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

Dear Ms. LaPorte:

This firm represents Blue Cross and Blue Shield of Arizona (“BCBSAZ”) Health Choice (“BCBSAZ Health Choice” or “Health Choice”). Under Arizona Administrative Code (“A.A.C.”) R9-22-604, Health Choice protests the decision to award two statewide ALTCS E/PD Contracts under RFP number YH24-0001 (the “Contract”) to Arizona Physicians IPA, Inc. dba UnitedHealthcare Community Plan (“United”) and Health Net Access, Inc. dba Arizona Complete Health-Complete Plan (“Health Net”).

I want to begin by saying that Health Choice did not make the decision to file this protest lightly. Health Choice appreciates its relationship with Arizona Health Care Cost Containment System (“AHCCCS” or “State”) and the individuals involved in evaluating the competing offers. However, but for the flawed evaluation process and material errors discussed below, Health Choice is confident that it would have been selected for a contract based on the RFP’s stated goal to provide the highest quality care to AHCCCS members who are Elderly and/or have a Physical Disability (E/PD) in the Arizona Long Term Care System (ALTCS) Program. *See* Solicitation Section D(1), p. 42-46. Health Choice feels compelled to submit this Protest to ensure a sound scoring methodology and level playing field so that the right partners are selected in the best interests of the State to serve this vulnerable population not only in this solicitation but also in future Medicare solicitations.

Multiple flaws in the procurement became apparent once the scoring documents were released.

First, AHCCCS did not determine and agree upon a scoring methodology until after the proposals were opened. Such a process is contrary to the purposes for public procurement and creates the potential for the Evaluation Team to sway the scoring in favor of one offeror versus another after they reviewed the contents of the offers. This flaw permeates the entire procurement and requires that the awards be cancelled, and the procurement re-solicited.

Second, the scoring methodology chosen by AHCCCS after opening proposals (revealed at the same time as the rankings) arbitrarily created artificially large disparities in the numerical scores, even in situations where two proposals are effectively equivalent in substance. This forced inverse ranking system unfairly punishes offerors, awarding only a certain percentage of possible points regardless of the actual substantive quality of the proposal. This flaw was exacerbated by the evaluation team's approach which focused not on the substance of the proposed programs but the style of the written description. This flawed scoring methodology does not accurately reflect a proposal's substantive merit and advantage to the State. The use of the flawed, arbitrary ranking system requires the re-solicitation of the procurement.

Third, AHCCCS did not disclose the weightings of the evaluation factors and subfactors, which prevents full and free competition. Although all bidders were in the dark as to the weight that AHCCCS intended to place on the different factors and subfactors, procurement authorities recognize that a full disclosure allows all bidders to submit the best-tailored proposals to meet the State's goals.

Fourth, there were numerous scoring flaws not only in the narrative scoring sections, but also with respect to past performance, CMS Stars quality performance, and cost. In several instances, the ranking and rationale spreadsheets focus on criteria that were not part of the question. A comparison of the proposal submitted by Health Choice with other bidders shows that Health Choice's proposal included more innovative programs and should have received a higher score on several questions. Indeed, Health Choice scored very highly on the oral presentations yet came in last on the narrative questions that discussed the same programs.

As discussed further below, these errors infected the procurement process and absent these errors, Health Choice would have received a Contract award. Accordingly, the law requires that the awards to United and Health Net be set aside, and a new solicitation issued, or alternatively, the solicitation should be re-scored and a contract awarded to Health Choice.

This Protest is timely filed pursuant to A.A.C. R9-22-604(D).

On December 7, 2023, Health Choice made a public records request to AHCCCS for several categories of documents, including documents produced in response to other bidders' public records requests. AHCCCS is still in the process of producing materials in response to the bidders' public records requests. The most recent production from AHCCCS was on December 20, 2023. Health Choice reserves the right to amend or supplement this protest based upon materials that AHCCCS has not yet produced.

The following information is provided in support of this Protest:

**1. Name, Address, and Telephone Number of the Interested Party.**

The Interested Party and key contact of the Interested Party is:

BCBSAZ Health Choice



8220 N. 23rd Avenue  
Phoenix, AZ 85021

Shawn Nau, Chief Executive Officer  
BCBSAZ Health Choice  
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## **2. The Signature of the Interested Party or the Interested Party's Representative.**

The protest is signed below by Mr. Kevin O'Malley, the Interested Party's representative, with the following contact information:

Kevin E. O'Malley  
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## **3. Identification of the Solicitation Number.**

The solicitation number is RFP YH24-0001 ALTCS E/PD.

## **4. Detailed Statement of the Legal and Factual Grounds of the Protest.**

### **A. Background.**

#### **1. Health Choice's Experience.**

Health Choice is a wholly owned subsidiary of Blue Cross Blue Shield of Arizona ("AZ Blue"). Health Choice has been an active participant in the AHCCCS program for over 30 years and AZ Blue has served Arizona since 1939 and is the largest health insurer based in Arizona covering approximately two million members. AZ Blue is also Arizona's only nonprofit health insurer, which means that our earnings go back into Arizona communities and financially support hundreds of health-related philanthropic endeavors every year. AZ Blue is also a part of the national Blue Cross Blue Shield Association which collectively manages more Medicaid-covered lives than any other national system - with 25 Medicaid (including Managed Long-Term Services and Supports and DSNP) plans and covering over 13 million Medicaid members in 2023.



Health Choice is dedicated to serving AHCCCS and Dual Eligible Special Needs Plans (“DSNP”) members. Indeed, Health Choice became the first AHCCCS health plan to meet AHCCCS’ accreditation requirements by achieving National Committee for Quality Assurance (“NCQA”) Health Plan accreditation in 2021, Medicaid (“MED”) and Medicare Deeming (“MA”) accreditation in 2023 and is currently working toward NCQA Health Equity and Health Equity Plus accreditation in early 2024.

Health Choice’s innovations in Health Choice Pathway, its Medicare Advantage DSNP, which serves beneficiaries who have social and health conditions similar to those of ALTCS members led to Pathway achieving a CMS Four (4) STAR rating for the past two performance years, and the only Arizona DSNP with a Five (5) STAR Part D Program.

## **2. The State’s Goals and Evaluation Criteria Disclosed in the RFP.**

The RFP explained AHCCCS “mission and vision” “to reach across Arizona to provide comprehensive quality health care to those in need while shaping tomorrow’s managed health care from today’s experience, quality, and innovation.” RFP Section D(1), p. 42. AHCCCS noted it “supports a program that promotes the values of: 1. Choice. 2. Dignity. 3. Independence. 4. Individuality. 5. Privacy. 6. Self-determination.” *Id.* p. 42-43. The RFP emphasized AHCCCS’ focus on improvement and “the development of initiatives aimed at building a more cohesive and effective health care system in Arizona by reducing fragmentation, structuring provider reimbursements to incentivize quality outcomes, leveraging Health Information Technology (HIT), and working with private sector partners to further innovation to the greatest extent.” *Id.* p. 43.

The RFP also outlined the “values, guiding system principles and goals” that were the “foundation for the development of this Contract.” *Id.* p. 45. These values and goals, briefly summarized, are: accessibility of network; collaboration with stakeholders, consistency of services, member-centered case management, member-directed options, most integrated setting, and person-centered service planning. *Id.* p. 45-46.

Section H, Instructions to Offerors, Paragraph 8 of the RFP (p. 5) provided that “awards shall be made to the responsible Offeror(s) whose Proposal is determined in writing to be the most advantageous to the state based upon the evaluation criteria. Proposals will be evaluated based upon the ability of the offeror to satisfy the requirements of the RFP in a cost-effective manner.” The RFP then listed two “scored portions” in relative order of importance: (1) “Programmatic Submission Requirements”; and (2) “Financial Submission Requirements.” *Id.*; *see also* p. 6 (“Programmatic and Financial Requirements will be evaluated and weighted.”).<sup>1</sup> The RFP further explained that the “Narrative Submission Requirements will be scored for each Offeror and the score for that Offeror will be applied to all GSAs bid.” *Id.* p. 6.

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<sup>1</sup> Although the RFP capitalized the term “Programmatic Submission Requirements,” it never defined that term.

AHCCCS told the bidders that “AHCCCS has 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 the AHCCCS mission and goals.” Section H, Instructions to Offerors, Paragraph 8 p. 5 (emphasis added). Thus, the bidders were notified that their proposals would be scored in line with the stated mission and goals according to a methodology that had already been developed.

Paragraph 8 further provided that AHCCCS’ decision would be “guided, but not bound, by the scores awarded by the evaluators. AHCCCS will make its decision based on a determination of which Proposals are deemed to be most advantageous to the State and in accordance with Paragraph 11, Award of Contract, in this Section.” AHCCCS contemplated a total of 3 contract awards (maximum of two contractors in the North and South GSAs and three contractors in the Central GSA). Section H, Instructions to Offerors, Paragraph 11, p. 8. AHCCCS further noted that up to 2 statewide contracts may be awarded. *Id.*

In response to questions submitted by the offerors, AHCCCS stated that it would not provide scoring or weighting details. *See* RFP Amendment No. 1, Response to Question 24. Accordingly, the full guidance given to the bidders was the proposals would be “evaluated based upon the “ability of the offeror to satisfy the requirements of the RFP in a cost-effective manner” with respect to programmatic submission requirements and financial submission requirements.

When the evaluation materials were released, however, none of the evaluator comments on the proposals were linked to the achievement of the State’s goals and values from the RFP. As discussed further below, the evaluators focused on style rather than a bidder’s substantive ability to meet the State’s goals with respect to the ALTCS program.

Furthermore, the Evaluation Summary provided no explanation as to how AHCCCS arrived at its determination that two statewide contracts to Health Net and United would be in the State’s best interest, even though AHCCCS announced in the RFP that it contemplated a total of 3 contract awards. The Summary just provided the conclusory statement that the award “will be the most advantageous to AHCCCS and the State of Arizona based on the evaluation factors set forth in the solicitation.” This is one of several examples of AHCCCS’ failure to provide sufficient information supporting its evaluation.

**B. AHCCCS Improperly Waited Until After Receiving Bids to Establish the Scoring Methodology**

**1. Contrary to the RFP, the Evaluation Materials Reveal that AHCCCS Did Not Establish the Scoring Methodology Until After the Proposals Were Opened and Evaluated.**

Paragraph 8 of the Instructions to Offerors stated that “AHCCCS has 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 the AHCCCS mission and goals.” Section H, p. 5. Yet, when the awards were released, the RFP Executive Summary revealed otherwise. The Executive

Summary provides that 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 detailed in the Evaluation Process Overview document available in the procurement file.”

Thus, contrary to what AHCCCS told the bidders in the RFP, the scoring methodology for this contract was not determined prior to the issuance of the RFP. And it was not determined prior to opening the proposals. Instead, the process to determine the methodology started on the same day that proposals were received October 2, 2023, and continued until November 15, 2023. By November 15, more than a month after proposals were opened, the Evaluation Team had already participated in scoring training (Oct. 2), participated in consensus meetings and indeed in many instances, issued final rankings of the proposals. *See* Executive Summary, p. 2; *see, e.g.*, Ranking and Rationale for B7 and B8.

It is hornbook law that a procuring agency cannot alter the RFP after opening bids. *See, e.g.*, A.A.C. R9-22-602(B)(2) (“The Administration shall evaluate a proposal based on the GSA and the evaluation factors listed in the RFP.”). Doing so removes the level playing field necessary for full and free competition. As noted in the RFP, all amendments were to be issued prior to the offer due date and indeed, each offeror acknowledged the receipt of all amendments in its proposal. *See* RFP, Section H, Paragraph 7. AHCCCS issued three RFP amendments in this solicitation. Yet AHCCCS failed to tell the bidders until after contract award that it made a material and improper change to the RFP as to the timing of the selection of a scoring methodology. This alone compels re-solicitation. *See Pharmchem Laboratories, Inc.*, B-244385 (Oct. 8, 1991), available at <https://www.gao.gov/products/b-244385> (contracting officials “do not have the discretion to announce in the solicitation that they will use one evaluation plan, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in making its award decision or inform all offerors of any significant changes made in the evaluation scheme”); *Lab'y Corp. of Am. Holdings v. United States*, No. 14-261C, 2014 WL 2858533 (Fed. Cl. June 13, 2014) (“If an agency's evaluation of proposals differs significantly from the process disclosed in the solicitation, the agency's decision lacks a rational basis.”).<sup>2</sup>

Moreover, the development and agreement of a scoring methodology by the Scope Team after the Evaluation Team ranked the proposals creates serious problems.

Although the file released by AHCCCS on December 1, 2023 did not identify the members of the Scope Team, documents released in response to the bidders’ public records requests have revealed that there is overlap between the Scope Team and the Evaluation Team.<sup>3</sup> Thus, at the same

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<sup>2</sup> Arizona courts look to federal authorities on matters of public procurement law. *Ry-Tan Const., Inc. v. Washington Elementary School Dist. No. 6*, 208 Ariz. 379, 395, ¶ 53 (App. 2004); *see also Willamette Crushing Co. v. State By and Through Dept. of Transp.*, 188 Ariz. 79, 81 (App. 1997) (“This appeal involves a public Contract and issues on which there are no Arizona cases. 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.”).

<sup>3</sup> Specifically, Danielle Ashlock, Dara Johnson, Jakenna Lebsock, Megan Woods, Melissa Arzabal, Pam Sullivan, and Rachel Conley were both on the Scope Team and the Evaluation Team.



time that the evaluators were reviewing the proposals and determining strengths and weaknesses, some (but not all) of those evaluators were also meeting to decide upon a scoring methodology. This means that at the time the evaluators were ranking proposals, they did not know what scoring methodology would be used or how the rankings would ultimately translate into point scores for each proposal. *See* Overview of RFP Evaluation Process, p. 1 (“Once the consensus ranking documents are completed, they will be submitted to the Finance Team for inclusion in the overall scoring methodology.”). As discussed further below, the scoring methodology agreed upon by the Scope Team on November 15, 2023, creates wide point differentials between each of the different ranks regardless of how close the proposals actually are in terms of substance. Yet the Evaluation Team could not have known such would be the result because they made their rankings before that methodology was selected.

To be clear, the Scope Team, not the Evaluation Team, made the recommendation to award two statewide contracts to Health Net and United. *See* Executive Summary at p. 3. Thus, the persons who actually reviewed and evaluated the proposals were not necessarily involved in the discussions regarding who should receive the contract award.

AHCCCS’ choice to wait until after the proposals were opened and reviewed to develop and agree upon a scoring methodology is contrary to fundamental procurement policies. The purpose of public procurement law is “to promote competition, to guard against favoritism, fraud, and corruption and to secure the best work or supplies at the lowest price practicable.” *Achen Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 55 (1992); *Rollo v. City of Tempe*, 120 Ariz. 473, 474 (1978). “[T]he letting of contracts for public business should be above suspicion or favoritism.” *Brown v. City of Phoenix*, 77 Ariz. 368, 377, 272 P.2d 358, 367 (1954).

A process that allows scoring criteria or methodology to be determined based upon the information from the proposals themselves is improper as a matter of law because it creates a potential for favoritism or bias. In a recent decision by Administrative Law Judge Tammy Eigenheer in connection with a bid protest before the Arizona Department of Administration, Judge Eigenheer found that the Department of Administration erred by developing “Scoring Criteria” after the bids were opened and reviewed. *See* Decision in Appeal of GuideSoft Bid Protest, RFP BPM003913- MTS-MSP-Multi-Temporary Staffing Services-Managed Services Provider, Case No. 22F-003-ADM (May 22, 2023) (the “*GuideSoft* Decision”), attached hereto as **Exhibit 1**.

Specifically, Judge Eigenheer found that “[w]ithout preset Scoring Criteria, the members of the Evaluation Committee could easily sway the scoring in favor of one offeror or against another offeror.” *Id.* ¶ 26. “While nothing in the Arizona Procurement Code explicitly prohibits the formulation of Scoring Criteria after the bids are open and reviewed, such a process is antithetical to the purposes of the code. Rather, the requirement that Evaluation Tool and Evaluation Instructions be finalized prior to the offers being opened demonstrates that the offers themselves should not affect the scoring.” *Id.* ¶ 29. Thus, even though the Evaluation Tool had been developed prior to opening bids, the failure to establish the Scoring Criteria, i.e. “the process of assigning numerical values to the proposal responses received” (*id.* ¶ 11), until after the evaluators reviewed the proposals was a sufficient flaw to sustain a bid protest. *Id.* ¶ 31.

Although the *GuideSoft* Decision is not binding authority, the same rationale applies here. As in the *GuideSoft* Decision, the Scope Team did not develop and agree upon the “process of assigning numerical values to the proposal responses received” until after the proposals were opened, reviewed, and ranked, which creates the possibility that the selection of that methodology was influenced by the proposals themselves and how that methodology would hurt or help specific proposers. This potential for bias infects the entire evaluation and requires re-solicitation using evaluation criteria and a scoring methodology chosen before the opening of bids. See *Eel River Disposal & Res. Recovery, Inc. v. Cnty. of Humboldt*, 221 Cal. App. 4th 209, 238, 164 Cal. Rptr. 3d 316, 339 (2013) (“The mere potential for abuses likely to arise from significant deviations from standards designed to eliminate favoritism, fraud, and corruption, avoid misuse of public funds, and stimulate advantageous market place competition is a sufficient basis upon which to grant judicial relief even without a showing that the deviations actually resulted in such abuses.”).

**C. The Ranked Scoring Methodology Selected After the Review by the Evaluation Teams Arbitrarily Creates Wide Gulfs Between Bidders Regardless of the Actual Substantive Differences in the Proposals.**

As discussed above, AHCCCS’ process of determining the scoring methodology after opening and reviewing proposals fails as a matter of law. But in any event, the forced inverse rank scoring methodology that AHCCCS used improperly and arbitrarily discounted a large percentage of points that was not tied to substantive differences in the proposals.

The Evaluation Process Overview released after the contract awards described for the first time the scoring process used to arrive at the point scores for each of the scored categories. Specifically, AHCCCS used the following scoring formula:  $\text{Maximum Points}/\text{Number of Offerors} \times \text{Offeror's Inverse Rank} = \text{Score}$ . Here, because there were five bidders, this means that the bidder who was ranked first on a question received 100% of the possible points for that question, the second ranked bidder received 80% of the points, the third ranked bidder received 60% of the points, the fourth ranked bidder received 40% of the points, and the fifth ranked bidder received 20% of the points. Thus, each decrease in rank resulted in an automatic 20% deduction of points even if the responses were virtually identical. For questions that were worth a significant number of points, that 20% decrease represents a substantial deduction. For example, on B5, the 20% difference equated to 29 points, i.e. 2.9% of the total possible points. The formula forced the 20% decrease regardless of the actual qualitative difference between two proposals. Put another way, no matter how close two bidders were in terms of merits, the lower ranked bidder always received 20% fewer points for that question.

It isn’t hard to come up with a scenario that demonstrates the illogical ramifications of this formula. Let’s imagine that on a 100 point scale, the five bidders’ answers would be rated as 100, 99, 98, 97, and 96. All five proposals would be considered an A+ score. Although the 100 score is slightly above 99, the difference between the two is essentially negligible. But under AHCCCS’ scoring formula, the second ranked bidder whose proposal was practically perfect would only receive 80% of the points. And it only gets worse from there. The fifth ranked bidder (the 96 score) would only receive 20% of the available points despite submitting an A+ answer.



In short, the formula is not rationally tied to the actual comparative differences in substance between proposals. Even negligible differences between answers were automatically treated as significant differences. But the RFP itself noted that there could be negligible differences between proposals. Paragraph 8 of the Instructions to the Offerors provided that if “AHCCCS deems that there is a negligible difference in scores between two or more competing Proposals for a particular Geographic Service Area (GSA), in the best interest of the State” AHCCCS could consider a number of additional factors such as past performance, compliance actions, and administrative burden. Yet the scoring formula used ensures that there will not be a negligible difference in the scores between two ranked answers.

In contrast, common methods of assigning values to evaluation criteria allow the evaluation committee to set point values that correspond to how well the proposals meet the criteria (instead of solely determining how they rank against each other). For example, Section 6.8.2 of the Arizona Procurement Manual<sup>4</sup> discusses two such typical methods. In the first method, the evaluators themselves assign a point score up to the maximum point value for each evaluation criteria category. *Id.* Thus, if each proposal merits top points for that category, the evaluation team awards the appropriate points. In the second described method, evaluators consider the technical criteria on a “pre-established scale” such that an excellent response falls within a certain range of the potential points available, a good response is within a lower range, and a poor response is in the lowest range. *Id.* Again, under this method, if all the proposals were technically excellent, they would be scored within the excellent range.<sup>5</sup>

Although these are not exclusive methods for assigning values, the State Procurement Manual cautions that “[t]he evaluation criteria and the values assigned must be consistent with any information provided in the RFP.” Here, the values assigned reflected the assigned ranking rather than how well the proposal met the RFP criteria. This is contrary to the principle that proposals must be evaluated based on the evaluation criteria set forth in the RFP. *See* A.A.C. R9-22-602(B)(2) (“The Administration shall evaluate a proposal based on the GSA and the evaluation factors listed in the RFP.”); *Orion Tech. Res., LLC v. Los Alamos Nat. Sec., LLC*, 2012-NMCA-097, ¶ 12, 287 P.3d 967, 972 (“Under the laws . . . the city was required to apply the criteria set out in the RFP—and no others—in evaluating the proposals”) (internal citation omitted).

The use of this formula is especially concerning given that the Scope Team did not agree upon this formula until after the Evaluation Team had arrived upon their consensus rankings. Thus, the persons who actually evaluated and compared the qualitative differences between the different answers did not determine the ultimate points awarded for each category.

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<sup>4</sup> Available at

<https://spo.az.gov/sites/default/files/Arizona%20State%20Procurement%20Manual%20DC%2009%20r0.pdf>

<sup>5</sup> It is our understanding that AHCCCS previously used a version of this method to score proposals, which provided both bidders and reviewers sufficient information to determine how the proposals were scored.

AHCCCS' use of this flawed, arbitrary ranking formula can only be remedied by a re-solicitation. Given that AHCCCS has already reviewed the proposals, a new selection of a scoring methodology would be tainted by the possibility of bias for the reasons explained in the previous section.

**D. AHCCCS Did Not Disclose the Weighting of the Evaluation Factors, Which Fails to Provide for Maximum Competition.**

As noted above, Paragraph 8 of the Instructions to the Offerors listed two “scored portions” in relative order of importance: (1) “Programmatic Submission Requirements”; and (2) “Financial Submission Requirements.” *Id.*; *see also* p. 6 (“Programmatic and Financial Requirements will be evaluated and weighted.”). The RFP, however, did not define what constituted the Programmatic Submission Requirements or announce the weighting of the two portions or the relative importance of the different scored questions, including past performance. In response to questions submitted by the offerors, AHCCCS stated that it would not provide scoring or weighting details. *See, e.g.*, RFP Amendment No. 1, Response to Question 24.

It wasn't until the contract awards were announced and the scoring summaries released that the offerors learned that AHCCCS gave the most weight to the narrative summary scores (55.5% of the overall points), followed by the oral presentations (29%), non-benefit cost bid (10%), and past performance (5.5%).<sup>6</sup> The Overview does not provide any rationale from AHCCCS tying the weighting of these categories, including the heavy weighting of subjective components like the written narratives over objective components such as price and performance, to the State's goals announced in the RFP.

AHCCCS' failure to disclose the weighting of the evaluation factors before the bids were submitted or opened is not a specific violation of the AHCCCS procurement code, yet it violates the fundamental policies of public procurement. *See Isratex, Inc. v. U.S.*, 25 Cl. Ct. 223 (1992) (“As a matter of sound procurement policy, the fullest possible disclosure of all of the evaluation factors and their relative importance is to be preferred to reliance on the reasonableness of the offerors' judgment as to the relative significance of the various evaluation factors.”) (quotation omitted).

Indeed, both the State of Arizona and the federal government generally require an RFP to disclose the weighting of evaluation factors and subfactors. For example, the State Procurement Code requires RFPs to “state the relative importance of price and other evaluation factors” and forbids modification of the “evaluation criteria or their relative order of importance after offer due date and time.” A.R.S. § 41-2534 (E) & (G); A.A.C. R2-7-C301(E)(1)(h); A.A.C. R2-7-C316(A). It is also a requirement under the Model Procurement Code. American Bar Association, Section of Public Contract Law, Section of State and Local Government Law, The 2000 Model Procurement Code for

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<sup>6</sup> The Overview (p. 3) puts both the oral presentations and the past performance questions under the heading of “Programmatic Submission Requirements.”

State and Local Governments (“The Request for Proposals shall state the relative importance of price and other factors and subfactors, if any.”).

The federal government also has indicated its strong preference for the disclosure of the weighting of evaluations factors and subfactors in RFPs. *See Bean Stuyvesant, L.L.C. v. United States*, 48 Fed. Cl. 303, 321 (2000) (noting that the Federal Acquisition Regulations require solicitations to “clearly state all significant factors and subfactors as well as their relative importance”). When it comes to Medicaid procurements, states must use the same process for Medicaid procurements as their non-federal procurements and attest to compliance with this requirement in their Medicaid state plans. 45 C.F.R. § 75.326. But use of the same process is not itself sufficient – the state “must provide for free and open competition, to the maximum extent practical, in the bidding of all procurement contracts for coverage or other services in accordance with the procurement requirements of 45 CFR part 75, as applicable.” 42 CFR § 457.940. For non-state entities procuring under Medicaid, such as local governments, this means that disclosure of the importance of the evaluation factors is mandatory: “Requests for proposals must be publicized and identify all evaluation factors and their relative importance.” 45 CFR §§ 75.326, 75.329(d)(1). Even though states are not required to meet this standard, the Government Accountability Office (“GAO”) has criticized Puerto Rico for its failure to “include information about the relative importance of proposal evaluation factors” in its Medicaid procurements. *See* GAO-21-229, CMS Needs to Implement Risk-Based Oversight of Puerto Rico’s Procurement Process, February 201, at p. 10, *available at* <https://www.gao.gov/assets/720/712348.pdf>. The GAO noted that two procurements “did not include information about the relative importance of proposal evaluation factors. Not including this information may compromise fair competition and agencies’ ability to obtain proposals that are as responsive as possible . . .” *Id.*

By failing to follow widely accepted procurement standards regarding the disclosure of the weighting or relative importance of evaluation factors, it is doubtful whether this RFP provided for maximum free and open competition. Moreover, the failure to disclose the weighting of evaluation factors and subfactors exacerbated the other errors identified in this protest.

#### **E. The Rankings Suffered from Multiple Scoring Errors.**

Looking at the Narrative Ranking and Rationales from the Evaluation Team,<sup>7</sup> it is apparent that numerous scoring errors were committed when the evaluators reviewed and ranked the narrative responses (B4-B9), past performance (B10 and B11), and the non-benefit cost bid (C1-C4).

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<sup>7</sup> The Evaluation Team consisted of 22 different individuals, but typically only three or four members of the team evaluated a particular question. AHCCCS did not provide any explanation as to why certain individuals were assigned to specific questions or what expertise those individuals may have in the specific area addressed in that question.

**1. The Evaluation Committee's Notes Do Not Explain the Substantive Differences Between the Bidders' Answers.**

Although AHCCCS produced Ranking and Rationale spreadsheets as part of the procurement file that purport to explain the rankings assigned for each of the narrative questions, upon examination the rationales presented therein do not actually provide an explanation as to how each proposal met or did not meet the evaluation criteria announced in the RFP. Rather than describe whether a proposed initiative met the State's goals, the rationales merely observe the level of detail in the proposals. Over and over again, the rationales note whether an offeror "described" or "clearly described" or "did not clearly describe" a particular item, but the rationales do not evaluate the substance of what is being described or how that substance would further the RFP's stated goals, such as accessibility of network, collaboration with stakeholders, or consistency of services.

For example, the Ranking and Rationale spreadsheet for B4 states whether an offeror "identified" or "provided a detailed description" of its approaches to support health equity. But the spreadsheet fails to discuss how each bidder's proposed approach actually meets the State's health equity goals in a way that is better or worse than another proposal. In short, the spreadsheet does not actually reflect any technical evaluation of the proposal's merits; instead it determines the style of the writing.

And in B5, the evaluation committee noted whether each offeror "described its strategy for addressing member experience, quality-of-life and outcomes, but fails to discuss which strategies are substantively better in terms of meeting the evaluation criteria.

For B6, which concerned what data offerors would use to improve health outcomes and inform program initiatives, the Ranking and Rationale spreadsheet repeatedly notes that the offerors described the collection and use of various types of data. But nowhere does the spreadsheet evaluate whether the data described is actually useful in AHCCCS' experience.

For B7, the Ranking and Rationale spreadsheet again identified whether the offerors provided a three-year plan with action steps and measurable outcomes or described strategies for maximizing available resources, but did not evaluate which of the proposed action plans or strategies was most in line with the State's goals and values for AHCCCS.

This flaw runs throughout the ranking and rationale spreadsheets for the narrative submissions.

By failing to provide an explanation of how the proposals met the RFP evaluation criteria, the evaluation team's rankings are effectively unreviewable by a neutral decision-maker. "[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, 1998 WL 1012362 (Comp. Gen 1998) (citations omitted). "Specifically, the agency must articulate the reasons for its procurement decision including a rational connection between the facts found and the

choice made.” *Lab’y Corp. of Am. Holdings v. United States*, No. 14-261C, 2014 WL 2858533 (Fed. Cl. June 13, 2014). Numeric scores are acceptable only if there is sufficient narrative reasoning to allow a neutral decision-maker to fairly assess whether the scoring was arbitrary and capricious or otherwise tainted. *See, e.g., Opti-Lite Optical*, B-281693, 1999 WL 152145 (Comp. Gen. Mar. 22, 1999) (“[A]n agency is required to have adequate documentation to support its evaluation of proposals and its selection decision. While adjectival ratings and point scores are useful as guides to decision-making, they generally are not controlling, but rather, must be supported by documentation of the relative differences between proposals, their strengths, weaknesses and risks, and the basis and reasons for the selection decision.”).

The failure to explain the actual substantive differences between the proposals is perhaps best shown by comparing Health Choice’s scores on B9 and OP1 with its scores on B4 and B5. Health Choice received high scores on B9 and OP1 for its innovative approaches, such as Blue Care Anywhere multi-provider telehealth supports; Blue Caregiver Café, a 24/7/365 peer-based support platform specifically for caregivers; NAU/ASU CHER’s health equity research tools; Blue Care Teams to support self-directed care and caregivers; and Health Choice’s innovative use of an ACA health plan to support and expand caregiver capacity. Yet, when those approaches were noted in B4 and B5, as they pertained to those questions, Health Choice was not given sufficient credit and was ranked fourth on B4 and fifth on B5. That Health Choice knocked it out of the park when allowed to present these programs in person but was marked down for its narrative description of these very same programs illustrates the arbitrary nature of the rankings.<sup>8</sup>

Furthermore, in more than one instance, the final consensus rankings cannot be reconciled with the tentative individual evaluator rankings produced in response to the bidders’ public records request.

For example, the following chart summarizes the tentative rankings and the consensus score for B5:

Offeror	Tentative Rankings	Consensus Ranking
United	3, 4, 5	2
Banner	3, 4, 4	1
Health Choice	2, 3, 5	5
Health Net	1, 2, 2	3
Mercy Care	1, 1, 5	4

This chart shows that all three evaluators believed that Health Net’s proposal should be ranked above either United or Banner. Yet, somehow, the consensus ranking put both United and Banner ahead of Health Net. If all three agreed that Health Net outscored United and Banner before meeting together, then it only stands to reason that when they met together, they would agree to

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<sup>8</sup> The only difference in the evaluation panel between B5 and OP1 was that Jakenna Lebsock, the Health Care Services Assistant Director, participated in OP1 but not B5.

score Health Net ahead. For Health Choice, the individual rankings would place Health Choice in either second or third place, yet it was ranked fifth in the consensus ranking. As noted above, the ranking and rationale document does not provide any substantive analysis as to why the evaluation committee collectively agreed that Health Choice should come in last place contrary to their individual rankings.

The rankings for B4 are also similarly confusing:

Offeror	Tentative Rankings	Consensus Ranking
United	4, 5, 5	3
Banner	5, 4, 4	5
Health Choice	2, 2, 3	4
Health Net	3, 3, 2	2
Mercy Care	1, 1, 1	1

Here, each of the three evaluators believed that Health Choice's proposal was better than United's. Yet, somehow, in the consensus score, Health Choice came in fourth place behind United, and Health Net received a second-place score even though the majority of the evaluators believed that Health Choice should have scored higher. Again, the ranking and rational document does not establish any support for all 3 evaluators changing their minds in this manner.

In addition, the tentative rankings for B7 show an extremely wide variation between the three scorers:

Offeror	Tentative Rankings	Consensus Ranking
United	1, 2, 4	2
Banner	2, 3, 5	5
Health Choice	3, 4, 5	4
Health Net	1, 4, 5	1
Mercy Care	1, 3, 3	3

Thus, the majority of evaluators believed Health Net was at the very bottom, while another believed that same answer should have been in first place. United, Banner, and Health Choice also had scored at or near the top and at the bottom.

These inconsistencies again highlight the lack of any rational substantive explanation for the scores, the ambiguity of the evaluation criteria, and the arbitrariness of the forced inverse rank scoring. If the evaluation team members individually believed that Health Choice performed better on B4 than United, but then switched those scores on the consensus ranking, clearly there was not much substantive difference between the two proposals. And yet Health Choice received only 40% of the total possible points for B4, while United received 60% of the points, and Health Net received 80% of the points.



Because the ranking and rationale spreadsheets do not provide adequate support relating to the RFP evaluation criteria and the achievement of the State's goals, the contract awards cannot be sustained.

**2. The Evaluation Committee Evaluated Criteria that Was Not Part of the Question Asked.**

“It is a fundamental tenet of procurement law that proposals must be evaluated in accordance with the terms of the solicitation.” *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 374, *opinion clarified*, 87 Fed. Cl. 654 (2009); *see also Banknote Corp. of Am. v. United States*, 56 Fed. Cl. 377, 386 (2003), *aff'd*, 365 F.3d 1345 (Fed. Cir. 2004) (“It is hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation.”). However, it appears that in several instances, the evaluation committee marked down Health Choice on the narrative submissions for failing to provide information that was not part of the question asked. These errors affected Health Choice's ranking and overall score.

For example, in Narrative Question B5, Health Choice was marked down for not providing a timeline for implementation of new systems and processes. This, however, was not part of the question. The question asked the offerors to describe how the offeror would ensure that person-centered service planning would include active engagement with ALTCS members covering all aspects of quality of life consistent with the individual's needs and wishes. The question cannot be fairly read to require offerors to discuss timelines of implementation. In marking down Health Choice for something that was not appropriately within the scope of the question, the evaluation committee erred.

Also, it appears that Health Net was given credit in Narrative Question B6 for health equity accreditation, even though that was not part of the question, which focused on the data used to improve member health outcomes and inform program initiatives.

In addition, evaluators also wrongly gave “extra credit” to offerors for concepts included in the narratives that were not actually responsive to the question presented. Indeed, the scoring tools for each of the narrative questions included a section entitled “Other Notable Considerations.” This is just another way in which the evaluation committee failed to evaluate the proposal according to the criteria announced in the RFP.

**3. The Evaluation Committee Failed to Give Credit for Information that Was Present in Health Choice's Proposal.**

In several instances, the evaluation committee consistently failed to give Health Choice credit for information that was part of Health Choice's Proposal. In these cases, the committee positively noted that other offerors had provided this exact same information. Thus, the evaluation committee erred by unfairly failing to recognize similar information in Health Choice's Proposal.

The Ranking Rationale for Narrative Question B4 is a good example of the evaluation committee's failure to give Health Choice appropriate credit for information contained within Health Choice's proposal. Question B4 asked the offerors to describe how they will develop and implement best practices for ALTCS Case Managers. The Ranking Rationale states that Health Choice did not "clearly describe its approach for continual skill building for case managers." But Health Choice's proposal devoted two full paragraphs to the training provided to Health Choice Case Managers, including the use of the Blue ALTCS Academy for continuing case manager education and skill building. *See* Health Choice Proposal at 51-52. But even though Health Choice's proposal was more detailed than Mercy Care's proposal, it was ranked lower. Health Choice was the only offeror to address "acute only" transitions, and Health Choice referenced many of the same vendors as Mercy Care, yet Mercy Care received a higher score than Health Choice. There is not a sufficient explanation why Health Choice was scored fourth on B4 but Mercy Care was ranked first.

Similarly, on Narrative Question B5, the Ranking Rationale states that Health Choice did not describe how to encourage participation in person-centered service plans (PCSP). But Health Choice's proposal spent several paragraphs addressing engagement with ALTCS members in the PCSP process. *See* Health Choice Proposal at 57.

Also, the Ranking Rationale for Narrative Question B6 states that Health Choice did not describe the use of data in evaluating evidence-based initiatives. But an entire call out box on page 62 of Health Choice's proposal is dedicated to the use of data in evaluating FUH7 performance. And unlike other bidders, it does not appear that Health Choice received credit for initiatives and programs like Wellth or Health Choice's previous experience working with constituent groups to facilitate data input. *See* Health Choice Proposal at 62-63. Nor was Health Choice given credit for its Fraud, Waste, and Abuse analytics. *See id.* at 64.

In the Ranking Rationale for Narrative Question B7, Health Choice was marked as not clearly describing "data sources or analysis tools" for monitoring access to care and network adequacy. Yet Health Choice's proposal provided a detailed plan and strategy for using data analysis tools to "identify gaps and locate providers in the right service areas for contracting." *See* Health Choice Proposal at 69, 72. Indeed, although the scoring of Health Choice's response appears to have varied widely between individual reviewers, one of the scorer's conclusions is particularly noteworthy. The reviewer noted (apparently as a negative scoring factor) that, "This submission is very unlike the others in that it really is a network plan addressing the need for HCBS services that includes the submission requirements for capacity building and getting [nursing facilities] into HCBS services" – which, in fact, *was* the essence of the question being asked. It appears that Health Choice was given a lower ranking specifically *because*, it alone was responsive to the specific question being asked.

On Narrative Question B8, the Ranking Rationales states that Health Choice did not indicate how demographics are used to inform recruitment efforts. Health Choice's proposal, however, referenced Health Choice's use of a wide variety of data-driven tools, including Bureau of Labor data which includes demographics, and Health Choice's commitment to using tools designed to engage candidates who can provide culturally competent case. *See* Health Choice Proposal at 74, 76-77. Health

Choice's ranking also appears – unlike all other bidders -- to have been negatively affected by a scorer's arbitrary and baseless "belief" regarding Health Choice's ability to accomplish the identified commitments: "Like caregiver focused approach [sic], some programs, but not sure I believe their goals, targets and data sources based upon the details they give."

The above serve as only a few examples of the many inconsistencies within the narrative scoring process. If Health Choice had been given appropriate credit for including this information in its proposal, its score on each of these narrative submissions would have been higher.

#### 4. Errors in the Past Performance Scores.

##### i. AHCCCS Relied upon Undisclosed Evaluation Criteria to Score B11 (STAR rating).

As amended, B11 required the offerors to submit their 2023 AZ Medicaid Plan D-SNP STAR Rating.

BCBSAZ-Health Choice and United were the only two DSNPs in 2022 that received 4 STARS. Yet, United was ranked 1st and Health Choice was inexplicably ranked 4th on this question, behind Banner-University Care Advantage and Mercy Care, who tied for second even though they had 3.0 STAR ratings. Based upon the undisputed Star ratings, Health Choice should have tied for first place, and thus received 20 points instead of 8.

The Ranking and Rationale Sheet does not provide any explanation why Health Choice would be ranked behind other offerors with a lower 2023 STAR rating. It appears that AHCCCS may have penalized Health Choice for submitting a rating from an Arizona HIDE SNP plan rather than from an Arizona FIDE SNP plan. But such a penalty was never disclosed within the RFP and would not be reasonable given that the acuity of the populations served by the two plan types is virtually identical. The RFP did not inform the offerors that they would be scored negatively for an Arizona HIDE SNP plan as compared to an Arizona FIDE SNP plan.<sup>9</sup>

Accordingly, AHCCCS erred in scoring Health Choice lower on a criteria that was never disclosed. A decision based upon undisclosed evaluation criteria is by definition arbitrary and capricious. *See, e.g., Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273, *modified*, 63 Fed. Cl. 141 (2004) (noting that "agency's failure to follow its own selection process embodied in the Solicitation" lacks a

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<sup>9</sup> By contrast, the RFP did express a preference with respect to contracts not in Arizona: "If the Offeror does not have a D-SNP STAR Rating in Arizona, the Offeror shall cite its 2023 STAR rating with the corresponding Medicare Contract Number, from one of the states for the Medicaid contracts cited in Submission Requirement B2, using the preference order detailed below. Preference order for STAR Rating from another State: a. FIDE SNP/DSNP Plan, b. Another type of SNP, or c. Medicare Advantage Plan." RFP, Exhibit H, B11, as amended (emphasis added).

rational basis and is “also a prejudicial violation of a procurement procedure established for the benefit of offerors”).

Moreover, in doing so, AHCCCS improperly advantaged the incumbent offerors, who are the only ones who could submit a 2023 Star rating for an Arizona FIDE SNP plan. “It is well-established that a ‘Contracting agency must treat all offerors equally, evaluating proposals evenhandedly against common requirements and evaluation criteria.’” *J.C.N. Const., Inc. v. United States*, 107 Fed. Cl. 503, 513 (2012) (quoting *Banknote Corp. of Am., Inc. v. United States*, 56 Fed. Cl. 377, 383 (2003), *aff’d*, 365 F.3d 1345 (Fed. Cir. 2004)). Uneven treatment “goes against the standard of equality and fair-play” and “amounts to an abuse of the agency’s discretion.” *Id.*; *see also Brown v. City of Phoenix*, 77 Ariz. 368, 375-76 (1954) (identifying “favoritism” as the “evil” that must be avoided in exercising the power to reject any bids).

The process of evaluating competing proposals should not be influenced by incumbent bias. Unfairly emphasizing and focusing on incumbency results in “something less than maximum competition” and defeats the entire purpose of soliciting proposals in the first place. *In the Grp. Hosp. Serv., Inc.*, 58 Comp. Gen. 263, 270-71 (Feb. 6, 1979). Here, Health Choice received a 4 Star rating in 2023 for its Arizona HIDE SNP. Yet, Health Choice was treated as less than the incumbents purely because it did not have an Arizona FIDE SNP 2023 rating. There are few functional differences between the populations or services of FIDE and HIDE, so there is no reason to devalue scores based on the distinction (which was not disclosed in the RFP). Indeed, if anything, it is inherently more difficult to achieve a higher CMS Star Rating score with the unaligned dual eligible beneficiaries in a HIDE than under a FIDE in many CMS Star Rating measures.

Health Choice should have received the full 20 points for B11.

## **ii. AHCCCS Erred in Scoring B10 (Compliance Review).**

Section I, Exhibit H of the RFP stated that for B10, AHCCCS would evaluate “compliance reviews and incorporate the Offeror’s past performance as specified below:

a. Incumbent E/PD Contractors - A submission is not required. AHCCCS will utilize the AHCCCS Calendar Year (CY) 23 ALTCS E/PD Operational Review (OR),

b. Incumbent non-E/PD Contractors - A submission is not required. AHCCCS will utilize the most recent finalized AHCCCS Operational Review (OR), and

c. Non-Incumbent Offerors - The Offeror shall submit its most recent review(s) that together comprise a complete evaluation. The review(s) shall be selected from one of the Medicaid Contracts cited in B2 in compliance with 42 CFR 438.358 (b)(iii) for a business line which includes provision of services that are comparable to the Scope of Services for this RFP. The Offeror shall include a description of how the services delivered in the business line for the submitted compliance review are comparable to the Scope of Services for this RFP. The Offeror’s submission shall not

exceed one page plus attached compliance review(s). AHCCCS reserves the right to validate the submitted review.”

The RFP did not, however, disclose to the bidders how the compliance review would be evaluated. The most logical and straightforward scoring process would have been to give a straight percentage score based on overall compliance with the individual operating review (“OR”) standards as AHCCCS has historically used in both reporting and past procurements. Instead, based upon the evaluation materials, AHCCCS appears to have used a bi-furcated formula that compared the number of standards that were fully met (100%) for each plan and then adjusts that score based on the number of standards that were not met. In addition, it appears that AHCCCS may have placed greater importance on certain categories and standards over others. Again, this is yet another example where the Ranking and Rationale spreadsheet does not actually provide sufficient detail to know how AHCCCS arrived at its conclusion. The effect of this formula was to remove all standards that were partially met from consideration. In short, it essentially created a “pass/fail” test for each standard, entirely ignoring partial compliance even if it was just a small percentage away from 100% compliance. Again, as with the narrative rankings, this formula artificially and arbitrarily creates large differences that do not accurately reflect an offeror’s performance.

In addition, Health Net appears to have been scored based on their last ALTCS OR result in 2021 rather than their more recent ACC or RBHA OR, as was the case with all other current non-ALTCS contractors. AHCCCS acted arbitrarily and capriciously by treating Health Net differently than the other offerors and contrary to the RFP, which required the use of “the most recent finalized AHCCCS Operational Review.” *See TLT Constr. Corp. v. United States*, 50 Fed. Cl. 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.”). Accordingly, the scores for B10 cannot stand.

## **5. Errors in the Non-Benefit Cost Bid Scores.**

As noted in the Cost Bid Ranking and Rationale spreadsheet, Health Choice’s proposed total administrative rates ranked third. However, it is unclear how AHCCCS reached this ranking based on the documents that were produced. It appears that Health Choice’s ranking may have been reduced based on a comment that Health Choice “submitted total administrative rates . . . that appear to consistently decrease as membership increases, which does not appear reasonable absent further explanation.” But it is common-sense that rates would decrease as membership increases and fixed costs can be spread out across a larger population. Indeed, with the exception of Banner, all of the other bidders also proposed rates that decreased as membership increased. Thus, it appears that Health Choice was inappropriately and arbitrarily singled out and penalized when other bidders who submitted similarly structured rates were not. Without clear transparency on the weighting for each section, HCA is unable to determine if the ranking is appropriate or not, but it appears Health Choice should have received second place on its non-benefit cost bid, thereby receiving a score of 80 points instead of 60 points (and correspondingly decreasing Mercy Care’s score by 20 points).

Taking into consideration all of the errors identified above, the scoring of the RFP should not be allowed to stand.

## **5. The Form of Relief Requested.**

We recognize that AHCCCS Administration is tasked with the duty to determine which contract awards are in the “best interest of the state.” However, this phrase cannot be allowed to act as a talisman to automatically justify an arbitrary decision-making process. The “best interest of the state” *should* mean that the process results in the selection of contractors who demonstrate substantive performance benefits to Arizona Medicaid members and the citizens of the state of Arizona.

Here, however, there was a series of compounding errors that resulted in contract awards that cannot be shown to be in the best interests of the State. At no point prior to opening bids does it appear that AHCCCS determined what would be considered a good solution to meeting the State’s needs. Although it was not announced to the bidders in the RFP, AHCCCS placed the majority of weight on the narrative submissions. The “criteria” for evaluating those written answers to broad questions, however, were extremely vague and open to differing interpretations by the evaluators as evidenced by the scoring anomalies noted above. Without sufficiently definite criteria tied to the State’s needs and goals, the evaluation team focused upon style rather than substance. The ranking and rationale spreadsheets leave the bidders and a neutral fact finder without the information necessary to determine how AHCCCS actually arrived at the announced rankings. Then those rankings were plugged into a scoring methodology, developed after the fact, that created arbitrarily large point differentials divorced from how well each proposal met the State’s articulated needs. Taken together, these issues raise serious concerns about the use of a methodology that appears designed to create an opaque evaluation in order to frustrate a protest rather than to clearly establish the support for a determination that certain proposals are the most advantageous to the State.

For the reasons explained above, the recommended award is arbitrary and capricious, clearly erroneous, and an abuse of discretion. *Achen Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 55, 839 P.2d 1093, 1100 (1992); *Brown v. City of Phoenix*, 77 Ariz. 368, 377, 272 P.2d 358, 364 (1954). AHCCCS should cancel the awards to United and Health Net and order that the procurement be re-solicited, or alternatively, that the solicitation be rescored, and award a contract to Health Choice based upon the new scoring of the solicitation. *See* A.A.C. R9-22-604(H) (listing possible remedies).


In addition, Health Choice requests a stay of the contract while its Protest is decided, in order to preserve its remedies. *See* A.A.C. R9-22-604(E).



Meggan LaPorte  
December 21, 2023  
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Very truly yours,

GALLAGHER & KENNEDY, P.A.

By:   
Kevin E. O'Malley

Enclosures  
CC: HHP



# **EXHIBIT 1**

1 Guidesoft Inc., DBA Knowledge Services

No. 22F-003-ADM

2  
3 v.

**ADMINISTRATIVE LAW JUDGE  
DECISION**

4 ARIZONA DEPARTMENT OF  
5 ADMINISTRATION

6 **HEARING:** April 3, 2023, April 10, 2023, and April 11, 2023, with the record held  
7 open until May 1, 2023.

8 **APPEARANCES:** Guidesoft Inc., doing business as Knowledge Services  
9 ("Guidesoft") was represented by Joshua Grabel. The Arizona Department of  
10 Administration was represented by Assistant Attorney General Kelly M. Wagner.

11 **ADMINISTRATIVE LAW JUDGE:** Tammy L. Eigenheer

12  
13 **FINDINGS OF FACT**

14 1. On November 11, 2021, the Arizona Department of Administration, State  
15 Procurement Office ("Department") first published Solicitation No. BPM003913  
16 ("Solicitation") for the procurement of MTS-MSP-Multi-Temporary Staffing Services –  
17 Managed Services Provider in the State of Arizona on the Arizona Procurement Portal  
18 ("APP"). Notice of the publication of the Solicitation was sent to two thousand eight  
19 hundred nine (2,809) prospective suppliers in APP on the same day.

20 2. On November 17, 2021, notice of the Solicitation was also published in the  
21 Arizona Republic.

22 3. At 10:00 a.m. on November 29, 2021, the Pre-Offer Conference was held  
23 virtually on Google Meet for all interested parties.

24 4. On December 2, 2021, Solicitation Amendment #1 was issued. The  
25 amendment posted the questions and answers from the Pre-Offer Conference.

26 5. The Solicitation included several parts, including instructions regarding  
27 minimum information required in the offer, specific responsibility or susceptibility criteria,  
28 the relative order of importance of the evaluation factors, and other offer requirements  
29 specific to the Solicitation. The evaluation factors were set forth, specifically identified with  
30

1 the Special Instructions to Offerors, at Paragraph 6.5 and listed in their relative order of  
2 importance, which were 1) Experience and Capacity of Offeror; 2) Method of Approach;  
3 and 3) Pricing.

- 4 a. With respect to Experience and Capacity of Offeror, the Solicitation  
5 contained Attachment 9: Experience and Capacity Questionnaire, which  
6 asked five overall questions, with several questions having subparts. As  
7 part of the questions asked in Attachment 9, prospective offerors were also  
8 to complete Attachment 7: Organization Profile and Attachment 4  
9 Supplement: Key Personnel.
- 10 b. With respect to Method of Approach, the Solicitation contacted Attachment  
11 11: Method of Approach, which included several overall questions. As part  
12 of the questions asked in Attachment 11, prospective offerors were also to  
13 complete Attachment 8: Proposed Subcontractors.
- 14 c. With respect to Pricing, the Solicitation included Attachment 12: Pricing  
15 Document.

16 6. On December 13, 2021, the Evaluation Tool was finalized. The Evaluation  
17 Criteria and Factors were Experience and Capacity of Offeror; Method of Approach; and  
18 Pricing. The Evaluation Tool, referred to as “the Shell” or “Evaluation Matrix” in the  
19 hearing, included the overall factors and the separate criteria, with a total point value for  
20 each criteria that fell under those overall factors.

- 21 a. Experience and Capacity of Offeror was scored with a total of 500 points  
22 with 100 points for Company Profile, 100 points for Clients Market, 100  
23 points for Serving Clients in Arizona, 50 points for Current Client Size, 50  
24 points for Two Examples of Offerors’ Experience, and 100 points for  
25 Proposed Project Members.
- 26 b. Method of Approach was scored with a total of 300 points with 75 points for  
27 Staff Augmentation Services, 75 points for Project Based Consulting  
28 Services, 50 points for VMS Software, 50 points for Vendor Network, and  
29 50 points for Contractor Resource Management.
- 30 c. Pricing was scored with a total of 200 points.

1 7. On December 15, 2021, an Evaluation Committee was appointed with  
2 individuals from the agencies that most utilized the services that were the subject of the  
3 Solicitation. The ACPO asserted that these individuals were subject matter experts for  
4 purposes of the Solicitation because they represented those that most used the services.

5 8. On January 18, 2022, the Solicitation was closed at 3:00 p.m., with a total  
6 of eleven (11) submitted proposals.

7 9. On January 24, 2022, the Evaluation Committee received the pre-separated  
8 proposals for independent review.

9 10. After the initial review of proposals, Confidentiality Determination Letters  
10 were sent out to six (6) Offerors on January 21, 2022; and Request for Clarification letters  
11 were sent out to five (5) Offerors from February 7 to February 15, 2022.

12 11. On February 17, 2022, the initial consensus evaluation was conducted by  
13 the Evaluation Committee. During the initial consensus evaluation, the Scoring Criteria  
14 was developed. The development of the Scoring Criteria was the process of assigning  
15 numerical values to the proposal responses received, in an effort to compare Offerors'  
16 strengths and weaknesses. Based on the initial scoring, it was determined that seven (7)  
17 Offerors were not susceptible for award in comparison to other offers based on the  
18 Evaluation Criteria set forth in the Solicitation.

19 12. On March 25, 2022, Offerors determined to be reasonably susceptible for  
20 award provided Methodology Presentations to the Evaluation Committee. The Offeror's  
21 presentations were scored after the presentations were complete, on the same day.

22 13. On April 4, 2022, negotiations were conducted with responsible Offerors  
23 determined to be reasonably susceptible for award.

24 14. On April 21, 2022, a request for Best and Final Offer was given to all  
25 Offerors Susceptible for Award.

26 15. On April 27, 2022, the Best and Final Offer period closed at 3:00 p.m.

27 16. On May 6, 2022, an evaluation report and the recommendation of award  
28 was made by the Evaluation Committee to the ACPO.

29 17. On May 6, 2022, award, non-award, and determination letters were sent out  
30 to the Offerors, and the procurement file was made available for public inspection.

1           18. On May 10, 2022, a debriefing on the solicitation was provided to Guidesoft  
2 by the ACPO.

3           19. On May 16, 2022, Guidesoft filed its Protest of the award alleging, in part,  
4 that the manner in which the Department scored the criteria of Experience and Capacity  
5 of Offeror and Method of Approach resulted in the Department “relying exclusively upon  
6 price.”

7           20. On June 29, 2022, the ACPO issued an Agency Chief Procurement Officer’s  
8 Decision in which the ACPO denied the Protest and concluded that “the actions taken by  
9 the ACPO were reasonable, supported by evidence, and well-within the discretion  
10 afforded to procurement officers under the Arizona Procurement Code.” On page 14 of  
11 the decision, the ACPO stated that “[a]fter the initial review of the proposals, the MTS-  
12 MSP Proposal Scoring Criteria . . . was developed.” This was the notice Guidesoft  
13 received that the Scoring Criteria was not set until after the offers were opened and  
14 reviewed.

15           21. On July 29, 2022, Guidesoft filed an appeal of the denial of its Protest to the  
16 Department director. In the request, Guidesoft argued that the decision and award of the  
17 ACPO was clearly erroneous, arbitrary, and capricious and an abuse of discretion. The  
18 bases for the appeal were set forth as follows:

- 19           a. Failing to establish Scoring Criteria *before* reviewing Proposals;
- 20           b. Erroneously scoring Guidesoft’s Experience;
- 21           c. Failing to review the information submitted by ACRO;
- 22           d. Failing to properly evaluate the Key Personnel criteria; and
- 23           e. Failing to properly evaluate ACRO’s response regarding clients.

24           22. On August 19, 2022, the ACPO issued an Agency Report in which she  
25 stated that the appeal was “built on misrepresentations and misstatements, as well as  
26 new claims, and represented nothing more than a disagreement on how the ACPO scored  
27 the Offerors’ proposals.” The ACPO concluded that, while Guidesoft may not agree with  
28 the scoring of Offerors’ experience and methods of approach, it “failed to set forth any  
29 actual legal or factual errors in the procurement process.”  
30



1           23.    On August 29, 2022, Guidesoft filed a request for hearing arguing that the  
2 ACPO set arbitrary Scoring Criteria and ACRO was not susceptible for Award.

3           24.    On October 7, 2022, the Department director referred the matter to the  
4 Office of Administrative Hearings for a hearing.

5           25.    At hearing, Guidesoft argued there were only six bases for their appeal as  
6 follows:

- 7           a. The Evaluation Criteria were determined after the ACPO reviewed the  
8 proposals;
- 9           b. The ACPO failed to evaluate experience based upon the Scope of Work in  
10 the Solicitation;
- 11           c. The ACPO failed to ask the right questions to get the answers the State  
12 wanted;
- 13           d. The ACPO violated the Code by setting a floor regarding scoring making  
14 the scoring system wrong;
- 15           e. The ACPO failed to verify ACRO's data because it contained untruthful  
16 statements; and
- 17           f. The scoring of the Solicitation turned the matter into an invitation for bids.

18           26.    ACPO Whittington testified that she did not prepare any evaluation  
19 instructions prior to the bid openings. ACPO Whittington testified at hearing that Exhibit  
20 37, or "the Shell", constituted the Evaluation Tool. ACPO Whittington further stated that  
21 Exhibit 10, entitled MTS-MSP Proposal Scoring Criteria, was not the Evaluation Tool, but  
22 was only her summary of the discussion that occurred during the initial consensus  
23 evaluation.

24           27.    The Department argued that the Evaluation Criteria was different than the  
25 Scoring Criteria. The Department asserted that the Evaluation Criteria, "the Shell", was  
26 finalized prior to opening and did not change after opening. The Scoring Criteria, on the  
27 other hand, was the "Exceeds Expectations," "Meets Expectations," "Falls Below  
28 Expectations," and "Not Responsive" that was determined during the initial consensus  
29 evaluation among the Evaluation Committee members. The Scoring Criteria was not set  
30

1 prior to the opening or prior to the individual Evaluation Committee member's review of  
2 the offers.

3 28. The Department asserted in its closing arguments that setting Scoring  
4 Criteria prior to the opening of offers, would violate the Arizona Procurement Code and  
5 create "absurd situations" that would be potentially costly to the Department. The  
6 Department posited that, if Scoring Criteria were drafted ahead of the offer due date and  
7 time, "the scoring could likely be set at such levels that it may require the Solicitation to  
8 be canceled and rebid as one or no prospective vendors could meet predetermined  
9 scoring criteria that cannot be varied once determined." Rather, the Department argued  
10 that "to promote competition, the scoring criteria concerning the evaluation criteria are  
11 determined by the evaluation committee after offers are received so that scoring relates  
12 to the received offers."

13 29. ACPO Whittington stated that, in all her years managing procurement  
14 processes in Arizona, the Scoring Criteria was always set during the initial consensus  
15 evaluation after the offers were opened and reviewed by the Evaluation Committee.

16 30. ACPO Whittington also testified that the document entitled MTS-MSP  
17 Proposal Scoring Criteria was just her notes of the initial consensus evaluation meeting  
18 discussion and that she used the notes to ensure that the Evaluation Committee was  
19 consistent throughout the evaluation of the offers.

20 31. ACPO Whittington asserted that the Evaluation Criteria could not be altered  
21 at any time after the offers were opened as it would indicate "bias" based on what was  
22 contained in the offers, but was unable to explain why the Scoring Criteria could be set  
23 after the offers were opened and reviewed by the Evaluation Committee without invoking  
24 the possibility of bias.

25 32. Guidesoft argued that allowing the Evaluation Committee to set the Scoring  
26 Criteria after all the offers were opened and reviewed opened the process to bias,  
27 favoritism, and corruption.

### 28 **CONCLUSIONS OF LAW**

29 1. The Arizona Procurement Code is set forth in A.R.S. § 41-2501 *et seq.*

1           2.     A.R.S. § 41-2615 provides that the Arizona Procurement Code and the rules  
2 adopted under the Code “provide the exclusive procedure for asserting a claim against  
3 this state or any agency of this state arising in relation to any procurement conducted  
4 under this chapter.”

5           3.     Guidesoft bears the burden of proof to establish by a preponderance of the  
6 evidence that the Solicitation did not comply with the procurement statutes and regulations.  
7 See A.R.S. § 41-1092.07(G)(1); A.A.C. R2-19-119; see also *Vazzano v. Superior Court*, 74  
8 Ariz. 369, 372, 249 P.2d 837 (1952). “A preponderance of the evidence is such proof as  
9 convinces the trier of fact that the contention is more probably true than not.” MORRIS K.  
10 UDALL, ARIZONA LAW OF EVIDENCE § 5 (1960).

11           4.     The Arizona Procurement Code’s stated purposes were, in part, to  
12 Provide for increased public confidence in the procedures followed in public  
13 procurement.  
14 Ensure the fair and equitable treatment of all persons who deal with the  
15 procurement system of this state. . . .  
16 Foster effective broad-based competition within the free enterprise system.  
17 Provide safeguards for the maintenance of a procurement system of quality  
18 and integrity.

19           5.     A.R.S. § 41-2501(B) provides that the Arizona Procurement Code “applies  
20 to every expenditure of public monies, including federal assistance monies . . . by this  
21 state, acting through a state governmental unit, under any contract . . . .”

22           6.     The Arizona Procurement Code sets forth the procedures for the  
23 procurement of goods and services for the State of Arizona. As part of the process, the  
24 Director may delegate procurement authority to those within the agency, to which ACPO  
25 Whittington testified she had received relative to this matter. See A.R.S. § 41-2512.

26           7.     Pursuant to A.A.C. R2-7-206, a “procurement officer shall perform all  
27 procurement duties in accordance with the Arizona Procurement Code and within the  
28 authority delegated to the procurement officer in accordance with this Chapter.”

29           8.     A.A.C. R2-7-A901(C) provides that if a protest “is based upon alleged  
30 improprieties in a solicitation that are apparent before the offer due date and time, the  
interested party shall file the protest before the offer due date and time.” A.A.C. R2-7-

1 A901(D) provides that if the alleged improprieties in a solicitation are not apparent before  
2 the offer due date and time, “the interested party shall file the protest within 10 days after  
3 the agency chief procurement officer makes the procurement file available for public  
4 inspection.”

5 9. Statutes shall be liberally construed to affect their objects and to promote  
6 justice. See A.R.S. § 1-211(B). In interpreting a statute, “[w]e first consider the language  
7 of the statute and, if it is unclear, turn to other factors, including “the statute’s context,  
8 subject matter, historical background, effects, consequences, spirit, and purpose.”  
9 *McMurren v. JMC Builders, Inc.*, 204 Ariz. 345, 350 ¶ 12, 63 P.3d 1082, 1087 (App. 2003)  
10 (citation omitted).

11 10. Statutes should be interpreted to provide a fair and sensible result. See  
12 *Gutierrez v. Industrial Commission of Arizona*, 226 Ariz. 395, 249 P.3d 1095  
13 (2011)(citation omitted); *State v. McFall*, 103 Ariz. 234, 238, 439 P.2d 805, 809 (1968)  
14 (“Courts will not place an absurd and unreasonable construction on statutes.”).

15 11. “In applying a statute its words are to be given their ordinary meaning unless  
16 the legislature has offered its own definition of the words or it appears from the context  
17 that a special meaning was intended.” *Mid Kansas Federal Savings and Loan Ass’n of*  
18 *Wichita v. Dynamic Development Corp.*, 167 Ariz. 122, 128, 804 P.2d 1310, 1316 (1991).

19 12. The Tribunal is required to apply equitable principles when rendering  
20 decisions. *Seitz v. Industrial Commission of Arizona*, 184 Ariz. 599, 603 (Ariz. Ct. App.,  
21 Div. 1, 1995). The application of equity entails offering a remedy to avoid an  
22 unconscionable or unjust result. *Sanders v. Folsom*, 104 Ariz. 283, 289, 451 P.2d 612  
23 (Ariz. 1969) (quoting *Merrick v. Stephens*, 337 S.W.2d 713, 719 (Mo. App. 1960)).

24 13. The evidence established Guidesoft did not file its Protest prior to the offer  
25 due date and time, but did file its Protest within ten days after the procurement file was  
26 made available for public inspection.

27 14. To the extent the Department argued that Guidesoft waived its argument  
28 regarding the allegedly erroneous methodology of scoring the offers because the issue  
29 was not raised in the Initial Protest, Guidesoft did not waive the argument because it had  
30

1 no way of knowing the Scoring Criteria was not set prior to the opening of the offers until  
2 receipt of the ACPO's Decision that explained the process.

3 15. A.A.C. R2-7-C316 provides, in pertinent part, as follows:

4 A. An agency chief procurement officer shall evaluate offers and best  
5 and final offers based on the evaluation criteria contained in the request for  
6 proposals. The agency chief procurement officer shall not modify evaluation  
7 criteria or their relative order of importance after offer due date and time.

8 B. An agency chief procurement officer may appoint an evaluation  
9 committee to assist in the evaluation of offers. If offers are evaluated by an  
10 evaluation committee, the evaluation committee shall prepare an evaluation  
11 report for the agency chief procurement officer. The evaluation report shall  
12 supersede all previous draft evaluations or evaluation reports. The agency  
13 chief procurement officer may:

- 14 1. Accept or reject the findings of the evaluation committee,
- 15 2. Request additional information from the evaluation committee, or
- 16 3. Replace the evaluation committee.

17 16. Standard Procedure 043 ("SP 043") is a "Standard Procedure for  
18 conducting Evaluations and Discussions in accordance with A.R.S. § 41-2534,  
19 Competitive Sealed Proposals, as set forth in the Arizona Procurement Code." SP 043  
20 provides additional direction regarding the procurement process.

21 17. Pursuant to SP 043, the ACPO must determine the contract and contractor  
22 objectives and then create criteria related to those objectives. Specifically, SP 043  
23 provides as follows:

24 1.4 Create Criteria. With the Customer, prioritize these objectives by  
25 their relative importance, with the most important objectives listed first and  
26 the least important objective listed last. Use these prioritized objectives in  
27 establishing the Solicitation's Evaluation Criteria.

28 18. SP 043 further details the development of a solicitation, in part, as follows:

29 2.1 Incorporate Criteria in Solicitation. Develop the Solicitation with  
30 Evaluation Criteria in mind. Identify how Offers will be evaluated for each  
Criterion. Include sufficient Solicitation Instructions, Forms, and  
Questionnaires to address each of the Evaluation Criteria.

2.2. Plan Evaluation. Develop the Evaluation Tool, as well as its  
accompanying Evaluation Instructions.

1           19. With respect to preparation for opening, SP 043 provides, in pertinent part,  
2 as follows:

3           3.2 Finalize Evaluation Preparation. Finalize Evaluation Committee  
4 members, Evaluation Tool, and Evaluation Instructions. Hold a Kick-Off  
5 meeting with the Evaluation Committee to review the plan, discuss the  
6 Solicitation and agree on schedules.

7           20. Regarding the evaluation process, SP 043 provides, in pertinent part, as  
8 follows:

9           4.3 Evaluation Committee Meeting. Hold Evaluation Committee  
10 Meeting(s) as necessary. Complete an Evaluation Tool for each Offer.  
11 Document the Evaluation Committee's responses and rating for each rating  
12 item, based upon consensus. If no negotiations are to be performed, then  
13 the Evaluation Committee shall provide the consensus score with a written  
14 recommendation for award to the Procurement Officer.

15           21. The Department did not point the Administrative Law Judge to any provision  
16 of the Arizona Procurement Code, the Arizona Administrative Code, or SP 043, that  
17 specifically provided that the Scoring Criteria could be established after the offers were  
18 opened and reviewed by the Evaluation Committee. In fact, the Administrative Law Judge  
19 was unable to locate the term "Scoring Criteria" in any of those documents. Rather, 3.2  
20 of SP 043 requires that the Evaluation Tool and Evaluation Instructions be finalized prior  
21 to opening the offers.<sup>1</sup>

22           22. Based on the testimony presented at hearing, the only matter decided  
23 before the offers were opened and reviewed was the selection of the questions to be  
24 scored.

25           23. After the members of the Evaluation Committee reviewed the proposals  
26 individually, the members met and discussed the offers in setting the Scoring Criteria as  
27 a group. Interestingly, the Scoring Criteria was recorded as "Exceeds Expectations,"  
28 "Meets Expectations," "Falls Below Expectations," or "Not Responsive."

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29 <sup>1</sup> The Administrative Law Judge also notes that Evaluation Instructions were not prepared or finalized in  
30 this matter.



1           24.   “Expectation” is defined as “the act or state of expecting.”<sup>2</sup> “Expect(ing)” is  
2 defined as “to anticipate or look forward to the coming or occurrence of.”<sup>3</sup>

3           25.   The very act of waiting until the offers had been opened and reviewed  
4 before determining the Scoring Criteria vitiates the premise that the responses exceeded,  
5 met, or fell below anyone’s expectations. One cannot anticipate what an offer will include  
6 if one has already reviewed the offer.

7           26.   While ACPO Whittington was confident that the members of the Evaluation  
8 Committee would not allow any information they knew outside the contents of the offers,  
9 including opinions regarding the identity of the offerors themselves, to affect how they  
10 scored the offers, the manner in which the Scoring Criteria was developed allows for that  
11 to have occurred. Without preset Scoring Criteria, the members of the Evaluation  
12 Committee could easily sway the scoring in favor of one offeror or against another  
13 offeror.<sup>4</sup>

14           27.   While the Department presented the possibility of a situation in which all of  
15 the responsive offerors were deemed not susceptible for an award because the Scoring  
16 Criteria was set too high, ACPO Whittington emphasized that the members of the  
17 Evaluation Committee were selected as subject matter experts because they were  
18 representative of the agencies that most used the service at issue. If the members of the  
19 Evaluation Committee were, in fact, subject matter experts as to the scope of the  
20 Solicitation, they should have been able to establish appropriate Scoring Criteria reflective  
21 of the State’s needs.

22           28.   In fact, the opposite result would be more of a concern. That the Evaluation  
23 Committee, relying on the proposals as submitted to establish what would constitute  
24 “Exceeds Expectations,” “Meets Expectations,” “Falls Below Expectations,” or “Not  
25 Responsive,” could award a contract to an offeror that was not suitable. In such a case,  
26 proper Scoring Criteria established prior to the review of the offers would result in none

27 \_\_\_\_\_  
28 <sup>2</sup> <https://www.merriam-webster.com/dictionary/expectation>

29 <sup>3</sup> <https://www.merriam-webster.com/dictionary/expecting>

30 <sup>4</sup> This is not to say that any such malicious actions occurred in the instant matter, merely that it could have occurred.

1 of the responsive offerors being deemed susceptible for an award to the benefit of the  
2 State.

3 29. While nothing in the Arizona Procurement Code explicitly prohibits the  
4 formulation of Scoring Criteria after the bids are open and reviewed, such a process is  
5 antithetical to the purposes of the code. Rather, the requirement that Evaluation Tool and  
6 Evaluation Instructions be finalized prior to the offers being opened demonstrates that the  
7 offers themselves should not affect the scoring.

8 30. The development of the Scoring Criteria, as described by ACPO  
9 Whittington, failed to ensure fairness in the process.

10 31. Accordingly, Guidesoft sustained its burden of proof to establish by a  
11 preponderance of the evidence that the Department erred in its scoring of the offers  
12 responsive to the Solicitation.

13 32. Based on this analysis, it is unnecessary to determine the validity of the  
14 remaining bases of Guidesoft's appeal.

15 **RECOMMENDED ORDER**

16 Based on the foregoing, it is recommended that the appeal filed by Guidesoft be  
17 granted.

18 *In the event of certification of the Administrative Law Judge Decision by the Director*  
19 *of the Office of Administrative Hearings, the effective date of the Order will be forty (40)*  
20 *days from the date of that certification.*

21 Done this day, May 22, 2023.

22 /s/ Tammy L. Eigenheer  
23 Administrative Law Judge

24 Transmitted by either mail, e-mail, or facsimile to:

25 Elizabeth Alvarado-Thorson,  
26 Department of Administration

27 Kelly M. Wagner  
28 Office of the Attorney General  
29 Kelly.Wagner@azag.gov

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By: OAH Staff