

STATE OF NORTH CAROLINA  
DURHAM COUNTY

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
23 INS 738

BLUE CROSS AND BLUE SHIELD OF )  
NORTH CAROLINA, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
NORTH CAROLINA STATE )  
HEALTH PLAN FOR )  
TEACHERS AND STATE )  
EMPLOYEES )  
 )  
Respondent )  
 )  
and )  
 )  
AETNA LIFE INSURANCE COMPANY )  
 )  
Respondent-Intervenor. )  
 )

**RESPONDENT AND RESPONDENT-  
INTERVENOR'S JOINT MOTION  
FOR ENTRY OF PROTECTIVE  
ORDER**

NOW COME Respondent North Carolina State Health Plan for Teachers and State Employees (the “Plan”) and Respondent-Intervenor Aetna Life Insurance Company (“Aetna”), by and through their respective undersigned counsel, pursuant to 26 NCAC 03.0101 and Rule 26(c) of the North Carolina Rules of Civil Procedure, and jointly move this Tribunal for entry of the Proposed Protective Order attached hereto as **Exhibit A**.

These contested cases involve an appeal by Petitioner Blue Cross and Blue Shield of North Carolina (“Blue Cross”) of the Plan’s decision pursuant to a request for proposals (“RFP”) to award a contract for third-party administrator services to Aetna and to reject the proposal submitted by Blue Cross. The Parties anticipate that discovery and hearing in this matter will involve the production and disclosure of confidential and sensitive business, financial, personal, and other information. Because dissemination of such information outside of this contested case would

likely result in harm to one or more Parties or other individuals, the Parties have conferred and substantially agreed to the terms of a protective order.

However, the Parties disagree as to whether in-house counsel for Aetna and Blue Cross should be given access to information designated as “Highly Confidential—Attorneys’ Eyes Only” (“AEO”), and whether the Parties should be required to log privileged documents and communications regarding the implementation of the contract at issue in this litigation. Accordingly, for the reasons stated below, Aetna and the Plan move for entry of a protective order denying in-house counsel access to AEO materials, and which does not require the Parties to log privileged documents regarding the implementation of the contract because they are irrelevant to this litigation and outside of the scope of this Tribunal’s review. A redline comparison of Aetna and the Plan’s Proposed Protective Order and the proposed protective order proffered by Blue Cross is attached hereto as **Exhibit B**.

**A. In-House Counsel for Blue Cross and Aetna Should be Excluded from AEO Materials**

The Parties agree that materials may be designated as AEO if,

in the good-faith judgment of the Party making such designation, the information embodies or contains extremely sensitive trade secrets or non-public confidential and/or proprietary business, commercial, or financial information, the disclosure of which to persons or entities not identified in Section 6.3 would cause injury to the Producing Party or the Producing Party’s customers, clients, or members.

(Ex. A, § 1.1; *see also* Ex. B § 1.1.)

Under Aetna and the Plan’s Proposed Protective Order, AEO materials may be disclosed to: (a) outside counsel; (b) attorneys employed by the North Carolina Department of State Treasurer, (c) experts to whom disclosure is reasonably necessary, (d) this Tribunal and its personnel, (e) professional vendors to whom disclosure is reasonably necessary, (f) authors, addressees, and recipients of the AEO material to the extent they previously had lawful access,

and (g) any other person upon consent of the Parties or order of the Tribunal. (*See* Ex. A, § 6.3.)

In contrast, Blue Cross would allow access to all in-house counsel. (*See* Ex. B, § 6.3(b).)

Pursuant to N.C. R. Civ. Proc. 26(c)(vii), “[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]” In this instance, Aetna and the Plan request that the Tribunal enter a protective order excluding in-house counsel for Aetna and Blue Cross from any discovery materials designated as AEO.

Aetna and the Plan request that the Tribunal enter a protective order prohibiting disclosure of AEO materials to in-house counsel for Aetna and Blue Cross because in-house counsel for Aetna and Blue Cross serve in a variety of capacities, including directly and indirectly contributing to competitive decision-making, and cannot reasonably be expected to silo or erase AEO information gleaned from discovery in this litigation. *See F.T.C. v. Exxon Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980) (“It has been noted that in-house counsel stand in a unique relationship to the corporation in which they are employed. Although in-house counsel serve as legal advocates and advisors for their client, their continuing employment often intimately involves them in the management and operation of the corporation of which they are a part.”); *see also id.* (“[I]t is very difficult for the human mind to compartmentalize and selectively suppress information once learned, no matter how well-intentioned the effort may be to do so.”); *id.* (quoting *SCM v. Xerox Corp.*, Civil No. 15,807 (D. Conn. May 25, 1977) (Pre-Trial Ruling No. 44) (A. 996-1000), *aff’d sub nom, In re Xerox Corp.*, 573 F.2d 1300 (2d Cir. 1977)) (“The issue concerns not good faith

but risk of inadvertent disclosure. House counsel are employed full-time to advance the interests of their employer. They regularly meet with personnel of the corporation on day-to-day matters, wholly apart from this litigation.”).

Courts typically engage in a two-part test to determine whether in-house counsel should be permitted to access information designated as AEO. First, courts assess whether an unacceptable risk of inadvertent disclosure exists, which “turns on the extent to which the person to whom the information is to be disclosed is involved in ‘competitive decisionmaking’ with the client.” *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984). Second, courts must balance the risk of disclosure against any potential harm to the opposing party from restrictions imposed upon their right to have the benefit of counsel of their choice. *In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373, 1380 (Fed. Cir. 2010); *see also Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992) (collapsing two-step inquiry into balancing test).

For example, in *Exxon*, the Circuit Court for the District of Columbia affirmed the District Court’s “refusal to allow . . . two members of Exxon’s in-house legal department access to competitively sensitive Drives Group information[.]” because if the litigation resulted in Exxon and Drives Group being divested under antitrust law, allowing Exxon to “secure competitively sensitive information of the Drives Group, either intentionally or inadvertently, [would impair] the ability of the Drives Group to compete effectively with Exxon[.]” 636 F.2d at 1350. The *Exxon* Court explained that one member of Exxon’s in-house legal department sat on the board of directors of Exxon Enterprises, Inc., and noted that “[i]n any event, the District Court was faced with a possibility that both men had been closely involved with matters concerning Exxon’s entrance as a competitor in the drives market, and could continue to be so involved in the future.” *Id.*

In *Brown Bag Software*, the Ninth Circuit affirmed a protective order excluding in-house counsel from accessing confidential information though he entered an appearance after retained counsel for Brown Bag withdrew. 960 F.2d at 1471. The Ninth Circuit explained that, while “[t]he magistrate expressly credited in-house counsel’s integrity and good faith[.]” the magistrate also reasonably concluded that in-house counsel’s employment would necessarily involve advising Brown Bag in areas relating to the defendant’s trade secrets, thereby placing him in “ ‘the untenable position’ of having to refuse his employer legal advice on a host of contract, employment, and competitive marketing decisions[.]” *Id.*

In-house Counsel for Blue Cross are similarly engaged in competitive decision making. For example, Santiago Estrada, Blue Cross’s Chief Legal Officer, also serves as a Senior Vice President and Corporate Secretary. *See* BLUE CROSS NC LEADERSHIP TEAM: SANTIAGO ESTRADA, JD, <https://www.bluecrossnc.com/executive-profile/santiago-estrada-jd> (last visited Apr. 25, 2023). Melissa Kaluzny, Deputy General Counsel for Blue Cross, likewise serves as a Vice President. (Ex. C at 1.) Consistent with the persuasive authorities that have decided this issue, Mr. Estrada and Ms. Kaluzny should be precluded from accessing AEO information because they are corporate officers. *See, e.g., FTC v. United States Pipe & Foundry Co.*, 304 F. Supp. 1254, 1260-61 (D.D.C.) (denying access to counsel of record that also served as corporate officer); *see also Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 5:03-CV-165 (HGM/GLS), (N.D.N.Y. Apr. 24, 2003).

In *Norbrook Labs.*, Defendant Hanson retained its Corporate Secretary and board member who held a law degree, Mr. Heath, as co-counsel in the litigation, though he was not regularly employed as in-house counsel. Plaintiff Norbrook sought to exclude Mr. Heath from accessing materials labeled “Confidential/Attorney’s Eyes Only.” *Id.* While “Mr. Heath assert[ed] that his

duties at Hanford [we]re limited in time and scope, for he attend[ed] one monthly meeting of the Board of Directors in which he prepare[d] the Board minutes[,]” the Court ruled in Norbrook’s favor, reasoning:

For purposes of this decision, whether Mr. Heath is Hanford’s in-house counsel is of no consequence. The court finds that *Mr. Heath’s positions, both as Hanford’s Corporate Secretary and as a member of Hanford’s Board of Directors, create a serious risk of the inadvertent disclosure of confidential documents and information.* While Mr. Heath may not directly participate in competitive decisionmaking — product design, marketing strategy, scientific research, etc. — as a member of the Board of Directors, he sits in the same room as those who are involved in competitive decisionmaking. As such, Hanford’s board meetings present an unacceptable opportunity for the inadvertent disclosure of confidential information. While the court does not doubt Mr. Heath’s assurances that he will abide by the protective order, *it cannot endorse a situation that places Mr. Heath’s ethical obligations as an attorney in direct competition with his fiduciary duty to Hanford.*

*Id.* (emphasis added). Due to their roles as Senior Vice President and Corporate Secretary, Mr. Estrada and Ms. Kaluzny should similarly be precluded from accessing Aetna’s competitively-sensitive information.

By their own admission, the other senior members of Blue Cross’s in-house legal team participate in or advise on competitive decision-making. David Lamb, one of Blue Cross’s Managing Counsel, describes himself as a “trusted legal and business advisor” and “a counselor to senior executives, operational leadership, and fiduciary boards.” (Ex. C at 5.) Marcia Pennefather, also Managing Counsel for Blue Cross, states that she “[p]rovides strategic counsel to senior management on a variety of sensitive corporate, compliance, intellectual property and risk management matters for the company.” (Ex. C at 7.) Kate Paradise, who is also employed as Managing Counsel, says that she “advises senior leadership” on “contracting” as well as “operational” matters. (Ex. C at 9.) Therefore, allowing some or all of Blue Cross’s in-house counsel to access AEO materials produced in this litigation would pose a significant risk of inadvertent disclosure of Aetna’s competitively-sensitive information. *See Am. Standard, Inc. v.*

*Pfizer, Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (recognizing that there is an increased risk of harm when information is disclosed to direct competitors, such as Aetna and Blue Cross).

In-house counsel are regularly prohibited from accessing AEO materials in procurement cases as well as patent and trade secret cases. In the form protective order employed by the Court of Federal Claims in federal procurement cases, under paragraph 3, “the only individuals who may be given access to protected information are counsel for a party and independent consultants and experts assisting such counsel in connection with th[e] litigation.” FORM 8: PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES, <https://www.uscfc.uscourts.gov/sites/default/files/40.%20Form%208%2021.08.02.pdf> (last visited Apr. 25, 2023). To receive access to protected information,

An individual . . . must read this Protective Order; must complete the appropriate application form (Form 9—“Application for Access to Information Under Protective Order by Outside or Inside Counsel,” or Form 10—“Application for Access to Information Under Protective Order by Expert Consultant or Witness”); and must file the executed application with the court.

*Id.*

Form 9, Application for Access to Information Under Protective Order by Outside or Inside Counsel, incorporates and interprets the Supreme Court’s foundational decision in *U.S. Steel Corp.*, requiring applicants to certify the following:

My professional relationship with the party I represent in this proceeding and its personnel is strictly one of legal counsel. I am not in competitive decision making as discussed in *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir. 1984), for or on behalf of the party I represent, any entity that is an interested party to this proceeding, or any other firm that might gain a competitive advantage from access to the information disclosed under the Protective Order. I do not provide advice or participate in any decisions of such parties in matters involving similar or corresponding information about a competitor. *This means that I do not, for example, provide advice concerning, or participate in decisions about, marketing or advertising strategies, product research and development, product design or competitive structuring and composition of bids, offers, or proposals with respect to which the use of protected information could provide a competitive advantage.*

FORM 9: APPLICATION FOR ACCESS TO INFORMATION UNDER PROTECTIVE ORDER BY OUTSIDE OR INSIDE COUNSEL, <https://www.uscfc.uscourts.gov/sites/default/files/42.%20Form%209%2021.08.02.pdf> (last visited Apr. 25, 2023) (emphasis added); *see also* GUIDE TO GAO PROTECTIVE ORDERS, <https://www.gao.gov/assets/gao-09-770sp.pdf> (last visited Apr. 25, 2023) (explaining that only applicants that “establish that they are not involved in competitive decision making” will be admitted under a protective order in a procurement protest case in the Government Accountability Office).

Furthermore, the risk of disclosure outweighs any potential harm to Blue Cross from restrictions imposed upon their right to have the benefit of its in-house counsel. First, the proposed restriction of AEO information benefits Blue Cross as well as Aetna. Aetna and Blue Cross have each served discovery on the other, and may designate materials AEO, as appropriate. Second, “requiring a party to rely on its competent outside counsel does not create an ‘undue and unnecessary burden[.]’ ” *Intel Corp. v. Via Techns., Inc.*, 198 F.R.D. 525, 529 (N.D. Cal. 2000); *see also Akzo N.V. v. U.S. Int’l Trade Comm’n.*, 808 F.2d 1471, 1483 (Fed. Cir. 1986), *cert. denied*, 482 U.S. 909 (1987) (affirming protective order prohibiting in-house counsel of either party from accessing confidential information in part because “all protected information was freely available to outside counsel who could fully consider it”).

In *Intel Corp.*, the Court concluded that, though Intel’s in-house counsel, Ms. Fu, claimed she was “the leader of Intel’s litigation team[, and it was her] . . . job to advise Intel about this case and to manage Intel’s outside counsel[.]” Intel failed to establish good cause to modify a previously-entered protective order denying in-house counsel access to confidential information in part because Ms. Fu had graduated law school in 1991, had not litigated cases since she



joined Intel in 1995, and therefore had not established that she was “indispensable to the litigation.” 198 F.R.D. at 529.

With respect to Blue Cross’s senior in-house counsel, Mr. Estrada graduated from law school in 1991 and left private practice in 1997, going in-house as a corporate attorney. (Ex. C at 1–2.) Ms. Kaluzny graduated from law school in 1996, received a Master of Public Health, Health Policy and Administration in 1997, and joined Blue Cross in 2002. (Ex. C at 3–4.) Mr. Lamb graduated from law school in 2001, has two years of experience as an associate in a business practice group, and went in-house in 2003. (Ex. C at 5–6.) Brian Vick, who is also Managing Counsel for Blue Cross, graduated from law school in 2002, clerked and was in private practice as a litigator until 2014, when he joined Blue Cross. (Ex. C at 12–13.) Ms. Paradise graduated from law school in 2007, was in private practice as an employee benefits attorney for seven years, and joined Blue Cross in 2014. (Ex. C at 9–11.) Ms. Pennefather graduated from law school in 1998 and has worked primarily in private practice. (Ex. C at 7–8.) Therefore, like Ms. Fu, Blue Cross’s senior in-house counsel lack recent litigation experience, if any, and Blue Cross will not be prejudiced by relying on its “competent and experienced outside counsel throughout the proceedings.” *Akzo N.V.*, 808 F.2d at 1484.

Third, the agreed-upon terms of the protective order mitigate any potential hardship. For example, the Parties have agreed that, for information in documentary form, legends for AEO information shall be affixed on a page-by-page basis. (*Compare* Ex. A, § 4.1(a), *with* Ex. B, § 4.1(a).) For testimony given at a deposition or proceeding, only those portions of the testimony that are designated as AEO shall be withheld from disclosure. (*Compare* Ex. A, § 4.1(b), *with* Ex. B, § 4.1(b).) Therefore, the Parties have tailored their respective proposed protective orders such that the minimum amount of information is withheld from disclosure due to an AEO designation.

Moreover, the Parties have agreed to a redaction protocol for filed documents containing AEO information that would permit outside counsel to share and discuss redacted versions of sealed filings with their clients, including in-house counsel, thereby minimizing disruptions to strategic decisionmaking. The redaction protocols in the Parties' respective proposed protective orders were derived from paragraph 12 of the form protective order issued in procurement protest cases in the Court of Federal Claims. *See* FORM 8: PROTECTIVE ORDER IN PROCUREMENT PROTEST CASES, *supra*.

Aetna and the Plan's Proposed Protective Order also allows third-party experts to view AEO information, (*see* Ex. A, § 6.3), which would permit outside counsel for Blue Cross to retain consulting experts to interpret any technical AEO information for which subject-matter expertise is beneficial. *See Bendix Field Eng'g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227 (admitting consultant to protective order to assist counsel in their review of the agency's cost realism evaluation). Additionally, while retaining a consulting expert creates an additional expense, courts do "not deviate from a policy of providing protection to highly sensitive information exclusively on the ground of a plaintiff's claimed inability to 'bear the expense of turning the subject litigation entirely over to outside counsel.'" *A. Hirsh, Inc. v. United States*, 657 F. Supp. 1297, 1305 (Ct. Int'l Trade 1987).

Finally, to the extent Blue Cross contests any AEO designation by Aetna or the Plan, the Parties have agreed upon a protocol to challenge that designation, which requires the Parties to meet and confer before filing a motion with the Tribunal. (*Compare* Ex. A, § 5, *with* Ex. B, § 5); *see also Akzo N.V.*, 808 F.2d at 1483 (affirming protective order, which did not " 'unilaterally immunize' purportedly confidential documents from scrutiny of the opposing party" in part

because “the protective order provided a mechanism by which either party was free to object to its adversary’s designations at any stage of the proceeding”).

It is insufficient for Blue Cross to argue that Aetna and the Plan’s Proposed Protective Order “increase[s] the difficulty of managing the litigation[;]” it “must actually prejudice presentation” of Blue Cross’s case. *Intel Corp.*, 198 F.R.D. at 528. For the reasons argued above, prohibiting in-house counsel from accessing AEO information is appropriate in this instance because the unacceptable risk of inadvertent disclosure heavily outweighs any minimal inconvenience to Blue Cross. *See McDonnell Douglas Corp.*, B-259694.2, B-259694.3, June 16, 1995, 95-2 CPD ¶ 51 (denying in-house counsel admission to protective order in procurement protest case where there was an unacceptable risk of inadvertent disclosure because the in-house counsel advised his company’s competitive strategists and there was no showing that the in-house counsel needed access to the information to help the party pursue its protest); *Earle Palmer Brown Cos., Inc.*, B-243544, B-243544.2, Aug. 7, 1991, 91-2 CPD ¶ 134 (denying in-house counsel access to confidential information in procurement case because in-house counsel provided legal counsel to senior company management, such that counsel advises or participates in competitive decision making); *Dataproducs New England, Inc.*, et al., B-246149.3 et al., Feb. 26, 1992, 92-1 CPD ¶ 231 (same); *Bendix Field Eng’g Corp.*, B-246236, Feb. 25, 1992, 92-1 CPD ¶ 227 (same).

**B. The Parties Should not be Required to Log Irrelevant Privileged Documents Regarding Implementation of the Contract**

In Section 12(c) (Privilege Log) of its proposed protective order, Blue Cross desires to include the following carve out of the privileged documents that the Parties have agreed not to log: “For avoidance of doubt, the above categories do not include documents relating to implementation of the 2025-2027 contract for Third Party Administrative services at issue in the

Litigation.” This carve out is inappropriate because documents relating to the implementation of the contract awarded by the Plan are categorically irrelevant to this litigation.

In its Petition for Contested Case Hearing, Blue Cross alleges that the Plan: (1) failed to score each vendor’s network despite its importance to the Plan’s members; (2) did not validate the vendors’ self-reported network pricing; (3) irrationally assigned equal points to all technical requirements, and equal points to administrative fees and network-pricing guarantees, despite their varying significance; (4) included technical requirements that were impossible or not in the best interest of the Plan’s members; (5) failed to fully explain how points would be awarded for administrative fees and network-pricing guarantees; (6) failed to validate whether vendors could meet all technical requirements; and (7) failed to allow vendors to provide explanations if they could not meet a technical requirement. Documents concerning the implementation of the contract awarded to Aetna have no bearing on the contents of the RFP, the procurement process, or the award decision, and therefore are not relevant under Rule 26(b) of the North Carolina Rules of Civil Procedure.

In addition to being irrelevant to Blue Cross’s allegations, implementation documents also fall outside of the scope of the appropriate record for this Tribunal’s review. It is well established under North Carolina law that in a contested case reviewing a decision to award a certificate of need (“CON”), the “hearing is limited to the evidence that is presented or available to the agency during the review period.” *Britthaven, Inc. v. N.C. Dep’t of Hum. Res.*, 118 N.C. App. 379, 382, 455 S.E.2d 455, 459 (1995) (citing *In re Application of Wake Kidney Clinic*, 85 N.C. App. 639, 355 S.E.2d 788, *disc. review denied*, 320 N.C. 793, 361 S.E.2d 89 (1987), and 2 Am. Jur.2d, *Administrative Law* § 299 (1994) (“[U]pon resumption of formal proceedings all evidence presented in the informal proceeding becomes part of the record of the formal proceeding.”)); *see*

*also Dialysis Care of N.C., LLC v. N.C. Dep't of Health & Human Servs.*, 137 N.C. App. 638, 647–48, 529 S.E.2d 257, 262 (2000) (“The hearing officer (ALJ) is properly limited to consideration of evidence which was before the CON Section when making its initial decision.”); *Randolph Surgery Ctr., LLC v. N.C. Dep't of Health & Human Servs.*, 11 DHR 12275, 2012 WL 1301212 (N.C.O.A.H. Mar. 19, 2012) (Lassiter, ALJ) (“In CON contested cases, the ALJ is limited to considering only that evidence that was ‘presented or available’ to the Agency during the review period. This limitation is firmly established in CON jurisprudence.”).

The scope of the record in a contested case proceeding concerning a procurement decision should be similarly circumscribed. As this Tribunal articulated,

The subject matter of a contested case hearing by the ALJ is an *agency* decision. Under N.C. Gen. Stat. § 150B-23(a), the ALJ is to determine whether the petitioner has met its burden in showing that the *agency* substantially prejudiced petitioner’s rights, and that the *agency* also acted outside its authority, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule.

*Randolph Surgery Ctr.*, 11 DHR 12275, 2012 WL 1301212 (emphasis added). As argued above, the Plan’s RFP, administration of the procurement process, award decision, and denial of Blue Cross’s request for protest meeting were not and could not be influenced by documents that post-date them.

Moreover, the North Carolina Court of Appeals has limited the scope of relevant evidence in contested cases outside of the CON context. In *Stark v. N.C. Dep't Nat. Res., Div. Land Res.*, 224 N.C. App. 491, 508, 736 S.E.2d 553, 564 (2012), the Court of Appeals held that the administrative law judge appropriately excluded seismographic evidence offered by the petitioners in opposition to a permit modification granted by the Division of Land Resources (“DLR”) to Harrison Construction (“Harrison”) after the permit was modified. The *Stark* Court explained,

prior to DLR’s decision to approve Harrison’s permit modification under the Mining Act, petitioners had ample opportunity to participate, and did in fact

participate, in DLR's permitting review process. Petitioners attended the public hearing in this matter at which they presented their concerns regarding the damage to their home resulting from Harrison's blasting at the Hayesville Quarry, and petitioners likewise presented written comments concerning the same to DLR following the public hearing. In addition, *petitioners had the opportunity to present evidence addressing the correctness of DLR's decision to issue the permit modification based on circumstances existing before or at the time of the agency decision. Petitioners therefore had a meaningful opportunity to participate in the agency's decision-making process and to present evidence on their own behalf prior to the agency's determination to approve the permit modification.*

*Id.* at 506 (emphasis added). Accordingly, where a petitioner is given a meaningful opportunity to participate in the agency's decision-making process, the soundness of that agency decision cannot be challenged with post-decision evidence.

Like the petitioners in *Stark*, Blue Cross had "a meaningful opportunity to participate" in the Plan's procurement process. First, Blue Cross was given the opportunity to ask questions before its proposal was due. Under Section 2.3, the RFP explained:

If Vendors have questions, issues, or exceptions regarding any term, condition, or other component within this RFP, those *must* be submitted as questions in accordance with the instructions in Section 2.5 PROPOSAL QUESTIONS. *If the State determines that any changes will be made as a result of the questions asked, then such decisions will be communicated in the form of an Addendum.* The State may also elect to leave open the possibility for later negotiation and amendment of specific provisions of the Contract that have been addressed during the question-and-answer period.

...

*If a Vendor desires modification of the terms and conditions of this solicitation, it is urged and cautioned to inquire during the question period, in accordance with the instructions in this RFP, about whether specific language proposed as a modification is acceptable to or will be considered by the State.*

(Petition for Contested Case Hearing, Attach. A, Ex. 1 (emphasis added)). Therefore, the RFP not only allowed vendors to submit questions to clarify and interpret the RFP, but also to propose changes to the procurement process and the RFP's requirements. Second, Blue Cross submitted a comprehensive proposal to persuade the Plan that it was deserving of the contract award. (See

Petition for Contested Case Hearing, ¶ 9.) Third, the procedures set forth in Section 15, Attachment B of the RFP allowed Blue Cross to request a bid protest meeting and explain why the contract should have been awarded to Blue Cross instead of Aetna. (*See* Petition for Contested Case Hearing, Attach. A, Ex. 1.) Blue Cross did so, and the Plan provided a thoughtful, written response explaining why Blue Cross’s arguments were without merit. (*See* Petition for Contested Case Hearing, ¶ 41.) Accordingly, Blue Cross was afforded ample opportunity to participate in the Plan’s procurement process and influence the Plan’s award decision.

Limiting the scope of relevant evidence in this way would also be consistent with review of administrative decisions by federal courts, including procurement decisions. It is a general maxim that the “administrative record” is the record before the agency at the time of its decision. *See* 2 Am. Jur.2d, *Administrative Law* § 523 (“On judicial review of an agency decision, the whole record encompasses all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.”); *see also* *Bruce v. Azar*, 389 F. Supp. 3d 716, 725 (N.D. Cal. 2019) (“Judicial review of an agency decision is limited to ‘the administrative record already in existence, not some new record made initially in the reviewing court.’ ” (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))). In federal procurement cases heard by the United States Court of Federal Claims, the “relevant core documents” for a “protest case” notably exclude post-procurement documents related to performance of the awarded contract. *See* R. C. Fed. Cl., App. C, VII(22). Accordingly, because documents concerning the implementation of the contract are neither relevant to Blue Cross’s particular allegations nor review by this Tribunal of contested procurement decisions, Aetna and the Plan request that the Tribunal enter their Proposed Protective Order, which does not require the Parties to include such documents on their privilege logs.

**C. Conclusion**

WHEREFORE, for good cause shown, Aetna and the Plan respectfully request that this Tribunal enter the Proposed Protective Order attached hereto as **Exhibit A**.

Submitted, this 25th day of April, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing **AETNA’S MOTION FOR ENTRY OF PROPOSED PROTECTIVE ORDER** on the following via electronic transmission:

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