoring the Adherence to RFP criteria.

79. The statement in the Decision at page 35 that is relied upon by EUTF and Caremark is part of a longer narrative about the performance guarantee criteria. In summary, the Decision acknowledged that InformedRx failed to comply with the requirements of the RFP in terms of providing flat dollar performance guarantee amounts but that the EUTF knew or should have known of the lack of clarity of InformedRx's proposal at the time of the pre-BAFO discussions and should have asked InformedRx to provide clearer information in its BAFO. The problems with the "Account Management" and "Enrollee Services" categories were cited in that narrative (at page 35 of the Decision) as examples of the lack of clarity of InformedRx's proposal. That was the only purpose of the statement about the "Account Management" and "Enrollee" Services.

80. It was not appropriate for the EUTF, upon remand, to make deductions for these categories when the Decision on the Tenth Protest Point only cited them as examples of the lack of clarity of InformedRx's pre-BAFO proposal, the Decision assigned them dollar values that helped InformedRx achieve the maximum score on the Performance Guarantees category, and the Decision did not focus on, much less direct, any action to be taken with respect to the Adherence to RFP category.

81. The correction of EUTF's error here would restore 10 points to InformedRx's score. Nevertheless, as the EUTF effectively points out on its motion for summary judgment, rescoring here and returning InformedRx to its original score on the Adherence to RFP category will not make any overall difference to the outcome of this protest because the additional points that would be awarded to InformedRx on this issue would not be sufficient

to propel InformedRx into the position of having more scored more total points than Caremark.

82. Accordingly, solely with respect to this issue, the Hearings Officer on an interim basis grants InformedRx's Motion for Summary Judgment, and denies Caremark's Motion for Summary Judgment, because the Adherence to RFP category should not have been rescored. However, the Hearings Officer also grants the EUTF's Motion for Summary Judgment and therefore ultimately denies InformedRx's Motion for Summary Judgment, and holds, in the light of the decisions herein on all the other issues, that the inappropriate rescoring of the Adherence to RFP category is not material and does not result in any affirmative relief being granted to InformedRx.

G. Additional Considerations

83. In view of the above Conclusions of Law, InformedRx's claims of bad faith are dismissed as moot.

84. At page 11 of the EUTF's Memorandum in Opposition to InformedRx's Motion for Summary Judgment, the EUTF requests summary judgment be entered in its favor as the nonmoving party. Due to the structure of the EUTF's own Motion for Summary Judgment, this request is particularly relevant to issues pertaining to scoring categories other than the Network Disruption category. The EUTF's request here does not pertain at all to Issue No. 1.

85. The parties, and the Hearings Officer, agree that there are no disputed issues of material fact. In addition there is no procedural prejudice to InformedRx in the EUTF's motion because InformedRx was already disputing Caremark's Motion for Summary Judgment on the same issues that would be focus of a summary judgment in favor of EUTF as the nonmoving party. The Hearings Officer concludes that this is an appropriate situation for granting summary judgment in favor of the EUTF as a nonmoving party. Cf. Fuller v.

Pacific Medical Collectors, Inc., 78 Haw. 213, 226, 891 P.2d 300, 313 (Haw. App. 1995).

That EUTF is granted except for Issue No. 5, Rescoring the Adherence to RFP Category. On that issue, the EUTF's request is denied.

IV. DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer finds, concludes, and decides as follows:

a. The EUTF's Motion to Dismiss or in the Alternative for Summary Judgment is granted in part and denied in part as stated above. The EUTF's request for summary judgment as the nonmoving party with respect to InformedRx's Motion for Summary Judgment is granted in part and denied in part as stated above.

b. Caremark's Motion for Summary Judgment is granted in part and denied in part as stated above.

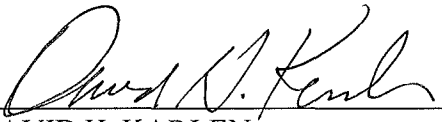
c. InformedRx's Motion for Summary Judgment is denied.

d. The EUTF's denial of InformedRx's procurement protest is affirmed, and InformedRx's Request for Hearing herein is dismissed.

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

MAR - 9 2012

DATED: Honolulu, Hawai'i, _____.



DAVID H. KARLEN
Senior Hearings Officer
Department of Commerce
and Consumer Affairs