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December 21, 2023

SENT VIA EMAIL

Ms. Meggan LaPorte
Arizona Health Care Cost Containment System (AHCCCS)
801 E. Jefferson St.
Phoenix, AZ 85034
Sent via email to RFPYH24-0001@azahcccs.gov

Re: Protest of Contract Award
ALTCS E/PD RFP YH24-0001

Dear Ms. LaPorte:

This law firm, along with Perkins Coie LLP, represents Banner-University Care Advantage dba Banner-University Family Care (Banner) regarding Request for Proposal YH24-0001. That RFP sought proposals from managed care organizations to operate the Arizona Long Term Care System for individuals who are Elderly and/or have a Physical Disability (ALTCS E/PD) pursuant to A.R.S. § 36-2931 *et seq*. This letter is Banner's formal protest of the contract awards announced on Friday, December 1, 2023.[1] Pursuant to A.A.C. R9-22-604(E), Banner also requests an immediate stay of the contract award until Banner's protest is fully submitted and resolved.

SUMMARY OF PROTEST

Banner is an Arizona-based nonprofit safety net health plan with a proven track record of success in coordinating care for Arizona Medicaid beneficiaries, including earning the highest operational review score from AHCCCS among ALTCS plans in 2023. Yet this procurement inexplicably sidelined Banner in favor of subsidiaries of two massive, out-of-state for-profit corporations and will result in the disruption of care to thousands of Arizona's most vulnerable citizens.

Previously known as the University of Arizona Health Plans, Banner's success flows from its long history of commitment to, and investment in, Arizona and its most vulnerable citizens. In its nearly forty years as a Medicaid contractor—and its five years as the incumbent ALTCS contractor for Central and Southern Arizona—Banner has dedicated itself to serving Arizona's Medicaid beneficiaries. Thanks to its relationship with both Arizona's leading healthcare delivery

[1] To comply with A.A.C. R9-22-604(C)(2), the following additional information is provided. Banner's address and phone number are: 5255 East Williams Circle, Ste. 2050, Tucson, AZ 85711; 520-874-3101. Banner's representative for this matter is: David Rosenbaum, Osborn Maledon, P.A., 2929 N. Central Ave., Suite 2000, Phoenix, AZ 85012; 602-640-9345

system and one of its leading academic institutions, Banner has unique access to the state's leading experts and unique partnerships with the Banner Alzheimer Institute and the University of Arizona College of Medicine. Banner has leveraged those home-grown relationships to provide high-quality, cost-effective care to its ALTCS members over the last five years. Recognizing the complex needs of its members, Banner deploys an innovative whole-person model of care approach that comprehensively addresses members' conditions and health needs through evidence-based assessments and a person-centered service plan. That approach is informed by Banner's model of care for D-SNP beneficiaries, which earned a 100% score from CMS.

Given its history of commitment to advancing Arizonans' health and well-being and its track record as the highest-scoring ALTCS plan, Banner is well-positioned to continue its partnership with AHCCCS and even expand its ALTCS program. Over its four decades serving Medicaid beneficiaries, and especially during the last five years as an ALTCS partner, Banner has indisputably demonstrated its "ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with AHCCCS mission and goals"—precisely what the RFP *purported* to be seeking in a contractor.

But what the RFP purported to seek, its procurement decision prevented. The agency's arbitrary scoring process displaced Banner and another local, non-profit (Mercy Care) in favor of national, for-profit entities with documented histories of prioritizing shareholder returns above the delivery of quality healthcare, particularly in Medicaid programs. The result undermines each of AHCCCS's three "critical goal areas:" providing "equitable access to high quality, whole-person care;" ensuring "optimal member and provider experience;" and "maintain[ing] core organizational capacity, infrastructure and workforce planning that effectively serves AHCCCS operations."

Throwing out proven success by local non-profits in favor of large for-profit conglomerates with material noncompliance with other governmental entities is reason alone to question the agency's procurement decision. The root cause of this failure is the agency's scoring method, and even a cursory examination of it reveals deep structural flaws with both the scoring methodology and its execution.

First, the agency provided misleading information about its scoring methodology and appeared to develop that methodology *after* receiving offerors' submissions. A fundamental principle of government contracting requires agencies to "evaluate procurement proposals and make awards *based on the criteria stated in the solicitation.*" 64 Am. Jur. 2d Public Works and Contracts § 43 (emphasis added). But despite announcing that the scoring methodology was developed before the RFP was published on August 1, 2023, public records have made clear that scoring methods were merely a "work in progress" at that time. The agency continued to make revisions through at least mid-November 2023, more than three months after the RFP was published and six weeks after offers were received and opened. *See, e.g.,* Final Evaluation Report, Executive Summary at 2 ("The Scope Team met October 2, 2023, through November 15, 2023, to determine the scoring methodology and came to an agreement to apply the scoring methodology . . ."). The procurement file and public records suggest that AHCCCS did not settle its scoring methodology until ***after*** offers had been received and opened. AHCCCS violated fundamental principles of fairness and transparency by its secret, untimely creation of a scoring method.

Second, the scoring methodology ultimately created by AHCCCS was arbitrary and unreasonable. The methodology deviated from standard methods used in the past by AHCCCS, notably in the lack of prior notice regarding the weighting of the scored components, the weighting itself, and in the forced ranking of proposals.

In an inexplicable reversal from prior procurements, AHCCCS significantly devalued the one factor that best predicts an offeror's "ability to provide cost-effective, high-quality contract services in a managed care setting"—the offeror's history of doing just that. In prior procurements, AHCCCS explicitly recognized the value of past performance and in the most recent procurement weighted it 25% of the overall score. This time, however, without forewarning, AHCCCS devalued proven performance, weighting it only 5.5% of the total score (55 of out 1000 points). In fact, ALTCS-specific past performance was only weighted at 3.5% of the total score. B10 and B11 gave an immaterial preference to incumbent plans, making only 55 total points available across the two performance categories. As a result, AHCCCS's scoring method gave no meaningful consideration to past performance.

In failing to give appropriate weight to past performance, AHCCCS's front-of-mind goals of fraud prevention, regulatory compliance, and reducing liability were not fully considered. Just as Banner's past performance demonstrates that it will provide cost-effective, high-quality services, the winning bidders' history foreshadows a contract term riddled with overbilling and compliance shortcomings at the cost of Arizona's vulnerable ALTCS E/PD members and taxpayers.

At the same time, and again in a baffling change from prior procurements, AHCCCS significantly overvalued the oral presentations – weighting them at 29% of the overall score. In other words, AHCCCS—without explanation, and apparently after reviewing the plans' written submissions—decided to give the plans' brief oral presentation nearly six times as much weight as their demonstrated histories of providing (or failing to provide) "cost-effective, high-quality contract services in a managed care setting." This weighting is especially concerning given the two-week timeframe during which oral presentations occurred, the limited time allowed for consensus scoring of the heavily-weighted oral presentations, the lack of individual evaluator notes, and the lack of quality audio recording and transcription. No meaningful or fair assessment can occur, or be later analyzed, in these circumstances. For Banner, the consequences of this arbitrary change in scoring practices were dispositive. Banner's five-year history of strong performance and investments in people and innovation barely moved the needle, while its apparent failure to dazzle listeners during the oral presentation cost it dearly and made it nearly impossible to finish among the top two. For example, Banner's top score on compliance review—a category that AHCCCS deemed worthy of only 35 maximum points—netted it only a 21-point advantage over Centene, whose checkered compliance history left it in fourth place. Indeed, despite receiving the highest point totals on past performance, Banner's 49 out of 55 possible points garnered it only 31 points more than Centene. That minimal scoring advantage was swamped by the 130.5-point difference between the two plans' oral presentation scores.

Heavy weighting of oral presentations not only conflicted with the RFP's stated goals, but it rested the RFP's outcome on the highly subjective scoring of the oral presentations. No evaluator notes exist (or at least none have yet been provided) to justify or allow scrutiny of that scoring.

Making matters worse, AHCCCS used a forced-rank scoring system that created false chasms in scoring among the plans in each category. Rather than assign scores to each plan's submission based on how well it actually measured up to the stated criteria, points were instead awarded based each plan's comparative ranking. Under this system, the points awarded to each plan in each category differed by at least 20% regardless of how closely the evaluators measured the submissions. The forced-ranking system thus led to arbitrary differences in scoring that may or may not have correlated with actual differences in the merits of the proposals.

Altogether, AHCCCS's scoring method was arbitrary and unreasonable, defying core principles of government contracting and "[t]he overriding concern in the evaluation process[,] that the final scores assigned reasonably reflect the actual merits of the proposal." *Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303, 326 (2000). Instead of reflecting the merits, the final scores emerged from subjective and non-transparent criteria, not fairly applied, and skewed artificially by forced-rank scoring.

The agency's flawed and arbitrary scoring has real-world consequences for many of Arizona's most vulnerable citizens. If the contract awards stand, every one of Banner's 7,000 ALTCS members and nearly 75% of all members statewide will be forced into a new plan, and untold numbers will also be forced to change one or more health care providers. Replacing two local plans who have long-standing provider relationships and extensive networks threatens to disrupt care for thousands of beneficiaries.

Remarkably, despite the potential for widespread disruption to the care received and loss of choice of provider for thousands of Arizona's most vulnerable citizens, AHCCCS appears nonplussed. Documents produced to date under public records requests reveal that the agency's "plan" for avoiding massive disruption consists largely of "encouraging" the for-profit national plans to contract with local providers, and vice-versa. Responding to community concerns about the loss of longstanding provider relationships, AHCCCS has provided zero assurance that disruption will not occur. Instead, the agency merely said that it will be "providing data" to the plans "to assist them in network building"; "encouraging" the plans to use existing providers; and encouraging "any provider" to reach out to the plans to discuss contracting. But, as AHCCCS made clear, the "final contracting decisions" depend on the willingness of providers and plans to "reach an agreement."

For these reasons, as detailed more fully below, Banner protests this award pursuant to A.A.C. R9-22-604. Banner requests that AHCCCS terminate the recent contract award, extend existing Contract Nos. YH18-0001 for a minimum of 12 months, and issue a revised solicitation to correct the errors identified herein.

LEGAL AND FACTUAL GROUNDS OF PROTEST

I. Factual Background

a. Banner's success in Arizona stems from its commitment to Arizonans.

As an incumbent contractor under YH18-0001-01,[2] Banner has documented experience providing services to ALTCS children, adults, and seniors who need long-term care services because of disabling conditions and chronic illnesses.

Banner's success in providing high-quality and cost-effective managed care services earned it the highest score among ALTCS plans in the Contract Year 2023 Long Term Care Plan Operational Review. The most recent operational review by AHCCCS included fourteen focus areas, each reviewed against well-defined, objective standards designed to measure performance and compliance with federal and state laws, rules and regulations, and contract requirements. Banner scored exceptionally well across all focus areas:

Focus Area	Banner Score
Case Management (23 Standards)	93%
Corporate Compliance (5 Standards)	100%
Claims and Information Systems (10 Standards)	99%
Delivery Systems (17 Standards)	95%
General Administration (5 Standards)	100%
Grievance System (17 Standards)	98%
Adult, EPSDT, and Maternal Child Health (16 Standards)	98%
Medical Management (22 Standards)	89%
Member Information (9 Standards)	96%
Quality Management (17 Standards)	88%
Reinsurance (4 Standards)	100%
Third Party Liability (8 Standards)	100%
Quality Improvement (6 Standards)	95%
Integrated System of Care (21 Standards)	96%

[2] ALTCS E/PD YH18-0001 available online here: YH18-0001 - ALTCS E/PD Procurement File (azahcccs.gov) AHCCCS conducts regular reviews of managed care organizations under contract with the agency to measure the health plan's operations and performance. Operational Reviews are posted online here: Administrative Actions (azahcccs.gov)

These high scores flow from Banner's hard work and investment as a committed partner to AHCCCS and the State of Arizona. Banner has endeavored to retain the highest qualified case managers, prioritizing members, building a comprehensive and high-quality network, and ensuring seamless transitions. Banner has invested significantly in its model of person-centered care, organizational capacity and compliance, and community workforce development. The plan has also invested over $20 million in technology to improve clinical analytics, risk stratification, and customer- and provider-facing tools. Banner has networks in Central and Southern Arizona that exceed AHCCCS requirements and would also exceed network requirements in Northern Arizona before June 1, 2024. Investing in Arizona, Banner toured Northern Arizona and learned providers were eager and open to Banner entering the Northern GSA.

Banner's commitment to its beneficiaries extends to the people helping them navigate the health care system. The proof is in the pudding: In the five years it has been an ALTCS plan, 68% of Banner's Case Managers have remained with Banner—a remarkably high retention rate. And that commitment to Case Managers has paid dividends for Banner's members, the vast majority—84%—of whom agree that their Case Manager has helped improve their health.

Banner's commitment to Arizonans also extends to the larger community. Last year, Banner invested over $4 million in community-based organizations to promote health equity through its community reinvestment programs, not to mention the nearly $1 billion in investments made by Banner Health, the state's largest employer and healthcare delivery system. Banner's investments created programs to address issues essential to the ALTCS E/PD population such as social isolation and loneliness. Community partners appreciate deeply Banner's efforts, including the eight Arizona Area Agencies on Aging, the five Arizona Centers for Independent Living, the Foundation for Senior Living, and Banner's unique Neighborhood Advisory Committees.

When Banner was awarded the contract five years ago, it received the top score for all three GSAs, and it replaced a Centene subsidiary that had a record of poor performance.[3] Yet just one cycle later, despite Banner's proven success and Centene's proven failure, AHCCCS has re-awarded the contract to a Centene subsidiary, risking not just a return to poor care but also continuity of care, and disrupting both members and the existing Arizona workforce.

b. The RFP was inaccurate, misleading, and resulted in an arbitrary result.

According to the initial set of public records recently produced, AHCCCS began developing the RFP about one year before its publication. AHCCCS's meeting minutes show that the agency discussed various major issues, including how many plans to award contracts and how to distribute members, but left major issues unresolved in the public record.[4] The minutes state

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[3] ALTCS E/PD YH18-0001 available online here: YH18-0001 - ALTCS E/PD Procurement File (azahcccs.gov).
[4] AHCCCS000400 (Executive Team Meeting, 11/08/22); All public records relating to the ALTCS RFP YH24-0001 are part of the agency record for purposes of this protest.

that the agency agreed that member choice needed to be provided in all regions.[5] But the priority of provider choice was somehow forgotten in the process, as this award shrinks ALTCS E/PD plans from three to two. That loss of choice is disparaging to members, some already marginalized. Shrinking the field may also have the unintended consequence of increasing costs.

On August 1, 2023, AHCCCS published the RFP requesting proposals for new ALTCS contracts, worth about $1.6 billion in total, to begin on October 1, 2024. The RFP states that awards would be made to the responsible Offeror(s) whose proposal was determined to be the most advantageous to the State. RFP, Section H: Instructions to Offerors, § 8.

In determining the responsibility of an offeror, AHCCCS said it would consider a wide range of information, including:

1. The Offeror's record of performance, including factual evidence of failure to satisfy terms of agreements; vendor performance reports; customer complaints; and/or negative references,
2. The Offeror's conformance with the requirements of the RFP,
3. The Offeror's pricing and whether it is unrealistic, or
4. Any other criteria deemed appropriate by AHCCCS to determine if the Offer is in the best interest of the State.

RFP, Section H: Instructions to Offerors, § 12

The RFP promised that AHCCCS had already developed its scoring methodology: "AHCCCS *has established* a scoring methodology to evaluate each Offeror's ability to provide cost-effective, high quality contract services in a managed care setting in accordance with AHCCCS mission and goals." *Id.* § 8 (emphasis added). The RFP, however, also stated that the award decisions would be "guided, but not bound," by the scores awarded during the evaluation process. If there were negligible differences in scores, AHCCCS could consider other factors including, but not limited to, potential disruption to members; continuity of care; and past performance amongst other factors. *Id.*

The RFP disclosed very limited information about the evaluation and scoring method. The evaluation factors were stated to be:

1. Programmatic Submission Requirements, and
2. Financial Submission Requirements.

Id. The RFP was intentionally silent as to the scoring methodology and the relative weighting of the scored portions of the evaluation.

On October 2, 2023, AHCCCS received five proposals from three incumbent contractors and two non-incumbent offerors. The incumbent contractors were Banner; Mercy Care; and

[5] *Id.*

Arizona Physicians IPA, Inc. (United). The non-incumbent offerors were BCBSAZ Health Choice; and Health Net Access, Inc. dba Arizona Complete Health-Complete Plan, a subsidiary of Centene Corporation (Centene). Centene and United are for-profit, nationwide healthcare corporations. Centene is based in St. Louis, Missouri; United is based in Minneapolis, Minnesota.

On December 1, Banner was notified that it was not awarded a contract. AHCCCS awarded two statewide contracts: one to United and the other to Centene.

That same day, AHCCCS revealed for the first time that, despite the RFP's assertion that the scoring methodology was set before the RFP was published, the agency apparently developed the methodology only *after* the offerors submitted their bids. In the Final Evaluation Report, Executive Summary released as part of the Procurement File, AHCCCS disclosed that a "Scope Team" met from October 2 through November 15 "to determine the scoring methodology." The scoring was outlined in the Evaluation Process Overview released the same day, which provided previously undisclosed details of the RFP scoring methodology the Scope Team had developed, including: (1) only 55 of 1,000 total points possible (5.5%) were allocated to the two past performance categories; (2) 290 points (29%) were allocated to oral presentations; (3) scoring in each category was based on forced consensus ranking rather than actual points earned; and (4) all working documents used in the evaluation and scoring process were "destroyed."

The scoring details revealed that in each scoring category, evaluators were instructed to rank the offerors rather than assign points. The rankings were then converted into points per a predetermined, fixed algorithm that awarded the top-ranked plan the maximum number of points available in the category while each lesser rank received 20% fewer points than the rank above it. Thus, the second-ranked offeror received 20% fewer points than the maximum available, the third-ranked plan received 40% fewer, and so on. Under this scoring algorithm the top-ranked plan received 100% of the points available so long as it was deemed superior to the other four, regardless of how well its submission actually met the category's criteria. And because the scoring algorithm was fixed and tied to the ranking, plan scores were separated by at least 20% even if their submissions were deemed very similar.

The scoring rubric also revealed that the two winning bidders scored 232 and 203 points, respectively, on the oral presentations, while Banner received only 101.5 points. Unlike the large number gap, the evaluators' comments on individual scoring and consensus scoring articulate reviews of similar performance by the offerors. This disconnect proves the arbitrariness and subjectivity of the scoring method. Meanwhile, Banner's top score on past performance—objectively reviewable measures—was worth 49 points, while Centene's 4th-place finish on those categories resulted in 18 points. The scoring method and the weights assigned created an unjustifiable result.

II. Legal Grounds of Protest

Arizona statutes establish our State's long-term care system and provide AHCCCS with operational responsibility for the program, including the responsibility to contract with managed care organizations to implement and operate the ALTCS/E-PD program. A.R.S. § 36-2932; *see also, e.g.*, A.R.S. § 36-2903(M) (conditions of contract with any contractor, which include contract terms necessary to ensure "adequate performance and compliance with all applicable federal laws by the contractor"). The program receives state and federal funding, requiring compliance with federal law, state law, and agency regulations.

AHCCCS regulations set the minimum content requirements for any request for proposal. A.A.C. R9-22-602(A). These rules require that a request for proposal disclose, among other things, the scope of covered services, the contract terms, and conditions, and "the factors used to evaluate a proposal." A.A.C. R9-22-602(A)(2)-(4); *see also, e.g.*, A.R.S. § 41-2534.E (under Arizona Procurement Code, requests for proposals state the "relative importance of price and other evaluation factors"). AHCCCS must also adhere to conflict of interest and confidentiality requirements. A.A.C. R9-22-601(B) (requiring conflict of interest safeguards "at least as effective as the Federal safeguards" provided in 41 U.S.C. § 2102); *see also* A.R.S. § 41-2517, § 41-2616. The federal safeguards establish strict standards for confidentiality, requiring recusals for conflicts of interest, and imposing penalties for violations.

These statutes and regulations are designed to guard against arbitrary or baseless awards and to promote public confidence in government contracting by ensuring fair and equal treatment of all offerors and maintaining the honesty, integrity, and impartiality of the process. The ABA Model Procurement Code explains well the public policies that guide government contracting and procurement rules.[6] *The 2000 ABA Model Procurement Code for State and Local Governments*, § 1-101(2). The purposes and policies of procurement rules include:

- To provide for increased public confidence in the process followed in public procurement;
- To ensure fair and equitable treatment of all persons who deal with the procurement system;
- To foster broad-based competition within the free enterprise system;
- To provide safeguards for the maintenance of a procurement system of quality and integrity; and

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[6] The Arizona Procurement Code is based on the ABA Model Code. *See Ariz. Procurement Manual*, ARIZ. DEP'T OF ADMIN. (Aug. 30, 2017) ("Based on the model procurement code of the American Bar Association, the Code was adopted by the State in 1985."). While AHCCCS is exempt from the Arizona Procurement Code for program contractor contracts, A.R.S. § 41-2501(I), the public policies favoring fair and equitable treatment of contractors applies to AHCCCS.

- To obtain in a cost-effective and responsive manner the materials, services, and construction required by State agencies for those agencies to better serve the State's businesses and residents.

Id. at § 1-101(2)(d) – (i).[7]

Here, material flaws infected every step of the evaluation process for this procurement. Among the major flaws, detailed further below, AHCCCS:

1. Misled offerors about the development of its scoring methodology;
2. Designed a deeply flawed scoring process *after* receiving proposal;
3. Developed scores in an arbitrary, capricious, and unsupported manner; and
4. Allowed impermissible conflicts of interest to affect the award decision.

The process was so fundamentally flawed, and the resulting awards so arbitrary, that the contract awards must be set aside and a new solicitation issued.

A. The scoring methodology was not reasonably disclosed.

The disclosure of the factors to be used when evaluating the proposals is a core tenet of government contracting and critical to fair competition. It assures that the proposals will be as responsive as possible so that the State can obtain the most advantageous benefits of a competitive solicitation process. *The 2000 ABA Model Procurement Code for State and Local Governments*, at § 3-203 (5) comments; *see also TLT Constr. Corp. v. United States*, 50 Fed. C. 212, 216 (2001 ("A fundamental principle of government procurement is that [the agency] treat all offerors equally and consistently apply the evaluation factors listed in the solicitation."); U.S. Gov. Accountability Off., CMS Needs to Implement Risk-Based Oversight of Puerto Rico's Procurement Process 2 (Feb. 2021) (criticizing procurement practices involving Medicaid for lacking sufficient information on factors used to evaluate and make awards, which the federal Government Accountability Office said created risk for fraud, waste, and abuse, and impeded competition).

Here, the evaluation criteria were not fully developed before the RFP was published on August 1, 2023. Although the RFP stated that "AHCCCS *has established* a scoring methodology," the public records make clear that the scoring methodology was merely a work in progress when the RFP was published. The agency continued to make revisions through at least mid-November 2023—3 ½ months after the RFP was published and 6 weeks after offers were received and opened. *See, e.g.,* Final Evaluation Report, Executive Summary at 2 ("The Scope Team met October 2, 2023, through November 15, 2023, to determine the scoring methodology and came to an agreement to apply the scoring methodology . . ."); *see also*, e.g., AHCCCS000389 (AHCCCS Scope Team Meeting, 9/07/23, stating that scoring tools "are nearing completion" with "lock

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[7] Transparency of process and rationale is recognized internationally as necessary to assure public confidence in government contracting. The Organization for Economic Co-operation and Development, oecd.org/governance/procurement/toolbox/principlestools/transparency/ (last visited Dec. 8, 2023).

down" of all documents scheduled for 9/25/23). The procurement file and public records suggest that AHCCCS was still reviewing and revising the scoring methodology ***after*** offers had been received and opened.

The RFP provided limited details about the evaluation factors and selection process. It stated that contract awards would be made to the offeror(s) whose proposal is determined to be the "most advantageous" to the State. The RFP explained that AHCCCS had "established a scoring methodology to evaluate an Offeror's ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with AHCCCS mission and goals." YH24-0001, Section H: Instructions to Offerors, § 8. The RFP did not indicate that the scoring method was still unsettled.

The scored portions of the evaluation in their relative order of importance were disclosed, vaguely, as: 1) Programmatic Submission Requirements, and 2) Financial Submission Requirements. The RFP did not disclose that oral presentations would be scored at all, let alone that they would be weighted so heavily. Indeed, the RFP was intentionally silent as to the scoring methodology, evaluation criteria, and weighting of submission requirements. Prospective offerors asked during question rounds about scoring and weighting, and AHCCCS responded repeatedly that it would not be providing scoring or weighting details. YH24-0001, Amendments 1-3.

The lack of transparency about the evaluation factors and selection process does not promote fair, equal, and robust competition. It leads to decisions and outcomes that appear arbitrary and, often, results-oriented, which erodes public trust and confidence in the procurement process.

B. The scoring process was not designed to determine the relative merits of the proposals and to select the proposal(s) most advantageous to the State.

The entire scoring process was poorly designed to achieve the stated goals and purposes of the RFP. The scoring process used an arbitrary point score system as a substitute for a detailed review of the proposals.

Point scores are not a substitute for adequate documentation.[8] *Panacea Consulting, Inc.*, B- 299307.4, 2007 WL 2296507 at *4 (Comp. Gen. July 27, 2007) (finding insufficient a scoring matrix containing only limited comments and "brief, often cryptic, notations"). This is because the contract award "should not be based on the difference in technical scores *per se*, but rather on the contracting agency's judgment concerning the significance of that difference, and on whether the record reflects that the judgment exercised was reasonable." *DynCorp*, B- 232999, 1989 WL 240354, at *2 (Comp. Gen. Feb. 14, 1989). Agencies are required to "document their

[8] Arizona courts may look to federal authorities for guidance in the area of public contracts. *Willamette Crushing Co. v. State ex rel. Dep't of Transp.*, 188 Ariz. 79 (App. 1997) ("For guidance, we look to the federal court of claims and the federal boards of contract appeals, for those specialty courts have expertise with public contracts.").

[procurement] selection decisions so as to show the relative difference between proposals, their weaknesses and risks, and the basis and reasons for the selection decisions." *Hattal & Associates*, 70 Comp. Gen. at 637. For an ALJ or court to perform a meaningful review, the agency record "must contain adequate documentation showing the bases for the evaluation conclusions and source selection decision."[9] *Panacea Consulting, Inc.*, B- 299307.4, 2007 WL 2296507 at *2 (Comp. Gen. July 27, 2007).

Here, the RFP stated that contract awards would be made to the offeror(s) whose proposal is determined to be the "most advantageous" to the State. The RFP states the scoring process was intended to "to evaluate an Offeror's ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with AHCCCS mission and goals." "The [award] decision," the RFP states, "will be guided, but not bound, by the scores awarded by the evaluators." Although the resulting scores could thus be disregarded by AHCCCS, a scoring system was developed nonetheless. That methodology, which assigned scores based on forced and consensus ranking, created arbitrary results.

The forced ranking developed in this way. AHCCCS assigned an evaluation team to review each submission requirement. The evaluators initially reviewed the submission requirements individually, taking notes and ranking the submissions from 1 to 5, with the highest ranking being one. Evaluators were told to base their score on what they "believe"[10] rather than objective, reasonable bases. They were also told that "*ties are ok but try to rank 1 to 5*."[11] The evaluation teams then met with a consultant to reach a consensus ranking. Confirming the arbitrariness of this process, comments by evaluators are too cryptic to know whether the review is positive or negative.

Moreover, in at least some instances, it appears evaluators wrongly inverted the scale and submitted "5" as a high score and "1" as a low score – rather than ranking first through fifth. One evaluation of category B7 illustrates this well. The evaluator ranked United as "2," which correlates to second-best, with comments "I would have liked to see more." The same evaluator ranked Banner as "5," or last, but commented "Locally owned plan, so they see and understand

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[9] *See also Radiation Oncology Group of WNY, PC*, B- 310354.2, 2008 WL 6610534, at *4 (Comp. Gen. Sept. 18, 2008) (confirming that the agency must provide—in more than conclusory statements—a "comprehensive assessment or listing of the proposals' strengths and weaknesses" indicating that the agency "considered the actual merits of the proposals in calculating the scores"); *ManTech Advanced Sys. Int'l, Inc.*, 2018 CPD 60, at *5 (Comp. Gen. Jan. 18, 2018) (holding "lack of meaningful comparison of the proposals, along with the lack of an explanation" regarding source selection decision rendered decision unreasonable); *Magellan Health Servs.*, B-298912, 2007 CPD 81, at *13-14 (Comp. Gen. Jan. 5, 2007) (holding evaluation report that "contained no discussion regarding the relative technical merits of the two offerors' proposals" and no "contemporaneous documentation that in any way discussed the relative technical merits of the offeror's proposal" was unreasonable when the evaluator assigned "technically equal" scores).

[10] AHCCCS000062, Oct. 3, 2023 Scoring Training.

[11] AHCCCS000060, Oct. 3, 2023 Scoring Training.

the community needs and what will work/be accepted; has a pulse on the GSAs and what is needed in each area, consider community and cultural uniqueness."[12] The disconnect between the evaluator's comments and ranking demonstrate either an outright mistake or a misunderstanding about the ranking scale, and the individual evaluations that were provided leave considerable doubt that each evaluator followed the same process and completed evaluations in the same manner. Many individual evaluations appeared "canned" and in some cases evaluations were missing altogether.

The rankings, whether completed accurately or not, were added to an overall scoring tool which computed a score for each submission requirement based on a numerical calculation of the rank and the possible points available. The maximum points available for each submission requirement was divided by the number of offerors (here 5), and the quotient was multiplied by the offeror's inverse rank resulting in each offeror receiving a proportion of the points possible based on their rank:

Scored Measures	**Points Rank 1**	**Points Rank 2**	**Points Rank 3**	**Points Rank 4**	**Points Rank 5**
B4 Complex Conditions & Member Transitions	75	60	45	30	15
B5 Person-Centered Service Plan	145	116	87	58	29
B6 Data	40	32	24	16	8
B7 Network Development	75	60	45	30	15
B8 Workforce Development	145	116	87	58	29
B9 Access to Services & Supports (Peer Supports)	75	60	45	30	15
B10 Past Performance – Compliance Review	35	28	21	14	7
B11 Past Performance – Star Rating	20	16	12	8	4
Op 1 Family Caregiver Support	145	116	87	58	29
Op 2 Abuse and Neglect Prevention	145	116	87	58	29
C1-C4 Non-Benefit Cost Bid	100	80	60	40	20

The ranking and scoring (combined with weighting) resulted in significant, artificially created, point discrepancies between the offerors. The 1 to 5 ranking and scoring assumes that each

[12] AHCCCS001491 EPD RFP_YH24-0001_Scoring Tools B7.xslx

particular submission is always 20% better or worse than the next ranking offeror's submission, creating false chasms in scores. The point differences thus reflect a numerical calculation rather than a reasoned assessment of the technical differences between the proposals. This scoring system may be easier for evaluators or make bid protests harder by disguising flaws, but it does not identify the proposal(s) most advantageous to serve the State of Arizona's ALTCS E/PD community.

The arbitrariness of this scoring system plays out in the record: individual evaluator assessments often bore no relationship to the final consensus evaluation. And the record is silent as to how consensus was reached when individual evaluators had wildly different assessments of each response. The individual evaluations for B6, B7, and B8, demonstrate this well. Individual evaluator rankings differed greatly from evaluator to evaluator and bore no relationship to the final consensus rank. In many cases, the comments in the observation documents within the Final Evaluation Report are similar between the offerors and provide no meaningful rationale for the ranking distinctions. The observations were inconsistent and cryptic.

The number of evaluators and disparate assignment of each to reviewing duties required dedicated ALTCS subject-matter expertise, AHCCCS executive leadership, and oversight. Instead, outside consultants were directed to "guide" evaluators to consensus scores, an unusually broad delegation of state authority. That process appears to allow a consultant to decide or strongly influence, rather than merely collect, final scores. High-level process oversight was placed in the hands of civilian consultants – likely due to AHCCCS's resources spread thin as the agency, understandably, is currently committed to its "singular focus" of combatting the fraud, waste, and abuse stemming from an ongoing Medicaid fraud scandal.[13]

Moreover, the RFP marginalized important factors by making them "tie breakers" if point differentials were negligible. Worse, the actual process made those tie breakers a near impossibility by employing forced ranking. The forced ranking and scoring system assured for all practical purposes that there would not be "negligible" differences in scoring between the offerors. The RFP, however, contemplated negligible differences and stated that the agency may consider additional factors in that scenario, including:

- Potential disruption to members, and/or
- An Offeror who has performed in a satisfactory manner (in the interest of continuity of care), and/or
- An Offeror who participates satisfactorily in other lines of AHCCCS business, and/or
- An Offeror's past performance with AHCCCS, and/or
- An Offeror's past Medicare performance, and/or
- The nature, frequency, and significance of any compliance actions, and/or
- Any convictions or civil judgments entered against the Offeror's organization, and/or
- Administrative burden to the Agency.

[13] Interview of Carmen Heredia, Dec. 7, 2023, https://www.youtube.com/watch?v=AM3AIYLbqTE (last visited Dec. 20, 2023).

These important policy considerations were not adequately considered under the ranking and scoring system used in this procurement. Agency records confirm the executive and scope teams, and the consultants advising those teams, discussed how to ensure these elements would be addressed in a holistic, final evaluation. However, the record is silent as to whether and how those issues were resolved when setting the final evaluation criteria. It appears they were forgotten altogether.

C. The results of the scoring process are arbitrary, capricious, and unsupported by the procurement file.

Unsurprisingly, the flawed scoring process here led to arbitrary and capricious results. "[A]gency evaluation judgments must be documented in sufficient detail to allow review of the merits of a protest, to show that they are not arbitrary, and to show that they are in accord with the evaluation criteria listed in the RFP." *General Security Services Corp.*, B-280388, B-280388.2, 99-2 CPD ¶ 49 (Comp. Gen. Sep. 25, 1998). The scoring tools used here do not document in sufficient detail the agency's evaluation.

1. Past Performance and Oral Presentations

AHCCCS gave no indication in the RFP about the inexplicable extent to which past performance would be undervalued and oral presentations overvalued in the scoring. In fact, the RFP gave no indication that the oral presentations would be scored *at all* and instead strongly signaled that they would not. The RFP's Instructions to Offerors expressly identifies the "scored portions of the evaluation" as "programmatic submission requirements" and "financial submission requirements." Nothing in those instructions even hints that oral presentations would be considered "submissions" or part of the "programmatic" scoring. The Instructions to Offerors also discusses what AHCCCS intended to consider in the scoring and expressly specifies that "Programmatic and Finance requirements will be evaluated and weighted"; that Cost Bids and Narrative Submission Requirements "will be scored"; and that "AHCCCS anticipates utilizing the Offerors' past performance when evaluating the Offeror's Proposal." No mention is made of scoring, evaluating or weighting oral presentations, and nothing even hints at that possibility, let alone indicates that the presentations would be weighted so heavily.

a. Offerors' past performance must be properly weighted to achieve RFP's objectives.

In prior procurements, AHCCCS consistently and correctly weighted offerors' past performance significantly. For example, past performance was weighted at 25% of the overall score for AHCCCS Competitive Contract Expansion RFP YH20-0002. This heavy weighting makes sense because past performance is the most objective and verifiable evidence of an offeror's ability to provide managed care services in accordance with federal and state laws, rules and regulations, and contract requirements and thus is the best indicator of "each Offeror's ability to provide cost-effective, high quality contract services in a managed care setting in accordance with AHCCCS mission and goals"—what the RFP says the scoring methodology was meant to assess.

Public policy also supports giving meaningful weight to past performance. Unnecessary replacement of proven incumbents undermines continuity of care, disrupts members, and threatens employment security of those who have been serving members successfully. Those employees whose efforts resulted in Banner's excellence in its current contract may have to start over with a new employer, losing their seniority and benefit accruals or changing professions.

Banner reasonably anticipated that past performance would be weighted meaningfully in this procurement.[14] That expectation flowed not just from prior procurements and public policy, but from the RFP's own language stating that past performance would be used to evaluate proposals. It was not. 5.5% weighting is almost no weighting at all. The agency's decision to give such little weight to past performance in this procurement, and its lack of transparency with offerors about this change from past procurement practices, was arbitrary and unreasonably favored non-incumbent offerors. If, instead, past performance had been given the same weight as the most recent procurement, Banner is awarded a contract.

Actual Scoring Weight Impact vs. Past Weight Impact

Original Scoring

	Pts Avail	United	Banner	Health Choice	Centene	Mercy
B4	75	45	15	30	60	75
B5	145	116	145	29	87	58
B6	40	20	20	8	40	32
B7	75	60	15	30	75	45
B8	145	116	87	29	58	145
B9	75	30	60	75	45	15
B10	35	28	35	7	14	21
B11	20	20	14	8	4	14
OP1	145	116	58	145	87	29
OP2	145	87	43.5	116	145	43.5
Admin	100	30	30	30	100	80
Total	**1000**	**668**	**522.5**	**537**	**715**	**557.5**

Scenario 2 – similar weighting as most recent procurement

	Pts Avail	United	Banner	Health Choice	Centene	Mercy
B4	75	45	15	30	60	75
B5	145	116	145	29	87	58
B6	40	20	20	8	40	32
B7	75	60	15	30	75	45
B8	145	116	87	29	58	145
B9	75	30	60	75	45	15
B10	200	160	200	40	80	120
B11	145	145	101.5	58	29	101.5
OP1	0	0	0	0	0	0
OP2	0	0	0	0	0	0
Admin	100	30	30	60	100	80
Total	**1000**	**722**	**673.5**	**359**	**574**	**671.5**

b. Centene's and United's past performance foreshadows issues of overbilling, compliance, and litigation.

[14] The issues of transparency of weighting in the RFP and consideration of past performance are not novel for AHCCCS. In 2002, the Arizona Auditor General approved of AHCCCS's procurement process, noting that despite its exemption from the state procurement code it was sufficient because "RFPs note how scores for each of these areas will be weighted in determining an overall proposal score." Performance Audit, Report No. 02-07, at 9. Here, the agency failed to sustain its approved practice of advising offerors of its scoring methodology. In the same report, the Auditor General criticized AHCCC's failure to "consider current contractors' past performance in ALTCS procurements." *Id.* at 12. The agency's failure on both counts requires this protest be granted.

In devaluing past performance, the procurement also minimized the awardees' history of misconduct in government contracting, including significant overbilling of Medicaid programs. The record is silent as to how AHCCCS considered the material noncompliance of Centene and United with government contracts in other states, as the RFP explicitly requires in Section 12 of Instructions to Offerors related to "Responsibility, Responsiveness, Susceptibility, and Best Interest."

i. Centene's history of enforcement actions

The Centene Corporation family has a long history of misconduct relating to Medicaid plans, including overcharging state Medicaid programs like AHCCCS *hundreds of millions* of dollars for prescription drugs. Given its massive size—Centene is the largest Medicaid managed care company and is number 60 on Fortune's Global 500 list—and sprawling reach, Centene's misconduct extends from Arizona to nearly every corner of the country.

Within this state, over about the last decade, AHCCCS has issued to Centene numerous sanctions. These include a $250,000 sanction for "violation of critical provisions and safeguards for provider claims payment standards," despite Centene's "repeated assurances" that it would "resolve the critical compliance issues."[15] AHCCCS chided Centene not only for "widespread" "operational failures" and "ongoing compliance issues," but also for failing to even "reliably provide AHCCCS with basic information" as requested.[16] In another instance, AHCCCS sanctioned Centene $125,000 for "failure to ensure performance consistent with AHCCCS requirements."[17] And in 2021, AHCCCS imposed a $100,000 sanction for "serious compliance failures" that "impacted" "[a] total of 39,013 members."[18] AHCCCS's website includes numerous other sanctions.[19]

Centene Corporation has a similar history of enforcement actions. Just this year, Centene agreed to pay over $215 million to settle allegations about overcharging California's Medicaid

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[15] https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/2019_10_AzCH_ComplianceAction.pdf.

[16] https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/2019_10_AzCH_ComplianceAction.pdf.

[17] https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/ArizonaCompleteHealth-CompleteCarePlanSanctionLtr12519.pdf.

[18] https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/20210623NoticeofSanctionsigned.pdf.

[19] *See, e.g.*, https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/2021_8_12_AzCH-ACC_SanctionLtr.pdf; https://www.azahcccs.gov/Resources/Downloads/AdminActions/ACC/Sanctions/AZCompleteHealth-CCPSanctionLtr.pdf.

program by inflating costs for prescription drugs.[20] As the California Department of Justice alleged, Centene's two managed care plans "reported inflated figures," "leveraged advantages in its pharmacy benefit manager (PBM) contracts to save its managed care plans" certain fees, and "failed to disclose or pass on these discounted fees."[21] This misconduct allegedly occurred for almost two years, from January 2017 to December 2018.[22] To settle similar overbilling allegations, Centene also agreed to pay Indiana $66 million,[23] Iowa $44 million,[24] and Massachusetts $14.2 million,[25] among others. In announcing its own $88.3-million settlement over allegations of "conspir[ing] to misrepresent the costs of pharmacy services," in fact, the Ohio Attorney General declared that "Centene used sophisticated moves to bill unearned dollars—moves known only at the top levels of health care companies."[26] Indeed, the overbilling was so extensive that Centene set aside $1.25 *billion* to repay state agencies.[27]

Centene's settlements with Texas and Kansas, for $165.6 million and $32.4 million, respectively,[28] are particularly noteworthy given how heavily Centene leaned on its affiliates in those states in its submission to AHCCCS. Centene specifically cited the state Medicaid contracts held by Superior Health Plan (Texas) and Sunflower Health (Kansas) in Section B2 of its response.

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[20] https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-215-million-settlement-against-healthcare; *see also* Settlement Agreement and Release, available at https://oag.ca.gov/system/files/attachments/press-docs/Centene%20CA%20Fully%20Executed%20Settlement%20Agreement%20and%20Release.pdf.

[21] https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-215-million-settlement-against-healthcare; *see also* Settlement Agreement and Release, available at https://oag.ca.gov/system/files/attachments/press-docs/Centene%20CA%20Fully%20Executed%20Settlement%20Agreement%20and%20Release.pdf.

[22] https://oag.ca.gov/news/press-releases/attorney-general-bonta-announces-215-million-settlement-against-healthcare; *see also* Settlement Agreement and Release, available at https://oag.ca.gov/system/files/attachments/press-docs/Centene%20CA%20Fully%20Executed%20Settlement%20Agreement%20and%20Release.pdf.

[23] https://indianacapitalchronicle.com/2023/02/01/centene-to-pay-66-5-million-in-indiana-medicaid-drug-pricing-settlement/.

[24] https://www.desmoinesregister.com/story/news/health/2022/12/15/medicaid-insurer-centene-settlement-iowa-accused-overbilling-prescription-drugs-pharmacy/69730485007/.

[25] https://kffhealthnews.org/news/article/centene-massachusetts-medicaid-drug-settlement/

[26] https://www.ohioattorneygeneral.gov/Media/News-Releases/June-2021/Centene-Agrees-to-Pay-a-Record-$88-3-Million-to-Se; *see also* Settlement Agreement and Release, *Ohio Dep't of Medicaid v. Buckeye Health Plan Cmty. Sols., Inc.*, No. 21CV001536 (Ohio Ct. Common Pleas June 14, 2021), available at https://www.ohioattorneygeneral.gov/Files/Briefing-Room/News-Releases/Buckeye-Ohio-Final-Settlement-Release-(Executed-Ve.aspx.

[27] https://www.texastribune.org/2022/09/19/centente-texas-medicaid-settlement/; Centene Corporation June 30, 2022 Form 10-Q Filing at 19, available at https://www.sec.gov/ix?doc=/Archives/edgar/data/0001071739/000107173922000286/cnc-20220630.htm ("the Company is in discussions to bring final resolution to similar concerns in other affected states. Consistent with those discussions, the Company recorded a reserve estimate of $1,250 million in the second quarter of 2021 related to this issue.").

[28] https://kffhealthnews.org/news/article/centene-to-pay-166-million-to-texas-in-medicaid-drug-pricing-settlement/; https://www.ag.ks.gov/docs/default-source/documents/2021-11-12-kansas-centene-settlement-agreement-and-release-(final-executed).pdf?sfvrsn=2b18a41a_2

Yet, despite relying on those contracts—and repeatedly boasting of both plans' performance throughout Sections B4 and B6—Centene never once mentioned that the two entities had overcharged Texas and Kansas Medicaid agencies by nearly *$200 million*.

Centene's affiliates in other states have similarly checkered histories. In addition to the $215 million overbilling for prescription drugs in California, a Centene affiliate in the Golden State was sanctioned $335,000 for the "failure to meet or exceed" "minimum performance levels" (MPL) under a "2017 Quality of Care Corrective Action Plan," based on "34 indicators below the MPL."[29] And another affiliate agreed to pay about 1,200 class members on average $1,775 each (or about $2 million) for allegedly not paying overtime wages in violation of the Fair Labor Standards Act.[30]

These are but a few examples; there numerous others. Nowhere in Centene's submissions, however, are any of these enforcement actions, sanctions, or settlements disclosed.

ii. United's history of enforcement actions

Also a large for-profit entity—Fortune ranked its parent company number five among the largest U.S. corporations—United is likewise no stranger to enforcement actions over billing practices. Like Centene, the United family includes misdeeds in many states. For example, in 2021, United settled with the U.S. Department of Labor and the New York Attorney General over allegations that "United unlawfully denied health care coverage for mental health and substance use disorder treatment for thousands of Americans."[31] As a result, United agreed to pay more than $14 million.[32] As New York's Attorney General announced, "United's denial of these vital services was both unlawful and dangerous—putting millions in harm's way during the darkest of times."[33] More recently, the Washington Insurance Commissioner fined United Healthcare Insurance Company $500,000 for failing to demonstrate compliance with federal and state laws requiring parity for mental health and substance abuse disorder treatment.[34]

In 2010, United paid one of the largest settlements ever relating to medical coverage: $350 million to settle a lawsuit by the American Medical Association and others over allegations about illegal billing.[35] As the AMA's then-president declared, "This [was] a situation where there was a rigged scheme to shift costs that were promised to be paid by an insurer to the patients

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[29] https://www.dhcs.ca.gov/services/Documents/MCQMD/Sanctions/SanctionLtr_HealthNet181012.pdf.
[30] https://www.law360.com/articles/1381989/attachments/0.
[31] https://ag.ny.gov/press-release/2021/attorney-general-james-and-us-department-labor-deliver-14-million-consumers-who.
[32] https://ag.ny.gov/press-release/2021/attorney-general-james-and-us-department-labor-deliver-14-million-consumers-who.
[33] https://ag.ny.gov/press-release/2021/attorney-general-james-and-us-department-labor-deliver-14-million-consumers-who.
[34] https://www.insurance.wa.gov/news/kreidler-fines-unitedhealthcare-500000-not-demonstrating-compliance-mental-health-parity-laws
[35] https://www.nbcnews.com/health/health-news/health-insurer-pay-350-million-settlement-flna1c9453541.

themselves[.]"[36] In yet another case, United was ordered to pay $91 million based on claims that it unilaterally reduced reimbursement rates for physicians.[37]

Meanwhile, the Centers for Medicare & Medicaid Services (CMS) sanctioned three of United's plans, barring them from being sold in six states for most of 2022.[38] This sanction was imposed after CMS concluded that United failed to spend the required minimum percentage of premiums on medical expenses for seniors over three consecutive years—in other words, the plans made too much profit.[39]

One way United makes so much profit, according to a recently filed lawsuit, is by illegally using artificial intelligence to "systematically den[y] elderly patients' claims for extended care."[40] The lawsuit contends that United uses an AI algorithm known as nH Predict to evaluate and deny claims for post-acute care, including stays in skilled nursing facilities and in-home care, and that when the AI coverage denials were appealed to federal administrative law judges, the judges reversed the denial nearly 90% of the time.[41]

Like Centene, United leaned heavily on sister companies in other states yet failed to disclose misconduct by United family members in those states. In its submission to AHCCCS United cited affiliates' contracts in Ohio and Tennessee and boasted throughout about selected aspects of those organizations' performance. But United did not disclose that OptumRx, a United subsidiary, recently agreed to repay Ohio $15 million for overcharging the state bureau of workers' compensation for prescription drugs.[42]

2. Offerors' oral presentations should not receive great weight because the scoring is not tied to the RFP's objective.

Without explanation or precedent, AHCCCS made the oral presentations worth 29% of the overall score. Historical analysis of past procurements shows that oral presentations have sometimes been ranked and scored, but there is no evidence oral presentations have ever been this heavily weighted in the final scoring. The overall weighting of the oral presentations here,

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[36] https://www.nbcnews.com/health/health-news/health-insurer-pay-350-million-settlement-flna1c9453541.
[37] https://www.law.com/njlawjournal/2023/05/04/91m-award-plaintiffs-win-on-claims-that-united-healthcare-stiffed-medical-providers/.
[38] https://www.cms.gov/files/document/unitedofthemidwestsanction09022021.pdf; https://www.startribune.com/feds-penalize-unitedhealthcare-plans-for-underspending-premiums-on-medical-care-for-seniors/600097385/
[39] https://www.startribune.com/feds-penalize-unitedhealthcare-plans-for-underspending-premiums-on-medical-care-for-seniors/600097385/.
[40] https://www.reuters.com/legal/lawsuit-claims-unitedhealth-ai-wrongfully-denies-elderly-extended-care-2023-11-14/.
[41] *Id*.
[42] https://www.reuters.com/legal/litigation/optumrx-pay-15-mln-settle-ohios-overcharging-claims-2022-10-25/#:~:text=(Reuters)%20%2D%20UnitedHealth%20Group%20Inc's,drugs%2C%20the%20state%20announced%20Tuesday.

particularly given the unusual format and the subjective nature of evaluating the presentations, is unexplained and unjustified in the procurement file.

The arbitrary nature of the scoring can be seen in the results. BCBS AZ Health Choice was the highest overall scorer on the oral presentations, receiving 261 points out of a total available of 290 points, but the lowest overall scorer on the written programmatic requirements, receiving just 216 points out of a total available of 610 points. It defies logic that the lowest scorer on the written programmatic requirements would be the highest scorer on the oral presentations if evaluation criteria were consistently applied. This disparity in results between oral and written submissions demonstrates the unclear, subjective, and arbitrary nature of the evaluation criteria. If objective and measurable criteria had been used instead, the scores on the oral submissions would serve to confirm the advantages of the proposals.

It defied common sense that Banner, the highest scorer on AHCCCS's 2023 operational review, and a plan with decades of executive-level, clinical, and case management experience with the program, would have been the lowest overall performer in an oral presentation focused on the ATLCS E/PD program. The scoring tool in the procurement file includes the specific criteria evaluated during the oral presentations, but the prompts for the oral presentation did not ask presenters to respond to the specific criteria being scored. Instead, points were awarded if offerors used "buzz words," even when those words were not required in an accurate answer. To date, the agency has not produced individual evaluator comments for the oral presentations, suggesting the consensus evaluation process was subject to considerable subjectivity. Moreover, Banner has transcribed the audio files, but portions are inaudible, resulting in an inadequate record of the adequacy of the process. The evaluations were inconsistent, with only some offerors receiving credit for topics mentioned, even when other offerors also raised the same topic. The lack of rationale in the weighting and scoring of oral presentations confirms the arbitrary result and requires this protest be sustained.

3. Cost Bid

The scoring was not designed to holistically evaluate the most cost-effective proposals but rather only the lowest-cost proposals. AHCCCS provided an administrative cost template but did not provide sufficient guidance for it to be completed consistently by all offerors. This allowed offerors to submit cost bids with varying and inconsistent underlying assumptions. Those assumption differences were then not given proper consideration due to the "lowest-cost" scoring methodology. The agency instead provided high-level historical claims and membership data, which required the offerors to build the data into anticipated capitation rates, to inform administrative cost bids.

An example can be found in the various slopes created for CM/Admin differences across membership bands. Banner interpreted the request for actuarial certification as requiring an administrative cost bid that is reasonable and obtainable. Banner developed an estimate that was based on documented experience administering this contract and the cost to be a top-performing and highly compliant plan as demonstrated by the 2023 operational reviews. In contrast, it appears that other offerors built administrative cost bids designed to be the lowest bid without regard to

the actual costs of administering the program. At least one reviewer disqualified United's administrative bid due to being "very low" and having a "PMPM that is unsustainable." If AHCCCS had been more transparent in its weighting and scoring, Banner may have been able to submit an administrative cost bid that aligned with those ultimately chosen.

It requires significant program and community investment to provide high-quality managed care services. To ignore these investments and costs in favor of lowest-cost proposals is contrary to the terms of the RFP, which states that offerors are evaluated based on their ability to provide high-quality, cost-effective managed care services. Scoring the cost bids without the context of assumptions created an arbitrary process and result, requiring this protest to be granted.

4. Other Scoring Errors

a. *Centene's clear errors were overlooked*

Centene's offer was riddled with disqualifying and concerning errors that were overlooked. Despite violations, Centene received the award.

With respect to proposal requirement B2, Centene failed to properly cite its D-SNP contract number. Instead of referencing the D-SNP contract with CMS, Centene cited its Medicare Advantage Organization (MAO) Agreement with AHCCCS. Despite that omission, Centene cited and referenced D-SNP in its proposal. Centene's references to D-SNP should have been disregarded. This error is particularly egregious given their unsuccessful, untimely attempt to amend their intent to bid.[43]

Regarding Narrative Submission B7, Centene's offer also fell short of the contract requirements. Centene provided that its network would be ready by July 1, 2024, a full month after the RFP's deadline of June 1, 2024. Centene's offer fell short again when it included errors in its own tax identification number.

With respect to Centene's oral presentations, the procurement file lists Michele Barnard as a Centene employee who responded to the prompts. Although her resume in the procurement file lists her as a Centene employee since 2015, open-source documents show she left Centene in 2018 and serves as a consultant no longer involved in Centene's day-to-day quality management, medical management, or care management. This undisclosed connection not only violated the RFP's requirement that oral presenters be employed by offerors and involved in day-to-day operations, it introduced improper conflicts that infected the decision making and likely skewed the outcome.

Any one of these errors could and should have been disqualifying. In aggregate, they show an offeror who falls short in meeting deadlines, disregards the state's requirements, and fails to carefully review its work.

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[43] AHCCCS0003560-61 (Sept. 7, 2023 AHCCCS letter rejecting Centene's request to amend intent to bid).

b. Avoidable errors due to insufficient engagement of the public

The errors in the award process could have been avoided had the state followed best practices seen in other states that recently held managed care procurements. The normative practice is to issue a Request for Information to members, providers, and plans to select structured, comprehensive feedback from all community stakeholders. *See* 42 CFR § 438.70 (requiring the State to ensure the views of beneficiaries, individuals representing beneficiaries, providers, and other stakeholders are solicited and addressed during the design, implementation, and oversight of a State's managed LTSS program). Instead, AHCCCS opted for a general, limited feedback "suggestion-email inbox" and "listening session" approach. This passive process caused the agency to miss the critical concerns now being voiced by members and providers troubled by the outcome of the ALTCS procurement.

c. Avoidable errors due to not using the allotted time for evaluation

AHCCCS missed other opportunities to avoid its many errors by not taking the full time allotted to evaluate the proposals. Internal documents provided by the agency reveal that staff were concerned there was not enough time to effectively review proposals. The initial timeline had the award by November 17, and staff sought the planned December 13 award date. In the end, the state did not use that time, announcing awards a full 12 days early, on December 1, 2023. The rush to the finish line should have been slowed to allow time and review to ensure the process and results were just.

D. Conflicts of Interests and Preservation of Issues Not Yet Brought to Light

In addition to the lack of transparency in both the pre- and post-solicitation process, Banner preserves arguments that this protest should be sustained due to potential or perceived conflicts of interests and violations of duties of confidentiality. With pending public records requests still unsatisfied, the record on these conflicts remains undeveloped. As detailed above, duties regarding confidentiality and conflicts of interest are set by state and federal law, as well as regulatory code.

First, Banner preserves the potential or perceived conflict of interest related to Matt Varitek's involvement in the RFP. Agency documents show he served as an evaluation team actuary despite having been employed in 2022 by Centene, an offeror and recipient of the statewide award.

Next, Banner preserves potential issues related to the involvement of the Governor's Office in this procurement. The agency's timeline sets aside ten days for "decisions" from the Governor's Office in the process, ensuring their involvement before the award was announced. Despite this, the agency provided no records of communication or transmission to the Governor's Office. It is not clear who was involved from the Governor's Office, their role, or their clearance of conflicts. The involvement of the Governor's Office in this process, however, creates an appearance of impropriety, opportunities for undue political influence, and favoritism in the contracting process, jeopardizing the integrity of the procurement process. This would be a significant departure from

the procurement process typically followed by AHCCCS, and it justifies the granting of this protest.

Banner has submitted public records request to AHCCCS and the outside contractor the agency engaged for assistance with the procurement but has not yet received all records responsive to those requests. Banner expressly reserves its right to supplement this protest letter as additional public records related to this procurement process are produced.

REQUEST FOR RELIEF

Banner requests that AHCCCS sustain this protest, stay the award, extend the existing contract nos. YH18-0001 for another 12 months, and issue a revised solicitation, with a structured process for community input through a Request for Information process, to remedy these errors.

Very truly yours,

David B. Rosenbaum

DBR/ale

CC: Meggan.LaPorte@azahcccs.gov