



David B. Rosenbaum
Direct: 602-640-9345
Office: 602-640-9000
drosenbaum@omlaw.com

2929 North Central Avenue
Suite 2000
Phoenix, Arizona 85012
omlaw.com

February 7, 2024

Sent Via Email:

RFPYH24-0001@azahcccs.gov
Carmen.Heredia@azahcccs.gov
Meggan.LaPorte@azahcccs.gov

Ms. Carmen Heredia, Cabinet Executive Officer and Executive Deputy Director
Ms. Meggan LaPorte, Procurement Officer
Arizona Health Care Cost Containment System (AHCCCS)
801 E. Jefferson St.
Phoenix, AZ 85034

Re: Banner's Appeal of the Procurement Officer Decision re: Contract Award
ALTCS E/PD RFP YH24-0001

Dear Ms. Heredia:

Banner submits this letter pursuant to A.A.C. § R9-22-604(I) to appeal the attached procurement officer decision ("Decision") denying Banner's protest regarding Solicitation Number RFP YH24-0001 (the "Procurement").

As one of AHCCCS' longest-serving managed-care partners, with decades of service to Medicaid and Medicare beneficiaries in Arizona, Banner is profoundly disappointed to find itself in this position. Banner deeply values its partnership with AHCCCS. But fundamental concepts of due diligence, fairness, and transparency compel this appeal and merit your intervention. We respectfully request that you exercise your authority to set aside the Procurement because it was fundamentally flawed in design and execution and the outcome is not in the best interests of the State—and, most importantly, it is not in the interests of the thousands of highly vulnerable Arizonans who rely on the ALTCS program and who stand to have their care disrupted and provider relationships fractured. For many, this award will disrupt both Medicaid and Medicare enrollment.¹

Banner requests that you consider why and how the Procurement resulted in the displacement of Banner and MercyCare: How did a solicitation that was meant to be "most advantageous to the state" result in the omission of the plan that scored highest in the most recent operational review and has high levels of member-satisfaction? We submit that the answer, in large part, is that the Procurement diverted—sharply—from the bedrock principles of government contracting, including transparency, fairness, and accountability. We ask you to recognize the Procurement's fundamental flaws in design and execution, which meant that it did not achieve the

¹ Banner submits this appeal to you in your position as Director of AHCCCS pursuant to A.A.C. § R9-22-604(I) and requests that you exercise your authority while preserving and expressly reserving all rights and arguments, if any, deriving from the lack of legislative confirmation.

intended outcome. We believe that what is at stake in the Procurement is too great for the outcome to be dictated by a haphazard process. Law and public policy alike require your intervention.

Banner recognizes the significant challenges facing AHCCCS, an essential and over-stretched agency. This RFP's formation took place during an unprecedented volume of activity for the agency, including new executive branch leadership, waiver implementation, workforce shortages, and redetermination. Importantly, AHCCCS's resources were appropriately committed to its "singular focus" of combatting the fraud, waste, and abuse stemming from an ongoing Medicaid fraud scandal.² Your sustaining this appeal is the opportunity to review and improve this process and will curb the unnecessary system disruption facing members if this flawed RFP process if its result are allowed to stand.

The hundreds of letters and emails submitted to AHCCCS by providers and beneficiaries, all dismayed at the outcome of the Procurement, demonstrate the strong relationships that Banner (and MercyCare) have established with health care providers, community-based partners, ALTCS beneficiaries, and their caregivers. Banner earned the highest scores among ALTCS plans in AHCCCS's recent operational review. Banner provides best-in-class service to the vulnerable Arizonans it serves, whose need for timely, compassionate, and effective health care is paramount. Banner has demonstrated, through its long history, 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.

The Procurement decision threatens this delicate balance. If the result stands, the Procurement would displace high performing, locally based, not-for-profit organizations who are deeply committed to serving the most vulnerable Arizonans and strengthening our communities with subsidiaries of huge, for-profit, out-of-state corporations who are committed to maximizing profit for their shareholders.

We agree that incumbency cannot and should not be the only consideration. And we do not contend that in-state charitable entities should be guaranteed contracts merely because of their local presence and 501(c)(3) status. Indeed, replacement of poor-performing incumbents can and is sometimes necessary, despite short-term disruptions. But that is not the case here, and that is not a position that Banner advocates. The letters of support reflect what the operational review revealed: Banner has provided and continues to provide the highest level of service to ALTCS beneficiaries. Indeed, for decades, Banner's member-centric mantra has been at the core of its organizational focus, and Banner is both distressed to think that its many years of effort and investment in service of ALTCS members will be tossed aside in an entirely unnecessary and destabilizing transition for its members, providers, and the workforce that supports them.

Banner asks you to exercise your discretion, as past AHCCCS Directors have done, and terminate the awards made in the Procurement, stay the existing contracts for one year, and reissue an RFP that appropriately considers and weighs past performance and investments in the State in

² Interview of Carmen Heredia, Dec. 7, 2023, <https://www.youtube.com/watch?v=AM3AIYLbqTE> (last visited Dec. 20, 2023).

the final scoring. At a minimum, Banner asks you to recognize its legitimate concerns and forward the matter for an administrative hearing. In determining what is in the best interests of the State of Arizona, Banner asks you to expressly consider not only the best interests of state government, but also the best interests of AHCCCS beneficiaries and AHCCCS providers, including the relative burdens and benefits of a major transition in services.

Pursuant to A.A.C. § R9-22-604(I)(2)(c), the specific bases for this appeal are the numerous legal and factual errors in the Decision detailed below that independently and collectively warrant a reversal or, at minimum, a hearing for further factual development. Among other things, the Decision veers off course from the outset by relying—heavily—on the wrong standard of review. The Procurement Officer improperly applies the judicial standard to her review of her own procurement decision and decides, repeatedly, that the protestors failed to meet that high burden. Compounding that error, the Decision repeatedly avoids the brunt of Banner's arguments by mischaracterizing them and responding to arguments that Banner never made—or by disavowing AHCCCS's own written representations.

We ask you to intervene and issue a decision consistent with the above pursuant to A.A.C. § R9-22-604(I). Alternatively, we request a hearing pursuant to A.A.C. § R9-22-604(I)(2)(d) and the Arizona Administrative Procedure Act, A.R.S. Title 41, Ch. 6. The Decision is attached hereto, *see* A.A.C. § R9-22-604(I)(2)(b).³ Finally, we ask you to issue a stay of the contract because it is necessary to minimize the disruption of care and provider relations for members. The stay will also allow this review to receive due consideration.

APPEAL⁴

The Decision erred legally by applying the wrong burden of proof, level of discretion, and standard of review.

The Decision errs at the outset by applying the wrong burden of proof, level of discretion, and standard of review.⁵ This fundamental error infects the entire Decision because the Procurement Officer applies it throughout the Decision to erroneously limit the scope of her review and hold the protestors to a higher standard, and she repeatedly concludes that Banner's protest fails because it does not meet that erroneously high standard. As a legal matter, these errors alone compel a reversal of the Decision, or, at bare minimum, a referral to a hearing so that an administrative law judge can review the matter through the correct lens. As a practical matter, these errors converted the Decision into a legalistic search for formalistic ways to rebut the protests

³ Banner provides the following information required by A.A.C. § R9-22-604(I)(2)(a): 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.

⁴ Banner incorporates by reference its protest, replies, their attachments, the procurement file, and documents produced and being produced as public records in this matter.

⁵ Decision at 8, 10, 11, 23, 28, 29.

rather than what it should have been: a thorough evaluation of whether the Procurement reached the right outcome for the State of Arizona and its ALTCS beneficiaries.

The Decision repeatedly conflates administrative and judicial review. First, it imposed a higher burden of proof applicable to judicial proceedings, not internal agency reviews. Second, it imposed artificial limits on the scope of the Procurement Officer's review. The Decision proclaims that the Procurement Officer cannot weigh the evidence and must affirm the result of the Procurement if it was supported by substantial evidence. But, as the parenthetical excerpts cited in the Decision make clear, those are limitations on a *court's* review of a final agency decision, and the Decision cites nothing indicating that the same limitations apply to the agency's own internal review—because they do not. Together, these show a meaningful misunderstanding of the agency's authority and duty. The Procurement Officer was called to the difficult task of critically reviewing AHCCCS's own process and result. Rather than embrace that authority and review the thrice echoed shortcomings, it was affirmed by applying a two-levels-of-review-away standard.

Rather, at this earliest stage of protest, the Procurement Officer has broad authority to resolve the protest. "The procurement officer issuing a RFP shall have the authority to resolve proposal protests ... the procurement officer shall consider all of the circumstances of the procurement."⁶ This is especially true where, as here, the scores used were not binding.⁷

The Decision itself makes clear that the choice of the wrong burden of proof and standard of review infected the entire enterprise: every protest issue alleged by every protestor is addressed "applying the standards of review and burdens of proof outlined above,"⁸ and the Decision repeatedly concludes that the Protestors have failed to meet *that* burden.⁹

A slightly different, yet flexible, standard of review applies to your review. Unlike the initial protest stage, the Director must dismiss the appeal if it "does not state a basis for protest," is untimely, or moot.¹⁰ But otherwise, the Director has broad authority to resolve the protest or refer it for hearing. Here, as detailed below, Banner states multiple bases—legal and factual errors—for its protest.

Banner demonstrated prejudice.

The Decision also errs in its articulation and application of the standard for showing prejudice. Again, the Decision cites case law discussing the requirements for standing to challenge a bid-protest denial *in court*.¹¹ That standard is informed by principles of standing, which limit who can bring a case in federal court. *See Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed. Cir. 2009) ("the question of prejudice goes directly to the question of standing"). There are of course, no comparable constraints on who can file a protest with the agency. Indeed,

⁶ A.A.C. § 9-22-604(B) and (H).

⁷ RFP § H at 5.

⁸ Decision at 12

⁹ E.g., Decision at 14, 24.

¹⁰ A.A.C. § 9-22-604(J)(1).

¹¹ Decision at 10.

AHCCCS regulations specify that “a person may file a protest with the procurement officer” without limitation. Ariz. Admin. Code § 9-22-604.

Even if the “substantial chance” test applied here, Banner demonstrated in its initial protest that, but for the identified scoring errors, it would have had a substantial chance of receiving a contract.¹² Moreover, the authority cited in the Decision establishes that where, as here, a protestor contends that the errors require a re-procurement, and the protestor “could compete for the contract once again,” the protestor “met the ‘substantial chance’ standard and had standing.” *Labatt*, 577 F.3d at 1379 (quoting *Impresa Costruzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed.Cir.2001)).

Banner's protest was timely; its appeal is also timely.

The Decision correctly provides that a protest must be filed before proposals are due and opened *if* the protest challenges improprieties apparent from the face of the RFP.¹³ But the Decision's assertion that Banner's arguments about scoring are untimely is legally and factually erroneous. Because AHCCCS did not disclose the protested scoring details in the RFP, Banner could not possibly have lodged a protest of those elements beforehand. Indeed, the Decision repeatedly contends that AHCCCS provided scant details of its scoring methodology because it was not required by regulation to disclose more. Setting aside that AHCCCS's bare-minimum approach is anathema to the foundational principle of government contracting—transparency—AHCCCS cannot have its cake and eat it too: having made the choice to keep details of its scoring methodology secret, AHCCCS cannot now claim that Banner waited too long to raise concerns about that methodology.

As even the authority cited by the Decision establishes, a bidder is only required to challenge RFP issues that are “apparent on the face” of the RFP, i.e., where the issues are “patent.”¹⁴ Decision at 9, citing *Arizona's Towing Pros., Inc.*, 196 Ariz. at 76.¹⁵ The Decision identifies nothing on the face of the RFP making it “apparent” that AHCCCS intended to (1) score the oral presentations at all; (2) assign far more points to the oral presentations than any other factor; or (3) use a forced-ranking scoring system that artificially introduced 20% gaps between each bidder. Because there is nothing.

¹² Banner protest at 16.

¹³ Decision at 9.

¹⁴ Merriam-Webster defines “patent” as “readily visible or intelligible.” See <https://www.merriam-webster.com/dictionary/patent> (last accessed February 7, 2024).

¹⁵ The argument is similar to the grounds on which the Procurement Officer denied Banner's request for additional time to submit this appeal. The Procurement Officer faulted Banner and other protestors for not identifying “any specific basis to believe that any future production of the ‘chat’ communications are likely to contain information relevant to any appeal of the Procurement Officer Decision.” The Procurement Officer's supposition that *Banner* should have known what AHCCCS was hiding in its scoring methodology and in public records AHCCCS has failed to timely produce would import into public procurement law a novel requirement that bidders possess ESP or some other paranormal capabilities.

Regarding timeliness of this appeal, it is timely as it was filed five calendar days after the Decision was filed.¹⁶ Requests for a stay, extension, or appellate process were all denied despite the incomplete response to Banner's public records requests and the agency's decision to release its Decision at end of day on Friday.

Recordkeeping errors and blame-shifting in the process justify sustaining this appeal.

The Decision confirms an unresolved issue of fact, which may support the finding of a violation of law, in what it characterizes as Protest Issue 1—namely, the timing of the development of the scoring methodology. Remarkably, the Decision blames the offerors for not catching the agency's "regrettably overlooked" error in recordkeeping.¹⁷ The Decision tacitly acknowledges that, if AHCCCS meant what it said about developing a scoring methodology after receiving bids, it would violate the law. But the Decision attempts to circumvent that by claiming that AHCCCS "misstate[d]" the facts and, oddly, blaming the Protestors for taking AHCCCS at its word. The Decision's discussion of the timing of the scoring methodology is internally inconsistent, at odds with the RFP, and, curiously, relies on no direct evidence of the scoring methodology but rather inferences from obtuse references in meeting minutes that are bereft of actual detail about the scoring methodology or its development. As Director, you have the opportunity to rectify this process.

The multiple contradicting representations about when the scoring methodology was developed and the claim that the agency's own description of the process in its (presumably heavily vetted) Executive Summary was a "misstatement of facts regrettably overlooked" warrant, at minimum, a hearing to establish the key facts about scoring methodology development. Indeed, because it is undisputed that an agency cannot develop its scoring methodology after receiving bids, how and when the scoring methodology was developed is critical.

But rather than clarify when and how AHCCCS developed the scoring methodology, the Decision further muddies the waters. In the August 1 RFP, AHCCCS represented that it "*has established a scoring methodology[,]*"¹⁸ i.e., that the scoring methodology *was already established* as of August 1. But the Decision says otherwise—it claims that meeting minutes establish that the Scope team met *through September 21, 2023*, "to discuss, among other things, finalizing and locking down the scoring methodology and weighting criteria utilized in the RFP."¹⁹ This is an irreconcilable conflict: Either the RFP misrepresent things, or the Scope Team meeting minutes are wrong. Curiously, rather than attempt to explain this tension, the Decision doubles down on the errors, claiming that "as reflected accurately in the RFP," the teams established the final scoring methodology and training "by September 28, 2023." Of course, that is not what the RFP said, and the Decision fails to explain how the RFP could possibly have "accurately" reflected something that occurred nearly two months *after* the RFP issued.

¹⁶ A.A.C. § 9-22-604(I)(1).

¹⁷ Decision at 12-13.

¹⁸ RFP Section 8 (emphasis added).

¹⁹ Decision at 13.

The Decision also suggests that the Protestors should have known that the process differed from AHCCCS's representation. That contention is particularly troubling given that because of the ongoing delays in production of public records, the Protestors still do not have all the relevant procurement documents. Moreover, the Decision itself relies on unidentified "procurement records,"²⁰ and Scope team meeting minutes instead of citing any documents that actually establish when the scoring methodology was developed.

The Decision concedes mistakes, – but somehow blames Banner! As Director, you have the opportunity – and responsibility – to reject to the agency's unjustified effort to shift blame. At bare minimum, the multiple conflicting accounts of the scoring-methodology timeline creates factual uncertainty that warrants referral for a hearing.

**The Decision fails to recognize that withholding scoring details preserved protest rights;
Oral presentations were noticed for evaluation and not scoring.**

The Decision errs factually and legally in discussing what it characterizes as Protest Issues 2 and 3. Because the issues are interrelated with respect to the oral presentation scoring, Banner discusses them together.

At the outset, to be clear, AHCCCS's decision to assign nearly one-third of the total points to the oral presentations was a radical and inexplicable departure from prior procurements that was not disclosed in the RFP, could not have been anticipated, and to this day remains entirely unexplained by AHCCCS. The secretive manner in which the oral presentations were conducted, and the agency's failure to produce individual scoresheets from the oral presentations only compounds the problem by further cloaking the issue from public scrutiny.

As an initial matter, the Decision mischaracterizes Banner's argument about the scoring of the oral presentations and again claims that AHCCCS's written word means something other than it says. The Decision claims that nothing in any relevant statute or regulation requires AHCCCS "to provide details about how the Oral Presentations would be scored."²¹ But that's not Banner's argument. Banner argues that the RFP never disclosed that oral presentations would be scored at all, let alone that they would be weighed far more than any other element. That is an *indisputable fact*. The Decision contorts the RFP language and conflates "evaluate" with "score" in a futile effort to make a case that the RFP put bidders on notice of oral presentation scoring, but, again, identifies nothing in the RFP discussing such scoring. For example, the Decision asserts that bidders should have understood that oral presentation "were part of the evaluated RFP submissions."²² But being "part of" the submission is not at all the same as being scored—there are, after all, numerous elements of RFPs that are "part of" the evaluation but are not scored. And in any event, "evaluated" is certainly not tantamount to being assigned far more scoring points than *every single other factor*, including every factor the *RFP expressly identified as a scored element*. In the recently released Housing Administrator RFP, AHCCCS noted the distinction

²⁰ see Decision at 4, 13, 14.

²¹ Decision at 17.

²² See Decision at 18.

between scoring and evaluating when it said, “*Though oral presentations are not scored separately for this procurement, information presented could impact the Offeror’s final evaluation of any part of the submitted proposal.*”²³

The Decision also errs factually and legally when it contends that Banner cannot show prejudice from the oral presentation scoring. Indeed, the Decision’s discussion of the law is wrong. The Decision relies on *Labatt*, 577 F.3d 1375 to support its claim that a protestor must “show the agency used a different basis in evaluating the proposals than disclosed.”²⁴ But that case says *nothing* of the sort. Indeed, the *Labatt* court’s analysis actually undermines the Decision. The issue in *Labatt* was whether the “government’s mistaken acceptance of bid revisions via e-mail neither helped nor hindered any offeror.” *Id.* at 1380. Because all three bidders submitted their revisions via email, the court held that “*Labatt’s* proposal would not have been improved and its chances of securing the contract would not have been increased if DSC cured the e-mail submission error”—in other words, “the government’s mistaken acceptance of bid revisions via e-mail neither helped nor hindered any offeror.” *Id.* For that reason, the court concluded, *Labatt* lacked standing to pursue its protest.

That is a far cry from the scoring issues Banner has identified here. Unlike in *Labatt* where the error had zero effect on the protesting party, it is indisputable that the oral presentation scoring significantly decreased Banner’s chances of securing a contract and significantly advantaged other bidders. As result, *Labatt’s* reasoning supports the conclusion that Banner has standing here. So too does *Labatt’s* discussion of prior case law holding that where “‘the government would have been obligated to rebid the contract’ if the protest was successful, and the ‘appellant could compete for the contract once again,’ [the protestor] met the ‘substantial chance’ standard and had standing.” *Id.* at 1379 (quoting *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed.Cir. 2001)).

The Decisions’ reliance on *NEQ, LLC v. United States*, 88 Fed. Cl. 38, 47 (2009) is also misplaced because that court addressed a claim that the agency relied on an unstated *element* of an evaluation factor. That is, again, a far cry from AHCCCS’s undisclosed scoring of the oral presentations. And the *NEQ* court distinguished between unstated evaluation *criteria and factors*—which defy “hornbook law that agencies must evaluate proposals and make awards based on the criteria stated in the solicitation,”²⁵ and the elements “intrinsic to the stated factors,” which a solicitation “need not identify.”²⁶ Oral presentations are hardly a mere intrinsic element of a stated factor. Moreover, as *NEQ* makes clear, an agency, “where appropriate, *must disclose* the factor’s relative importance”—something AHCCCS indisputably failed to do her. *Id.* at 48, citing *Isratex, Inc. v. United States*, 25 Cl.Ct. 223, 230 (1992) (emphasis added).

²³ AHCCCS RFP Y24-0012, Instructions at 6; available at <https://www.azahcccs.gov/Resources/Downloads/Solicitations/Open/RFPs/YH24-0041/ExhibitA-SolicitationInstructionstoOfferors.pdf> (last visited Feb. 7, 2024).

²⁴ See Decision at 19.

²⁵ *id.* at 37, quoting *Banknote Corp.*, 56 Fed.Cl. at 386

²⁶ *Id.* at 48.

AHCCCS should reject the scoring system used in this procurement.

The Decision errs factually and legally in discussing what it characterizes as Protest Issues 4 and 5. You have the authority to review the process used, one that started under a former Director,²⁷ and lingered without director-level, executive leadership.²⁸

Initially, the Decision rehashes its earlier erroneous discussion of prejudice by contending that Banner's protest of the scoring methodology "provide[s] no basis for disturbing the awards" because it does not "demonstrate specific prejudice that could have changed the outcome of the procurement for them[.]"²⁹ For the reasons discussed above, the Decision is particularly wrong here, where the problems identified with the scoring are so fundamental and the effects, as with the forced-ranking scheme, not readily quantifiable. In such situations, the remedy is a rebid, and Banner has a "substantial chance" because it could compete for the contract again. *Labatt*, 577 F.3d at 1379.

The Decision also errs by claiming that the protests are "speculative" and faulting Banner and the other protestors for not including more evidence when AHCCCS has not timely produced requested public records. Indeed, just last Friday night, AHCCCS notified Banner for the first time that it had neither collected nor reviewed any messaging-app communications among individuals involved in the Procurement. It is error to reject a protest for want of evidence when evidence is under control of an agency who has failed to timely produce it.

We ask that you reject the marginalization of important factors listed in the RFP as "tie breakers," only to be considered 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 recognized that the following factors were important, but the agency apparently did not consider them in any meaningful way:

- 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.

²⁷ AHCCCS001427

²⁸ A public record received hours after the Decision show that you were caught up on the RFP process and providers' performance by your team on January 8, 2024.

²⁹ Decision at 20.

In the Decision, the Procurement Officer eschews any obligation to consider these factors by determining there was no negligible difference in scores and by narrowly defining the interests of the State of Arizona.

Disruption of care was discounted by AHCCCS, but to Arizonans, the removal of Banner following success is unacceptable. As one provider put it, “[t]he thousands of hours that will be spent figuring out all of these changes are hours that could have been spent in the care of our residents.”³⁰ 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.

Letter writers have confirmed they want Banner to continue with the ALTCS program because “the removal of these program contractors instantly removes these years of commitment and stability they provide us with today.”³¹ One Yuma-based provider wrote, “[t]he announced transition to new ALTCS contractors will dramatically impact 100% of our ALTCS residents as they will be forced to transition During the solicitation process . . . the only contractors that contacted us for input . . . were Banner and Mercy.”³²

We ask that you reject, generally, the devaluing of past performance. Public records confirm that AHCCCS and its consultant, PHPG, chose a bare minimum review of past performance³³ and then weighted it near nothing. This prevents giving Banner credit for its strong performance and the narrow review missed Centene's and United's concerning past performance and enforcement actions. 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. Banner's high rankings are no mistake – they are the result of patient-driven care and an unwavering dedication to compliance. That good work should not be ignored. In fact, it would be unremarkable for you to sustain this appeal solely to require greater weight for past performance. Indeed, in 2002, the Auditor General criticized AHCCCS's failure to “consider current contractors' past performance in ALTCS procurements.”³⁴

³⁰ Letter from C. Kirby Dec. 19, 2023.

³¹ Letter from R. Gunnell Dec. 28, 2023.

³² Letter from Deborah H., Dec. 20, 2023.

³³ AHCCCS001905, Apr. 7, 2023, email and AHCCCS001896, “Options for Evaluating Performance” PowerPoint.

³⁴ Performance Audit, Report No. 02-07, at 12, available at <https://www.azauditor.gov/reports-publications/state-agencies/arizona-health-care-cost-containment-system/report/arizona-2> (last visited Feb. 6, 2024).

In that vein, we ask you to reject the over-weighting of oral presentations and corresponding devaluing of past performance. 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 other times not 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, particularly given the unusual format and the subjective nature of evaluating the presentations, is unexplained and unjustified in the procurement file. The lack of rationale in the weighting and scoring of oral presentations and past performance confirms the arbitrary result and requires this protest be sustained.

In all, the scoring methodology adopted failed to serve the RFP's objectives and should be rejected.

The cost bid analysis only sought the lowest bid and not the best value.

The Decision errs factually and legally in discussing what it characterizes as Protest Issue 7. You should sustain the appeal and reject the process because 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. AHCCCS did not give 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. This is clear from one reviewer, who disqualified United's administrative bid due to being "very low" and having a "PMPM that is unsustainable."

It requires significant program and community investment to provide high-quality managed care services. To ignore these investments and costs in favor of a myopic focus on lowest cost 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.

The evaluations and final rankings were not supported by the record.

The Decision errs factually and legally in discussing what it characterizes as Protest Issue 9. The scoring methodology, which assigned scores based on forced and consensus ranking, created arbitrary results. 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"³⁵ rather than objective, reasonable bases. They were also told that "*ties are ok but try to rank 1 to 5.*"³⁶ The evaluation teams then met

³⁵ AHCCCS000062, Oct. 3, 2023, Scoring Training.

³⁶ AHCCCS000060, Oct. 3, 2023, Scoring Training.

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. 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 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."³⁷ 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, and we have yet to receive evidence of individual evaluations of the oral presentations. 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. The ranking and scoring (combined with weighting) resulted in significant, artificially created, point discrepancies between the offerors.

Other issues justify sustaining the appeal.

The following is a list of other justifications, not resolved by the Decision, which justify sustaining the appeal or a hearing:

- Insufficient engagement of the public, apparent especially now as they write letters of concern;
- Centene's clear errors were overlooked, calling into question the fairness of the process;
- Centene's use of Michele Barnard to participate in oral presentations as a Centene employee with uninterrupted tenure, despite open-source documents confirming she left Centene in 2018;

³⁷ AHCCCS001491 EPD RFP_YH24-0001_Scoring Tools B7.xlsx

- The incomplete procurement file and outstanding public records requests;
- 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;
- 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;
- Agency's decision not to use the full time allotted to evaluate the proposal, discounting accuracy for speed; and
- Weighty enforcement actions by other governmental entities against Centene and United that were not considered.

The Procurement File remains incomplete.

Banner advises you that AHCCCS has still not fully responded to Banner's public records requests submitted two months ago and, at the end of last week, advised that it was about to search communications among procurement team members that it inexplicably failed to search before. Banner requested that the timeline for this appeal be extended to accommodate AHCCCS's delay, but the Procurement Officer denied that request. As a result, Banner submits this appeal under protest and continues to reserve the right to supplement its protest as additional materials are received.

REQUEST FOR RELIEF

Banner requests that you sustain this appeal, stay the award, extend the existing contract nos. YH18-0001 for another 12 months, and issue a revised solicitation to remedy these errors. In the alternative, we seek a hearing.

Very truly yours,



David B. Rosenbaum

Procurement Officer Decision YH24-0001

February 2, 2024

VIA ELECTRONIC MAIL

Mercy Care (Administered by Aetna Medicaid Administrators), an Arizona nonprofit Corporation

c/o Herrera Arellano LLP
Roy Herrera
1001 North Central Avenue, Suite 404
Phoenix, Arizona 85004
roy@ha-firm.com
c/o Henze Cook Murphy, PLLC
Kiersten Murphy
722 E. Osborn Road, Suite 120
Phoenix, Arizona 85014
kiersten@henzecoockmurphy.com

Blue Cross and Blue Shield of Arizona Health Choice

c/o Gallagher & Kennedy, P.A.
Kevin E. O'Malley
Hannah H. Porter
2575 East Camelback Road
Phoenix, Arizona 85016
hannah.porter@gknet.com

Banner-University Care Advantage dba Banner-University Family Care

c/o Osborn Maledon
David B. Rosenbaum
2929 North Central Avenue
Suite 2000
Phoenix, Arizona 85012
drosenbaum@omlaw.com
c/o Perkins Coie LLP
Matthew P. Gordon
12201 Third Avenue, Suite 4900
Seattle, WA 98101
mgordon@perkinscoie.com

Re: Procurement Officer Decision re: Solicitation No. YH24-0001

Dear Counsel:

The Arizona Healthcare Cost Containment System ("AHCCCS") received three procurement protests in response to its December 1, 2023 Notification of Contract Awards for the ALTCS E/PD solicitation, Request for Proposals NO. YH24-0001 (the "RFP"). These include:

1. A procurement protest on behalf of Mercy Care filed with AHCCCS on December 20, 2023;

2. A procurement protest on behalf of Blue Cross Blue Shield of Arizona Health Choice (“BCBSAZ Health Choice” or Health Choice”) filed with AHCCCS on December 21, 2023; and
3. A procurement protest on behalf of Banner University Care Advantage dba Banner-University Family Care (“Banner”) filed with AHCCCS on December 21, 2023.¹

These protests allege a variety of errors made by AHCCCS in connection with the solicitation for offers, the evaluation of offers, and the award of contracts under the RFP. The RFP solicited proposals from offerors to serve AHCCCS as program contractors and provide managed care organization services implementing and operating the Arizona Long Term Care System (“ALTCS”) for individuals who are eligible for ALTCS participation pursuant to A.R.S. § 36-2931, *et seq.* as persons who are Elderly and/or have a Physical Disability (“E/PD”).

Pursuant to Arizona Administrative Code (“A.A.C.”) § R9-22-604(G), this document serves as the Decision of the Procurement Officer in response to the foregoing protests.

As the bases for their respective protests, the Protesters allege numerous general deficiencies with substantial overlap in their arguments. These alleged general deficiencies include:

1. **AHCCCS failed to establish scoring and weighting criteria prior to receiving offeror proposals;**
2. **AHCCCS failed to disclose to the offerors its evaluation criteria and specific evaluation scoring/weighting details;**
3. **AHCCCS failed to inform the offerors that it would score the required oral presentation component of their proposals;**
4. **AHCCCS erred by utilizing a flawed scoring system;**
5. **AHCCCS erred by using a “forced ranking” system that inappropriately distributed available scoring points amongst the proposals;**
6. **AHCCCS erred by failing to properly train its evaluation personnel;**
7. **AHCCCS erred by not awarding three contracts;**
8. **AHCCCS performed an improper cost bid analysis that only valued the lowest-priced proposal; and**
9. **AHCCCS conducted an arbitrary evaluation and its final consensus ranking is not supported by the record.**

Because of the duplication of the foregoing protest grounds across more than one of the protests, this decision addresses each of the foregoing protest grounds first.

¹ The protests by Mercy Care, Health Choice and Banner are referred to here collectively as the “Protests”, and Mercy Care, Health Choice and Banner are referred to here collectively as the “Protesters”.

In addition, various Protesters have individually asserted additional protest arguments, including individualized arguments that AHCCCS erred by either evaluating or scoring their proposal incorrectly or inconsistently with how AHCCCS evaluated other proposals, meaning they deserved higher relative scores, or by failing to acknowledge problems with other offerors or those offerors' proposals that merited relatively lower scores. As these protest grounds are unique to the various Protests, those grounds are addressed last in this Decision.

II. The Arizona Statutes Grant the AHCCCS Administration Considerable Discretion Over the Procurement Process for the ALTCS E/PD Program Contractor Contracts.

A. The Arizona statutes and AHCCCS regulations provide specific authority and terms for procurement of ALTCS E/PD services.

Arizona state law invests the AHCCCS Director with broad authority and discretion to structure and conduct procurements like the one here that select the Contractors who will provide all major administrative functions of a Managed Care Organization ("MCO") for ALTCS-qualified individuals who are Elderly and/or have a Physical Disability (and are not enrolled members in certain excluded State of Arizona Medicaid care programs). See A.R.S. §§ 36-2904(A) ("The administration ... shall execute prepaid capitated health services contracts, pursuant to section 36-2906 ..."); 36-2932(B)(1) (granting AHCCCS "full operational responsibility for the [Arizona Long-Term Care System], which shall include ... 1. Contracting with ... program contractors ..."); 36-2944(A, B).

Specifically, the AHCCCS enabling statutes require the Director to "at least every five years ... prepare and issue a request for proposal and a proposed contract format to qualified [potential contractors] to be a program contractor and provide services pursuant to this article on a capitation rate basis to members who are enrolled with the program contractors by the [ALTCS] system ..." A.R.S. § 36-2944(A). The statutes further state that "[t]he [D]irector may adopt rules regarding the request for proposal process" that provide:

1. for the award of contracts by categories of members or services in order to secure the most financially advantageous proposals for the system;
2. for each qualified proposal shall be entered with separate categories for the distinct groups of members or services to be covered by the proposed contracts, as set forth in the request for proposal;
3. for the procurement of reinsurance for expenses incurred by any program contractor, any member or the system in providing services in excess of amounts specified by the director in any contract year; and
4. 3or second round competitive proposals to request voluntary price reduction of proposals from only those proposals that have been tentatively selected for award, before the final award or rejection of proposals.

A.R.S. § 36-2944(B). Finally, at A.R.S. § 36-2944(C), the statutes provide that "[c]ontracts shall be awarded as otherwise provided by law, except that in no event may a contract be awarded to any program contractor that will cause the system to lose any federal monies to which it is otherwise entitled."

The procurement at issue here is *not* subject to the requirements of the Arizona Procurement Code ("APC"), A.R.S. § 41-2501, *et seq.* or the provisions of the Arizona Administrative Code ("A.A.C.") implementing

the APCA.A.C. § R2-7-101, *et seq.* Instead, the Arizona Legislature provided at A.R.S. § 41-2501(H) that the AHCCCS Administration “is exempt from [the APC statutes] for ... program contractor contracts pursuant to title 36, chapter 29, articles 2 [containing A.R.S. § 36-2944] and 3” *See also*, A.A.C. §§ R9-28-601(D) (“The [AHCCCS] Administration is exempt from the procurement code under A.R.S. § 41-2501.”); R9-22-601(c) (same). AHCCCS has adopted its own set of regulations for this category of procurement, which are found at A.A.C. §R9-28-601, *et seq.* Those regulations, in turn, incorporate the procurement regulations AHCCCS has adopted at A.A.C. § R9-22-602 for the required contents of an RFP, the AHCCCS regulations under A.A.C. § R9-22-603 for contract awards, and the AHCCCS regulations under A.A.C. § R9-22-604 for proposal protests and appeals. *See* A.A.C. §§ R9-28-602; R9-28-603; R9-28-604. Thus, the notation in A.R.S. § 36-2944(C) that the ALTCS E/PD contracts “shall be awarded as otherwise provided by law” does not incorporate the expressly excluded provisions of the APC, but does logically incorporate the AHCCCS procurement regulations at A.A.C. §§ R9-22-601, *et seq.* and R9-28-601, *et seq.*

B. The AHCCCS regulations set minimum requirements for the RFP.

The AHCCCS RFP regulations require that the RFP include:

1. Instructions and information to an offeror concerning the proposal submission including:
 - a. The deadline for submitting a proposal,
 - b. The address of the office at which a proposal is to be received,
 - c. The period during which the RFP remains open, and
 - d. Any special instructions and information;
2. The scope of covered services under Article 2 of this Chapter and A.R.S. §§ 36-2906 and 36-2907, covered populations, geographic coverage, service and performance requirements, and a delivery or performance schedule;
3. The contract terms and conditions, including bonding or other security requirements, if applicable;
4. The factors used to evaluate a proposal;
5. The location and method of obtaining documents that are incorporated by reference in the RFP;
6. A requirement that the offeror acknowledge receipt of all RFP amendments issued by the Administration;
7. The type of contract to be used and a copy of a proposed contract form or provisions;
8. The length of the contract service;
9. A requirement for cost or pricing data;

10. The minimum RFP requirements; and
11. A provision requiring an offeror to certify that a submitted proposal does not involve collusion or other anti-competitive practices.

A.A.C. §§ R9-22-602(A), R9-28-602. The ALTCS E/PD RFP provided everything required by the regulation.

C. The AHCCCS regulations provide limited restrictions on proposal evaluation.

The AHCCCS RFP regulations, in relevant part, further provide that:

1. “The Administration shall evaluate a proposal based on the GSA and the evaluation factors listed in the RFP”;
2. “The Administration may initiate discussions with a responsive and responsible offeror to clarify and assure full understanding of an offeror’s proposal”;
3. “The Administration shall provide an offeror fair treatment with respect to discussion and revision of a proposal”;
4. “The Administration shall allow for the adjustment of covered services by expansion, deletion, segregation, or combination in order to secure the most financially advantageous proposals for the state”; and
5. “The Administration may issue a written request for best and final offers”, stating the date, time, and place for the submission of best and final offers.

A.A.C. §§ R9-22-602(B), R9-28-602.

D. The AHCCCS regulations provide limited restrictions on contract awards for an ALTCS E/PD procurement.

For contract awards, the AHCCCS regulations provide only the following:

The Administration shall award a contract to the responsible and responsive offeror whose proposal is determined most advantageous to the state under A.R.S. § 36-2906. If the Administration determines that multiple contracts are in the best interest of the state, the Administration may award multiple contracts. The contract file shall contain the basis on which the award is made.

A.A.C. §§ R9-22-603, R9-28-603. Beyond the foregoing, the Arizona law imposes no specific restrictions or requirements on the procurement here for ALTCS E/PD program contractor services.

II. AHCCCS Complied with the Regulatory Requirements for Content of the RFP, for Evaluation of Proposals, and for Award.

AHCCCS complied with the foregoing requirements of the AHCCCS regulations by implementing the following solicitation and offer evaluation process.

A. Development of the RFP.

AHCCCS issued RFP NO. YH24-0001 pursuant to A.R.S. § 36-2931 *et seq.*, as an exercise of its express statutory responsibility and authority under A.R.S. § 36-2944(A). AHCCCS structured the RFP to meet the requirements of A.A.C. §§ R9-22-602(A), R9-28-602. Section D of the RFP, at Paragraph 1, provided general notice of the scope of the contract(s) contemplated by the RFP, stating that the awarded Contractors “shall be responsible for the provision of integrated care addressing physical and behavioral health needs and Long Term Services and Supports (LTSS) ...” for specifically identified ALTCS-qualified individuals.

The development of the RFP took place between August 2, 2022, and June 12, 2023. The RFP was written and reviewed by internal subject matter experts from AHCCCS and approved for publishing by AHCCCS Procurement Office on July 12, 2023. The specific RFP content included, among other things, the following information to satisfy the requirements of A.A.C. § R9-22-602(A): (1) Notice of Request for Proposal containing a description of the purpose, due date for questions about the RFP, due date for the intent to bid form, and due date for proposals; (2) Section B, providing information on capitation rates and contractor specific requirements; (3) Section C and D providing, respectively, definitions and detailed descriptions of program requirements; (4) Section E, providing the contract terms and conditions; (5) Section F, attaching various ALTCS system standards and a contractor chart of deliverables; (6) Section H, providing instructions to offerors; and (7) Section I, attaching various forms, agreements and terms for offeror submission.

B. Development of the evaluation and scoring methodology.

The development of the evaluation and scoring methodology for the proposals was accomplished through the coordinated work of a Scope Team and an Evaluation Team. The Scope Team and Evaluation Team met from July 10, 2023 through September 26, 2023, to determine and finalize the scoring methodology used to evaluate the offerors’ proposals when they were received. As indicated in the Evaluation Process Overview for the RFP, published in the AHCCCS procurement file, all narrative submission requirements, oral presentation requirements, evaluation considerations, evaluation weights and point assignments, tools/templates, methodology, and training slide deck were locked down as final on September 28, 2023, prior to the October 2, 2023 proposal due date. AHCCCS did inaccurately state in the RFP’s Executive Summary, also published in the AHCCCS procurement file, that the Scope Team met from October 2, 2023 through November 15, 2023, to determine the scoring methodology that was detailed in the Evaluation Process Overview document. That is not correct, as confirmed by contemporaneous AHCCCS records identified in the discussion at pages 12-17 below. Rather, the scoring methodology and tools were all locked down before the offerors submitted their proposals, and were not modified thereafter.

C. Publication of the RFP, amendment, and receipt of proposals.

AHCCCS published the RFP on the AHCCCS website on August 1, 2023, and notified approximately 326 vendors/potential offerors of the RFP publication through email. Although AHCCCS held no pre-offer conference, AHCCCS invited prospective offerors to submit written questions, via email, to the AHCCCS Procurement Officer, and AHCCCS provided the prospective offerors a template for doing so. Where appropriate, AHCCCS responded to the questions submitted through Solicitation Amendments that AHCCCS posted publicly on the AHCCCS website, along with the RFP. AHCCCS released Solicitation Amendment #1 on August 15, 2023. It consisted of 44 detailed questions and answers and amended the RFP accordingly. AHCCCS released Solicitation Amendment #2

on August 30, 2023. It consisted of 19 detailed questions and answers and amended the RFP accordingly. AHCCCS released Solicitation Amendment #3 on September 8, 2023 and amended provisions of the Section H Instructions to Offerors, Section I, Exhibit A the Offeror’s Checklist, and the Section G Disclosure of Information Instructions and Attestation.

AHCCCS received five (5) proposals by the due date of October 2, 2023. The proposals came from the following offerors: (1) Arizona Physicians IPA, Inc. (DBA UnitedHealthcare Community Plan) (“APIPA”); (2) Banner-University Care Advantage doing business as Banner-University Family Care (“Banner”); (3) BCBSAZ Health Choice (“BCBSAZ”); Health Net Access, Inc. (dba Arizona Complete Health-Complete Plan (“Health Net”)); and Mercy Care (administered by Aetna Medicaid Administrators)(“Mercy Care”). AHCCCS publicly opened the proposals on October 2, 2023, in accordance with the RFP instructions.

D. Evaluation of the proposals.

AHCCCS Evaluation Team members reviewed and evaluated the written submissions and oral presentations for the five proposals between the submission date of October 2, 2023, and November 15, 2023, after AHCCCS had provided the team members training on the scoring methodology and process to apply it during the evaluation on October 3, 2023. The Evaluation Team members consisted of twenty-two (22) qualified subject matter experts from AHCCCS, each of whom was provided the relevant proposal submissions and scoring tools for their evaluation activities. The Evaluation Team members participated in the consensus evaluation process described in the Overview of RFP Evaluation Process, which is described in more detail starting at page 14 below.

As a result of the consensus evaluation process, AHCCCS calculated the final scoring for each of the offerors’ proposals. The final scoring on a scale with a maximum of 1,000 points available was as follows:

Offeror	Total Score	Rank Based on Total Score
Health Net	715.00	1
APIPA	668.00	2
Mercy Care	557.50	3
BCBSAZ	527.00	4
Banner	522.50	5

E. The award decision.

After the AHCCCS evaluation team members gave each of the proposals serious consideration, and evaluated their respective written submissions and oral presentations using the consensus evaluation and scoring protocol set by the AHCCCS Scope Team and Evaluation Team prior to opening of the proposals, the AHCCCS Scope Team recommended that AHCCCS award two statewide contracts: (1) a statewide contract to APIPA, and (2) a statewide contract to Health Net. The undersigned AHCCCS Chief Procurement Officer determined that both of those offerors had submitted a proposal that was responsible and responsive, and that the award of two contracts as recommended by the Scope Team would be most advantageous to AHCCCS and the State of Arizona, and was in the best interest of the State of Arizona in accordance with the terms of the RFP.

On December 1, 2023, AHCCCS provided public notice that it had elected to award two statewide contracts under the RFP, to APIPA and to Health Net, respectively. On December 1, 2023, AHCCCS issued Non-Award Letters to offerors Banner, Health Choice, and Mercy Care, informing each of them that they were not awarded contracts under the RFP. These Protests followed.

F. The filing of the Protests.

On December 20, 2023, Mercy Care filed a formal protest with AHCCCS to protest AHCCCS' decision not to award Mercy Care a contract under the RFP. In the alternative, Mercy Care asserted that it should have been awarded a third contract in the central GSA. On December 21, 2023, Banner filed a formal protest with AHCCCS protesting the contract awards announced on December 1, 2023. On December 21, 2023, Health Choice filed a formal protest with AHCCCS protesting AHCCCS decision to award contracts under the RFP to APIPA and Health Net.

The Protests allege in their protest filings numerous general deficiencies in the procurement process with substantial overlap between many of the separate protest in their allegations. The following addresses overlapping protest arguments collectively, and further addresses other protest arguments raised by a single Protester.

III. The Protesters' Burden of Proof.

To succeed on a protest challenging AHCCCS' exercise of its procurement authority, a Protester must prove that there exist timely challenged agency actions that were (1) contrary to law, (2) arbitrary or capricious, or (3) an abuse of the agency's delegated discretion. *See, e.g., City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 3 (1973); *Brown v. City of Phoenix*, 77 Ariz. 368, 372 (1954) (citing *Peters v. Frye*, 71 Ariz. 30, 36 (1950) (allowing action for writ of mandate "if it clearly appears that the officer has acted arbitrarily and unjustly and in the abuse of discretion ...") (quoting *Collins v. Krucker*, 56 Ariz. 6, 13 (1940)); *see also, Richard E. Lambert, Ltd. v. City of Tucson Dep't of Procurement*, 223 Ariz. 184, 187 (App. 2009) ("When reviewing an administrative decision, the superior court must determine whether the administrative officer's 'determination was arbitrary and capricious or an abuse of discretion.'" (quoting and citing *Robertson v. Superior Court*, 136 Ariz. 440, 442 (App.1983))); *see also, A.R.S. § 12-901(F)* ("In judicial review of administrative agency decision, '[t]he court shall affirm the agency action unless the court concludes that the agency's action is contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.'")

In the case of protests like these involving a "negotiated procurement" or "best value" procurement, in which the contract award decision rests on the determination of which proposal is most advantageous to the government, "the Protester's burden of proving that the award was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law is greater than in other types of bid protests." *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004) (citing *LaBarge Prods., Inc. v. West*, 46 F.3d 1547, 1555 (Fed.Cir.1995) (citing *Burroughs Corp. v. United States*, 223 Ct.Cl. 53, 617 F.2d 590, 597-98 (1980)); *see also, E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed.Cir.1996) ("Procurement officials have substantial discretion to determine which proposal represents the best value for the government."). "The higher burden exists because the contracting officer engages in what is 'inherently a judgmental process,'" *Omega World Travel v. United States*, 54 Fed.Cl. 570, 578 (2002) (citing *Burroughs*, 617 F.2d at 598), and "the greater the discretion granted to a contracting officer, the more difficult it will be to prove the decision was arbitrary and capricious." *Burroughs*, 617 F.2d at 597.

The Arizona law and other persuasive precedent confirm that the foregoing burdens of proof operate as follows.

A. Timeliness of the protest grounds.

To be considered at all as a basis for overturning an award or other relief in connection with a state procurement, a challenge to procuring agency conduct must be timely filed. *See, e.g., Arizona's Towing Pros., Inc. v. State*, 196 Ariz. 73, 75 (App. 1999) (holding that protest had to be filed before the bids were opened per the terms of the Invitation for Bids and the agency regulations for bid protests, and it was an abuse of discretion for the procuring agency to find good cause for ignoring the untimely submission of the protest). If the protest challenges alleged improprieties in the solicitation process that were apparent from the face of the RFP, the protest must be filed before the proposals are due and opened. *Id.* at 75. Arizona precedent affirms the sound legal policy behind this rule.

Requiring protests related to errors apparent on the face of the bid to be filed *before* the bid opening protects the integrity of the bid process. Otherwise, a bidder may wait until the bids are submitted and the contract is awarded to another candidate, then protest the bid solicitation, force another round of bidding, and adjust its prices and strategies after it has had the opportunity to view its competitors' bids. Because allowing such belated protests is prejudicial to the initial winning bidder, bidders should object to mistakes or ambiguities in a bid solicitation before they bid. A.A.C. § R2-7-904(A)(1); *see also Newport News Shipbuilding and Dry Dock Co. v. General Dynamics Corp.*, 960 F.2d 386, 395 n. 6 (4th Cir.1992) (“where omissions or inconsistencies in the contract's provisions are patent, the bidder is required to make inquiry regarding them before submitting its bid.”)

Arizona's Towing Pros., Inc., 196 Ariz. at 76 (emphasis in original).

The foregoing precedent confirms that Arizona law parallels the bedrock principle under federal procurement law that a Protester may not challenge the failure of an RFP to adequately announce or describe evaluation criteria, the relative value of the components of the proposal for evaluation purposes, or the procuring agency's proposal scoring system after the proposals have been opened and evaluated. Rather, if any portion of a solicitation is unclear or incomplete, or fails to incorporate or publish details required by law, the Protester is required to raise that objection prior to the evaluation of the offerors' submissions. *See Weston Sols., Inc. v. United States*, 95 Fed.Cl. at 322-23 (Fed. Cl. 2010), *aff'd*, 440 F. App'x 926 (Fed. Cir. 2011) (“By failing to object to [such issues] when [the RFP] was issued and prior to the evaluation process, the objection has been waived.”)

In this procurement, as in *Arizona's Towing Pros., Inc.*, both the RFP and the AHCCCS protest rule commanded that offerors submit any challenges to alleged procurement improprieties that were apparent from the face of the RFP documents “before the due date of receipt of proposals.” Exhibit H – Instructions to Offerors at paragraph 13 stated that “[p]rotests shall comply with the requirements set forth in A.A.C. § R9-28-601 et seq. and in particular A.A.C. § R9-28-604.” The applicable AHCCCS regulations, at A.A.C. § R2-28-604 states: “Contract or proposal protests or appeals shall be under A.A.C. § R9- 22-604 and 9 A.A.C. 34.” The latter chapter involves applicant, member, provider, and existing contractor claims, grievances, appeals, and requests for hearing but the former section, at A.A.C. § R9-22-604(D), states the rules governing time for filing a procurement protest. In pertinent part, it states:

1. A protester filing a protest alleging improprieties in an RFP or an amendment to an RFP shall file the protest at least 14 days before the due date of receipt of proposals.
2. Any protest alleging improprieties in an amendment issued 14 or fewer days before the due date of the proposal shall be filed before the due date for receipt of proposals.

Id. Unlike the regulation at issue in *Arizona's Towing Pros., Inc.*, 196 Ariz. at 76, the AHCCCS regulation does not provide the procurement officer a “good cause” exception that allows consideration of an untimely appeal. In this case, the due date for receipt of proposals was October 2, 2023. Therefore, the applicable law required the Protesters to formally file any challenges to improprieties apparent from the RFP or its amendments well before that due date. If they did not do so, the late challenges are untimely, and the Procurement Officer has no authority or discretion to consider the untimely protest allegations.

B. Alleged failure to provide information in the RFP for the offerors.

Proof that a procurement official has violated specific legal mandates or restrictions imposed by statute or regulation on the procuring agency and its officials may state a valid basis for protest. *See Wittman Contracting Co.*, 20 Ariz. App. at 6, 509 P.2d at 1043; *see also*, A.R.S. § 12-901(F) (In judicial review of administrative agency decision, “[t]he court shall affirm the agency action unless the court concludes that **the agency's action is contrary to law**, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion.” (emphasis added)). However, the protester may not find those sorts of mandates outside the codified statutes and regulations directly governing the procurement activities of AHCCCS. *See Go Servs., LLC v. City of Avondale*, No. 1 CA-CV 16-0482, 2017 WL 6328004, at *1 (Ariz. App. Dec. 12, 2017) (indicating Arizona courts do not adopt federal procurement law where there is Arizona law on point); *State ex rel. KNC, Inc. v. New Mexico Dep't of Fin. & Admin., Prop. Control Div.*, 103 N.M. 167, 171, 704 P.2d 79, 83 (App. 1985) (focusing only on New Mexico state Procurement Code because “the scope of discretion available to federal procurement officers is not necessarily that which our legislature intended the relevant state officers to have under the Act.”)

The foregoing applies especially in this case to the numerous Protester arguments that AHCCCS failed to publish the specifics of its evaluation and scoring methodology, including the scores assigned to various categories of the proposals and the relative weighting of the various areas evaluated and scored. If the applicable statutes and AHCCCS regulations do not expressly command inclusion of the information a Protester contends was needed, the lack of such information does not create a basis for the Procurement Officer to question the award decision or provide relief.

C. The Protesters must establish actual and sufficient prejudice to their opportunity for award as a result of each alleged impropriety.

In government bid protests, the Protester must also “establish that it has been prejudiced by the agency decision it is challenging.” *Weston Sols., Inc.*, 95 Fed.Cl. at 322. To show such prejudice, a Protester must demonstrate that “but for the error, it would have had a substantial chance of securing the contract.” *Labatt Food Serv., Inc. v. United States*, 577 F.3d 1375, 1378 (Fed.Cir.2009) (quoted in *Weston Sols., Inc.*, 95 Fed. Cl. at 322). As an example, “[w]here the protest claims “that an agency relied on an unstated evaluation criterion, a Protester must show that: (i) ‘the procuring agency used a significantly different basis in evaluating the proposals than was disclosed; and (ii) the protestor was prejudiced as a result—that it had a substantial chance to receive the contract award but for that error.’” *NEQ, LLC v. United States*, 88 Fed.Cl. 38, 48 (2009) (quoting *Banknote Corp. of Am., Inc. v. United States*, 56 Fed.Cl. 377, 387 (2003)), *aff'd*, 365 F.3d 1345 (Fed.Cir.2004) (*cited with favor in Weston Sols., Inc.*, 95 Fed.Cl. at 322).

D. The Procurement Officer may not re-evaluate the proposals or second-guess the evaluator decisions and scoring, but must uphold all decisions supported by substantial evidence.

There are definite limits on review of a procurement protest. For one, when addressing challenges claiming that the evaluation or award decisions were arbitrary or capricious, the Procurement Officer “may not weigh the evidence on which the decision was based.” *Richard E. Lambert, Ltd. v. City of Tucson Dep't. of Procurement*, 223 Ariz. 184, 187 ¶ 10 (App. 2009) (citing *Ariz. Dep't of Pub. Safety v. Dowd*, 117 Ariz. 423, 426, 429 (App.1977) (“*Dowd*”); see also, *Barlow v. Arizona Peace Officer Standards & Training Bd.*, No. 1 CA-CV 19-0378, 2020 WL 1274507, at *3 (Ariz. App. Mar. 17, 2020) (“We do not independently weigh conflicting evidence on appeal from an administrative agency decision.”). Nor can the Procurement Officer substitute her judgment for that of the proposal evaluators. See *Culpepper v. State*, 187 Ariz. 431, 436 (App. 1996) (“In reviewing factual determinations by an administrative agency, this court does not reweigh the evidence or substitute its judgment for that of the agency.”); *Blake v. City of Phoenix*, 157 Ariz. 93, 96 (App.1988); see also *Smith v. Ariz. Dep't of Transp.*, 146 Ariz. 430, 432 (App.1985).

Instead, the Procurement Officer must affirm the agency procurement decisions if they were supported by substantial evidence. See, e.g., *Dowd*, 117 Ariz. at 426, 429 (forbidding Superior Court from weighing the evidence considered by the agency); A.R.S. § 12-901(F); see also *Wassef v. Arizona State Bd. of Dental Examiners through Hugunin*, 242 Ariz. 90, 92, 93 (App. 2017). This standard applies especially to award decisions. See, e.g., *Aero Corp. v. Dep't of the Navy*, 493 F. Supp. 558, 567 (D.D.C. 1980) (holding record demonstrated Navy decision to award contract to awardee “is supported by substantial evidence”); *Gregory Constr. Servs., Inc. v. Mississippi Dep't of Fin. & Admin.*, 360 So. 3d 651, 656 (Miss. Ct. App. 2023) (The Mississippi Bureau of Building, Grounds and Real Property Management had substantial evidence to support its decision to award contract.); *Blue Cross of California v. State Dep't of Health Care Servs.*, 153 Cal. App. 4th 322, 329–30, 62 Cal. Rptr. 3d 772, 778 (2007) (“In reviewing the award of a public contract, our function is the same as the trial court's—to decide whether the public entity's decision is supported by substantial evidence” (quoting from *Ghilotti Construction Co. v. City of Richmond* (1996) 45 Cal.App.4th 897, 903, 53 Cal.Rptr.2d 389)); *State ex rel. KNC, Inc. v. New Mexico Dep't of Fin. & Admin., Prop. Control Div.*, 103 N.M. 167, 173, 704 P.2d 79, 85 (N.M. App. 1985) (holding that if public agency contract award decision “is supported by substantial evidence, we should sustain it.”).

The Arizona courts describe the “substantial evidence” test as a “deferential standard”. *Coplan v. Arizona State Bd. of Appraisal*, 222 Ariz. 599, 602 (App. 2009). “‘Substantial evidence’ is defined as any ‘relevant evidence from which a reasonable mind might draw a conclusion.’” *Doe v. Arizona Bd. of Regents*, No. 1 CA-CV 18-0784, 2019 WL 7174525, at *3 (Ariz. App. Dec. 24, 2019) (citing *Troutman v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 518 (App. 1992) (quoting *In re Estate of Mustonen*, 130 Ariz. 283, 285 (App. 1981)). A Protester may not establish a lack of substantial evidence by showing that the record before the evaluation personnel supported factual conclusions that are inconsistent with the conclusions reached by the evaluators. “Substantial evidence exists if the evidentiary record supports the decision, even if the record would also support a different conclusion.” *Wales v. Arizona Corp. Comm'n*, 249 Ariz. 263, 268 (App. 2020).

Accordingly, even if the procurement record would support alternative inconsistent conclusions, so long as the record demonstrates that the evaluators have selected at least one of the multiple inconsistent factual conclusions that might be reasonably reached under the procurement record, their decision is sufficiently supported by “substantial evidence”. *Williams v. Tucson Unified Sch. Dist. No. 1 of Pima Cnty.*, 158 Ariz. 32, 35–36 (App. 1987) (citing *Howard v. Nicholls*, 127 Ariz. 383 (App.1980); *Webster v. State Board of Regents*, 123 Ariz. 363, (App.1979)) (“Substantial evidence exists even if two inconsistent factual conclusions are supported by the record when the agency elects either possible conclusion.”); *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984) (“If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to support an administrative decision that elects either conclusion.”) The relevant protest review standard does not require any finding that a challenged agency decision was the *only* reasonable conclusion that could have been reached on a point, or even that there be *more* evidence or reasons favoring the conclusion the

agency personnel reached than favoring other decisions or evaluative conclusions they could have reached. It merely requires that there be some evidence in the record that might have led a reasonable agency evaluator to reach the evaluative conclusions the AHCCCS evaluators actually reached.

IV. The Protest Allegations Do Not Require Corrective Action by the Procurement Officer.

The following address the bases submitted for protest by the Protesters, applying the standards of review and burdens of proof outlined above.

Protest Issue #1: AHCCCS failed to establish a weighting and scoring methodology until after proposals were opened and being evaluated.

The Protesters each claim that AHCCCS failed to establish the relative weighting of its solicitation criteria and the scoring system it would use until *after* the proposals had all been opened and evaluations were underway. This claim is factually incorrect.

Instead, on August 1, 2023, AHCCCS publicly issued the RFP. At that time, Section H, Instruction to Offerors, ¶ 8 “Evaluation Factors and Selection Process” (p. 5) 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.” The Protesters claim that AHCCCS did not finalize the scoring methodology and weighting criteria until November 15, 2023, over a month past the opening of the proposals.

The Protesters claim that they first became aware on December 1, 2023, when AHCCCS disclosed the procurement file, that the scoring methodology was not finalized prior to issuance of the RFP. They point to AHCCCS’ Executive Summary and Final Evaluation Report, which contained an error and inaccurately noted: “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.” See Procurement File, Executive Summary, ¶ Scoring Methodology (p.2).

The Protesters claim that AHCCCS’ failure to finalize the scoring methodology or weighting criteria prior to the issuance of the RFP actually violated the terms of the RFP. The Protesters further note that AHCCCS declined to provide scoring or weighting details to the Offerors’ pre-submission questions submitted to AHCCCS. See Solicitation Amendment #1 (pgs. 7-8, and 11). And Protesters claim they could not have raised challenges to the scoring or weighting issues until after AHCCCS disclosed the procurement file on December 1, 2023.

AHCCCS’ Response

The Protesters’ assertion that AHCCCS failed to establish a scoring methodology and weighting criteria prior to the opening of proposals rests on a misstatement of facts regrettably overlooked in the final editing for page 2 of the Executive Summary. However, the Protesters should logically have questioned the accuracy of the Executive Summary statement because the time period it references – “October 2, 2023, through November 15, 2023” – was actually the dates over which the evaluations occurred for the narrative submissions and the oral presentations. See ALTCS E/PD RFP No. YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000029-0076); see also Consensus Meetings (AHCCCS000077); see also August 2, 2023, Scope

Team meeting minutes (AHCCCS00041).² Those evaluations could not have happened without use of an established scoring methodology, and the procurement file records reflect the Evaluation Team members received training on the evaluation methodology on October 3, 2023 (see ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000029-0076)). Thus the Protesters were able to determine that the Executive Summary statement was a mistake.

Moreover, the establishment of the scoring methodology and submission requirement weighting before the receipt and opening of proposals is confirmed through both the statement at Section H, paragraph 8 of the RFP and in other contemporaneous records from the procurement file. For example, the procurement records show that AHCCCS developed the RFP between August 2, 2022, and June 12, 2023, which included solidifying the scoring and evaluation methodology. Also of significance, the Protesters had access to records of the meetings of the Scope Team. Those records establish that between July, 10, 2023, and September 21, 2023, the Scope Team held the following meetings to discuss, among other things, finalizing and locking down the scoring methodology and weighting criteria utilized in this RFP:

- **On July 10, 2023**, the Scope Team discussed finalizing the Evaluation Teams and the “Lock Down Date for Scoring Tools is 9/25;”³
- **On July 19, 2023**, the Scope Team discussed: finalizing questions on narratives, broad categories, the “initial Meeting for documenting Criteria & Leads...” for “each Narrative/Cost Bid/Oral Presentation to assist evaluation team with discussing and documenting the categories and criteria,” and “Start discussion on Points/Weighting... Initial Draft Completed;”⁴
- **On July 20, 2023**, the Scope Team records show they discussed: the “Finalized [scoring] Points/Weighting,” and sending the finalized “Scoring (Points-Weighting)” to the RFP Consultants for their review and/or feedback;⁵
- **On July 26, 2023**, the Scope Team discussed: the approved “Review Finalized Points/Weighting Consultant Feedback,” the approved “Scoring (Points-Weighting), “Bring Doc to Exec for approval on 8/2,” and the approved “EPD RFP Broad Categories Tracker-PHPG Consultant input;”⁶
- **On August 2, 2023**, the Scope Team discussed: the approved “Review Finalized Points/Weighting Consultant Feedback,” the “Release of the RFP on 8/1/23,” the “Bids are due by October 2nd,” the “Oral presentations the week of 10/23/23-10/30/23,” the “Scoring from 10/03/-11/15/23,” and the Award on “December 13th;”⁷
- **On September 7, 2023**, the Scope Team discussed that the “Lock down of all documents is scheduled for 9/25/23,” including the “Overall Scoring Tool and Scoring Tool Narrative;”⁸ and

² After the announcement of the award decision under the RFP, the Protesters and the selected awardees have made public records requests to AHCCCS concerning records connected with the ALTCS E/PD procurement. In response, AHCCCS, through its counsel, has produced substantial to the Protesters and selected awardees records that were not included in the publicly posted procurement file. AHCCCS’s counsel has marked each page of those additional records with a sequential “Bates stamp” number, commencing with the prefix “AHCCCS000 _____”. Citations in this Decision to such numbers refer to Bates stamped pages from the records produced by AHCCCS in response to the public records requests.

³ See July 10, 2023, Scope Team meeting minutes AHCCCS000376

⁴ See July 19, 2023, Scope Team meeting minutes AHCCCS0000382

⁵ See July 20, 2023 Scope Team meeting minutes AHCCCS000383

⁶ See July 26, 2023, Scope Team meeting minutes AHCCCS000384

⁷ See August 2, 2023, Scope Team meeting minutes AHCC000411

⁸ See September 7, 2023, Scope Team meeting minutes AHCCCS000389

- **On September 21, 2023**, the Scope Team discussed the approved “Overview of evaluation process” and the approved “Overall Scoring Tool.”⁹

The procurement records further confirm that after establishing the scoring methodology and weighting criteria, the Scope and Evaluation Teams’ original internal deadline to “lock down” the scoring methodology and weighting criteria was September 25, 2023. See July 10, 2023, Scope Team meeting minutes (AHCCCS000376). AHCCCS took three additional days to finalize and lock down the scoring methodology and weighting criteria, but as reflected accurately in the RFP Instructions to Offerors, the AHCCCS Scope Team and Evaluation Team had established final, “locked-down” evaluation processes, along with the final “locked down” scoring tools/templates methodology and scoring training slide decks by September 28, 2023. See Procurement File, Evaluation Process Overview-Overview of RFP Evaluation Process (p. 1). It is AHCCCS’ long-standing practice and a fundamental tenet of its procurement operations to ensure all scoring methodology materials are finalized and locked down prior to proposal due dates. AHCCCS has adhered to this long-standing practice for this RFP.

The above-cited Scope Team meeting minutes show that, contrary to the misstatement in the Executive Summary document, AHCCCS personnel had actively established and locked down the approved points and weighting prior to receiving the Offerors’ proposals on October 2, 2023, and thus were prepared prior to proposal submission to apply a final evaluation and 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, as the RFP indicated. See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, Instruction to Offerors, ¶ 8 “Evaluation Factors and Selection Process” (p. 5); see also Procurement File, Evaluation Process Overview, ¶ Overview of RFP Evaluation Process (p. 1).

The Protesters have failed to prove that AHCCCS’ exercise of its procurement authority and actions to lock down the scoring methodology and weighting criteria for the RFP by September 28, 2023, was: (1) contrary to law, (2) arbitrary or capricious, or (3) an abuse of the agency’s delegated discretion. See, e.g., *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 3 (1973). Therefore, the challenges concerning the date by which AHCCCS procurement personnel had established the scoring methodology or weighting criteria they would use for the ALTCS E/PD procurement provide no basis to question the award decision, and must be denied as insufficient grounds for protest.

Protest Issue #2: AHCCCS failed to disclose evaluation criteria and specific scoring/weighting details.

All Protesters claim that AHCCCS should have provided the offerors additional detail regarding the evaluation criteria and specific scoring/weighting methods that would be used to evaluate and compare their proposals.

AHCCCS’ Response

The assertions that AHCCCS failed to adequately disclose prior to proposal submission required details of its evaluation criteria and scoring/weighting methodology are untimely, and therefore all such protest grounds are waived.

⁹ See September 21, 2023, Scope Team meeting minutes AHCC000390

As noted above, AHCCCS' procurement regulations require that protests related to improprieties that appear in an RFP, or in a subsequent RFP amendment, be submitted prior to the due date for the submission of proposals. See A.A.C. § R9-22-604(D)(1),(2) (incorporated by A.A.C. § R9-28-604). The Protesters' complain that details about the relevant evaluation criteria and scoring methodology were absent from the RFP and its amendments. That absence was obvious to the Protesters from the face of the RFP. A protest of such alleged facial deficiencies in a solicitation must be submitted prior to the due date for proposals, otherwise the protest ground is waived. See A.A.C. § R-22-604(D)(1),(2); *Arizona's Towing Pros., Inc.*, 196 Ariz. at 76.

Here, however, the Protesters were on express notice of the alleged solicitation deficiency from the absence of additional evaluation criteria or scoring methodology details in the RFP and its amendments. Also, some prospective offerors had submitted questions to AHCCCS in response to the initial publication of the RFP, in which they asked if AHCCCS would supply such additional details for them prior to the proposal due date. In response, AHCCCS explicitly informed all prospective offerors in its first of three RFP amendments that AHCCCS would not do so. With its publication of RFP Amendment #1 on August 15, 2023, AHCCCS repeated in four (4) separate responses to prospective offeror questions that "AHCCCS will not be providing scoring or weighting details" to offerors prior to the due date for receipt of proposals. See Procurement File, Solicitation Amendment #1 (pgs. 7-8, and 11).

Given AHCCCS' express rejection of requests for further evaluation scoring or weighting details, all the Protesters were on notice by the issuance of Amendment #1 of the RFP deficiency they now challenge. The law established in A.A.C. § R-22-604(D)(1),(2), and by the authority in *Arizona's Towing Pros., Inc.*, 196 Ariz. at 76, confirms that the Protesters had a duty to lodge any protest of AHCCCS' decision to not provide the additional evaluation scoring or weighting criteria or methods immediately, and certainly sufficiently before the due date for submission of proposals. No offeror, including the three Protesters, filed any protest until *after* the evaluations were completed and award decisions were made and published. The protests are untimely, and the Procurement Officer has no authority to excuse the Protester's waiver of these protest arguments. See also, *Fleetcor Techs. Operating Co., LLC v. State ex rel. Div. of Admin., Off. of State Purchasing*, 30 So. 3d 102, 107-08 (La. App. 1 Cir. 2009) (holding it was not error for Office of State Purchasing to fail to publish evaluation criteria and scoring system for technical proposal submissions where all offerors received the same information, and Protester was "aware that its proposal must be competitive in respect to all of the requirements of the RFP", plus the Protester had an opportunity to ask for further clarification during inquiry period but did not do so).

Even if the assertions that AHCCCS failed to provide sufficient details about the evaluation scoring and selection process were timely, they are factually incorrect and inconsistent with the governing legal standards for this AHCCCS ALTCS E/PD procurement. The Protests suggest that the failure to provide scoring or weighting details violates some legal duty AHCCCS had to the offerors, and therefore AHCCCS's decision to not provide additional scoring details was "contrary to law." But, the Protesters have not identified any controlling law that required AHCCCS to publish the additional details about its evaluation criteria and scoring methods.

As discussed above, the legal requirements for what AHCCCS must include in an RFP are limited, and are found only in A.A.C. §§ R9-22-602(A), R9-28-602. The only mention of evaluation criteria in that regulation requires that the RFP include "the factors used to evaluate a proposal", without any further elaboration requiring disclosure of underlying scoring methods, point values, or relative weighting of the factors. A.A.C. § R9-22-602(A)(4). This broadly worded instruction grants AHCCCS considerable leeway and discretion on how general or detailed to make its disclosure of the factors for evaluation. Moreover, the agency's interpretation of its own regulations is entitled to "great weight". See, e.g., *Sharpe v. Arizona Health Care Cost Containment System*, 220 Ariz. 488, 494 (App. 2009). For the ALTCS E/PD RFP, AHCCCS appropriately exercised its regulatory discretion and complied fully with a reasonable interpretation of the limited requirements of A.A.C. § R9-22-602(A)(4).

As previously stated, AHCCCS first provided in Section H ¶ 8 of RFP NO. YH24-0001 (at p. 5) that the evaluation factors for the procurement, listed in their relative order of importance, were:

1. Programmatic Submission Requirements
2. Financial Submission Requirements

The AHCCCS RFP further informed prospective offerors that the awards shall be made to responsible offeror(s) whose proposal(s) is/are determined in writing to be the most advantageous to the state based upon the evaluation criteria. See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H at ¶ 8 “Evaluation Factors and Selection Process.” (citing A.R.S. § 36-2903, *et. seq.*)

Adding even more detail, the RFP next informed Offeror(s) that, with the exception of past performance issues, AHCCCS would only score and evaluate submitted proposals based upon information submitted to AHCCCS by the offerors and 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 AHCCCS’ mission and goals.” *Id.* AHCCCS informed offerors that although the award decision would be guided by the scores awarded by the evaluators, AHCCCS is not bound by evaluation scores and would make its decision based on a determination of which proposal(s) was/were deemed most advantageous to the State. *Id.*

Further, AHCCCS informed Offerors that the RFP included evaluation of narrative submission requirements, past performance, oral presentations¹⁰, and a cost bid analysis. *Id.* at Section H ¶ 20 “Submission Requirements.” AHCCCS provided Offeror(s) specific Narrative Submission Requirements, which included a designation of a couple of Narrative Submission Requirements that AHCCCS would not score during the evaluation process. See RFP NO. YH24-0001 Section I Exhibit H “Narrative Submissions Requirements.”

Given the foregoing, AHCCCS disclosed sufficient, material details that informed prospective offerors of the fundamental evaluation factors and their respective priority for purposes of evaluation, as well as the fact that AHCCCS had a scoring methodology to use with those evaluation factors, and that the scoring methodology was established to evaluate an offeror’s ability to provide cost-effective, high-quality contract services in a managed care setting and in accordance with AHCCCS’ established mission and goals. Finally, AHCCCS also informed the prospective offerors that AHCCCS was invoking the “most advantageous to the state” standard for final award decisions. The combination of the evaluation process objectives and details the RFP did disclose provided more than the basic “factors used to evaluate a proposal” required by the AHCCCS regulation. There is no basis to claim that AHCCCS acted contrary to law by structuring and limiting its disclosure of scoring and weighting details the way it did.

Nor was the decision to not disclose all details of the scoring methodology somehow arbitrary and capricious. AHCCCS elected not to require disclosure of such details in its RFPs because highly detailed listing of scoring criteria can lead to offerors trying to “game” the process and focus their proposals on supplying information for the factors capable of earning them the most possible points while shorting their responses to low-value submission factors. The regulatory requirements at A.A.C. § R9-22-602(A) grant AHCCCS the authority to protect against such gamesmanship and ensure a more authentic representation of the offeror’s proposed solution to AHCCCS’ needs, mission and goals. The balance in scoring methodology details struck here was

¹⁰ The scoring of Oral Presentations is addressed in its own section below because of the specific challenges to the scoring or Oral Presentations.

reasonable and legally authorized. There was nothing arbitrary and capricious about it, and the protest challenges fail to prove any improper agency action, even if they had not been untimely filed.

Protest Issue #3: AHCCCS failed to disclose that it would score oral presentations.

Protesters Mercy Care and Banner claim that AHCCCS erred by failing to provide notice to offerors that AHCCCS evaluators would score the Oral Presentations the RFP required the offerors to provide. [See *e.g.*, 12-21-2023 Banner Protest Letter at p. 15 (“No mention is made of scoring, evaluating, or weighting oral presentations, and nothing even hints at that possibility, ...”); 12-20-2023 Mercy Care Bid Protest (“The RFP gave no indication that the oral presentation would be scored, and, indeed, it was not ‘designated for scoring’ according to the RFP’s own terms.”)].¹¹

AHCCCS’ Response

The assertion by Mercy Care and Banner that AHCCCS erred because it provided offerors no notice, nor any indication, that AHCCCS evaluators would score their oral presentations presents no basis for finding that AHCCCS acted contrary to law. After all, the argument that AHCCCS was somehow required to include specifics about scoring the oral presentations in the RFP parallels the broader arguments above that AHCCCS was required to disclose more about all aspects of how it would weigh the importance of various proposal submission components and how it would score the proposal submissions. Just as nothing in the statutes or regulations governing this AHCCCS ALTCS E/PPD procurement required more than AHCCCS actually provided the offerors about evaluation and scoring, there is nothing in any relevant statutes or regulations requiring AHCCCS to provide details about how the Oral Presentations would be scored.

Moreover, the two Protesters’ arguments that the RFP gave no indication at all that Oral Presentations might be scored is factually incorrect. Rather, the RFP at Section H, Instructions to Offerors, set the submission requirements for all offerors, and included, among other mandatory submission requirements, “Oral Presentation Information” at item B12. In that same RFP section, AHCCCS advised that it would hold oral presentations in a strict, monitored environment for the purpose of evaluation. The RFP, and subsequent notices of the Oral Presentation scheduling sent to Mercy Care and Banner, explicitly informed all offerors that “[p]resentations may be audio-taped by AHCCCS **for the Agency’s use in the evaluation process.**” (P. 18) (emphasis added); see also Procurement File, Oral Presentation Notifications. Factually, no offeror can claim any surprise that their Oral Presentations were part of the submissions by which AHCCCS’ procurement personnel would evaluate their respective RFP submissions and compare the strengths or weaknesses of their submissions against the relative strengths or weaknesses of the other offerors’ submissions.

Mercy Care’s and Banner’s assertions that RFP NO. YH24-0001 Section H, gave them no indication whatsoever that AHCCCS might score oral presentations, is also not credible. Even if the RFP had not created such

¹¹ Health Choice did not argue that it lacked notice that Oral Presentations were a scored item. This is likely because Health Choice performed well on the Oral Presentations. Instead, Health Choice argues it lacked notice of specific weighting and scoring information, and that its success relative to its Oral Presentation should have carried over to the scoring of its written submission requirements. Health Choice’s argument about lack of notice of specific weighting and scoring information, as discussed under Protest Issue #2 herein, is deemed an untimely and unmerited protest. Health Choice’s argument about AHCCCS’ lack of consistent scoring is addressed under Protest Issue #9 herein. Health Choice’s argument that its scores for its written submissions should reflect the same level of superiority over its competitors as its Oral Presentations scores did offers no facts that would justify such a conclusion.

a detailed oral presentation process, it would make little sense for an offeror to assume that a mandatory submission component is just a throw-away and will not be considered for evaluation or scoring purposes at all, absent an express indication AHCCCS intended so.

In addition, any such assumption here would be logically impossible. In the RFP, AHCCCS detailed the environment, use, and strict requirements for the oral presentations, and AHCCCS informed offerors that presentations may be audio recorded specifically for use in the “evaluation process.” So, the offerors were on express notice that the oral presentations were subjects of the “evaluation process.” Given that the RFP further advised the offerors 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 AHCCCS mission and goals,” See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H at ¶ 8 “Evaluation Factors and Selection Process”, the offerors were all on express notice that the “evaluation process” including oral presentations would also be subject to a “scoring methodology” built to evaluate matters that would be demonstrated through the oral presentations. There is no credible argument under these circumstances that Mercy Care and Banner had no idea their oral presentations might be scored.

The following are additional specific requirements expressed by the RFP that would have led reasonable offerors to understand their oral presentations were part of the evaluated RFP submissions:

- AHCCCS required pre-submittal of six individuals responsible for the Offeror’s oral presentation from each offeror. AHCCCS required those submittals be supplemented if an offeror needed to modify its attendees;
- AHCCCS recommended offerors include individuals with expertise in Medical Management, Case Management, and Quality Management as part of the presentation team. Those areas were critical portions of the “programmatic” submissions listed as one of the two primary evaluation factors in the RFP;
- AHCCCS held oral presentations in a controlled environment which forbid the usage of pre-prepared materials or presentations, laptops during presentation, cell phones, restricted communications to those outside of the oral presentation and preparation rooms, and required Offerors to provide their own internet connection;
- AHCCCS informed Offerors of the strict, controlled environment within the RFP and within the Oral Presentation Notifications AHCCCS sent each offeror;
- AHCCCS informed Offerors that they were forbidden from communicating to those outside of the oral presentation environment during both presentation and preparation phases; and
- Finally, AHCCCS monitored Offerors at all times during the oral presentation process, including during presentation preparation, to ensure compliance with their strict, controlled environment.

The foregoing structure did not amount to an impromptu “pop quiz” as suggested by the Protests. Rather, as expressed in great detail to the offerors through the RFP, the oral presentation phase was a test of the offerors’ ability, in a real-time setting, to impress AHCCCS with the combination of the offerors’ ability to prepare and to

sincerely and cogently delineate a plan matching AHCCCS' objectives. This is more like a classic setting in which AHCCCS set up a test, and the offerors would expect that their responses to the test would be evaluated in detail, subject to AHCCCS's established evaluation and scoring methodology.

The Procurement Officer notes that Banner and Mercy Care have participated in prior AHCCCS procurements that included oral presentations that were evaluated and scored. Also, by their actions in this procurement, Mercy Care and Banner confirmed they both understood the importance of the Oral Presentations. Mercy Care submitted to AHCCCS its list of presenters, as required, which included: its Deputy Chief Executive Officer; its Chief Clinical Officer, its Vice President of Quality Management, and various other directors or administrators. Mercy Care even listed its President and Chief Executive Officer as alternates. Similarly, Banner submitted its Chief Executive Officer, Chief Operations Officer, Chief Medical Officer, and various other administrators and directors to participate in the Oral Presentations. Banner's and Mercy Care's suggestions that they did not think the Oral Presentations would have any impact on their scoring is undermined by the fact that they engaged some of their highest-level executives to provide the oral presentations required by the RFP.¹²

Further, even if Banner's and Mercy Care's lack of notice claim was credible, the claim would provide no basis to set aside the contract awards. As noted above, a Protester claiming the agency relied on unstated evaluation criterion "must show that: (i) 'the procuring agency used a significantly different basis in evaluating the proposals than was disclosed; and (ii) the protester was prejudiced as a result-that it had a substantial chance to receive the contract award but for that error.'" *NEQ, LLC v. United States*, 88 Fed.Cl. 38, 48 (2009) (quoting *Banknote Corp. of Am., Inc. v. United States*, 56 Fed.Cl. 377, 387 (2003)), *aff'd*, 365 F.3d 1345 (Fed.Cir.2004). In other words, Mercy Care and Banner cannot succeed on this argument without showing that because AHCCCS failed to inform them that it would evaluate and score their oral presentations, they were actually prejudiced and eliminated from an award they otherwise had a substantial chance to receive. *See also, Weston Sols., Inc.*, 95 Fed.Cl. at 322.

But Banner and Mercy Care have offered no proof of actual prejudice arising from the alleged failure to inform them that AHCCCS would include their oral presentations in its scored evaluation. Neither Protester claims they would have structured or performed any differently in their oral presentations if they had more definitive notice that AHCCCS would score those presentations. Nor do Mercy Care and Banner claim that AHCCCS conducted the oral presentations in a manner other than what AHCCCS indicated it would use in the RFP and Oral Presentation Notifications. *See e.g., Labatt Food Serv.*, 577 F.3d at 1378 (requiring a Protester who claims agency relied on unstated evaluation criterion show the agency used a different basis in evaluating the proposals than disclosed). Finally, given the very specific structure and requirements the RFP set for the oral presentations, and the fact that Mercy Care and Banner enlisted their most senior executives to execute those presentations, it is not credible that the companies either did not take the presentation seriously, or that they would have radically changed and improved their oral presentations if they had just known that they were being scored. Because Banner and Mercy Care have made no attempt to show actual prejudice connected to this issue, their arguments about the evaluation of oral presentations present no valid grounds for protest or relief.

Protest Issue #4: AHCCCS erred by utilizing a flawed scoring system.

¹² Protester Banner suggests that Ms. Michele Barnard was not properly qualified per the expectations of the RFP to present for awardee Health Net. However, Banner has not provided adequate proof of its allegations, nor any proof of how Ms. Barnard's participation actually prejudiced Banner. Therefore, the allegation about Ms. Barnard provide no viable grounds for protest.

The Protesters make several challenges to the scoring methodology used by AHCCCS. They allege:

- AHCCCS erred in allowing Scope Team members to also participate as Evaluation Team members after the Scope Team knew what the relative scoring weights were for the scored proposal items;
- AHCCCS erred by departing from the scoring methodology and weighting of factors it has used historically in past, similar procurements, especially because they placed so much weight on the oral presentations and failed to weigh past performance as heavily as AHCCCS had in former procurements; and
- AHCCCS erred by using a scoring tool whose language does not match the RFP criteria.

AHCCCS' Response

The Protesters make a variety of challenges to the scoring values actually assigned to various aspects of the proposals. Yet, not all Protesters agree on why the scoring values are problematic, or which aspects of them constitute a procurement deficiency. In essence, these complaints appear to be structured in large part to target the aspects of the scoring system whose alteration or elimination would provide either the most relative benefit to the Protester making the argument, or that would have the most negative impact possible on scores assigned to the successful awardees, or to achieve both and catapult the complaining Protester's score ahead of or close to the scores of the awardees. In short, these protest grounds appear manipulated for effect.

In addition, each of these protest grounds suffers an identical, critical deficiency. Again, none of the Protesters have demonstrated specific prejudice that could have changed the outcome of the procurement for them and earned them a place in line for award. Without that sort of showing, these protest arguments provide no basis for disturbing the awards.

Addressing the merits of each of these arguments, they again are factually inaccurate and frequently speculative. For instance, the Protests include an argument that allowing Scope Team members to also serve as Evaluation Team members for individual scored items undermines the integrity of the evaluation process and allows the dual-purpose Scope Team members to manipulate scoring in favor of or against certain proposers because those team members would know the score values and relative score weights of the proposal aspects they were asked to evaluate. But this argument rests on pure speculation. Nowhere has any Protester shown any evidence that any such manipulation actually happened, or what impact it had on the scoring of their proposal or other proposals. Again, without proving such negative impacts actually altering the award outcome, the argument does not create a valid ground for protest.

Moreover, the evaluation and scoring process used here would not logically allow the sort of manipulation the Protesters raise the specter of. *See* ALTCS E/PD RFP NO. YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000029-0076), *see also* Consensus Meetings (AHCCCS000077). First, only eight of the 22 evaluators were on the Scope Team. *Id.* (at AHCCCS000042-0057); *see also*, Procurement File, Executive Summary, ¶ Evaluation Process (pgs. 2-3). The weighting and points were not communicated as part of the scoring training, so the other 14 evaluators conducted evaluations without knowledge of the scoring values being impacted by their consensus evaluations and rankings of the Offerors on individual proposal elements. *Id.*, and *see*, Consensus Meetings (AHCCCS000077).

There were eight Narrative Submission Requirements (approximately 30 pages for each of five offerors) with various elements of each subject to evaluation; a cost bid (with initial and best and final offer evaluations for each of five offerors), and two oral presentations for each of five offerors. *See* ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000042-0057). There were separate evaluation teams for each scored Narrative Submission Requirement, a separate evaluation team for the Cost Bid, and a separate evaluation team for the two oral presentations. *Id.*, *see also* Consensus Meetings (AHCCCS000077). Only 7 of the 22 evaluators were on more than one evaluation team. *Id.*; *see also* Procurement File, Executive Summary, ¶ Evaluation Process (p. 2), *see also* Consensus Meetings (AHCCCS000077).

Furthermore, the evaluations relied on consensus efforts using multiple evaluators for each scored element of the proposals, facilitated by the AHCCCS contracted consultants to encourage full, individual participation in the consensus discussion and development process. *See* Procurement File, Evaluation Process Overview, Overview of RFP Evaluation Process ¶ Consensus Evaluation (pgs. 1-2); *see also*, Consensus Meetings (AHCCCS000077). Even if the procurement had used just averages of pre-consensus discussion individual scores for each scored proposal element, it would have been nearly impossible for even a dual Scope and Evaluation Team member with malicious intent to manipulate the scoring to materially benefit or harm a particular offeror. *Id.*; *see also, id.*, ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000060-0068); *see also* Consensus Meetings (AHCCCS000077). And, once the evaluation process moved to the development of consensus rankings, the theory that individual Scope Team members could somehow control the consensus outcomes on their teams is even less credible. Finally, the Protesters have not identified any evidence that any such manipulation was attempted, let alone that it succeeded. The Protesters have provided no proof that the use of Scope Team members on evaluation teams created any improprieties in the evaluation scoring process, or created any sufficient prejudice to any of the Protesters.

The Protests also suggest that all scoring may be called into question, but offer no justification for casting such suspicion on the AHCCCS evaluators. Rather, the procurement record shows that during the October 3, 2023 Scoring Training, all of the Scope Team and Evaluation Team members were trained on, among others things, their individual responsibilities and roles in the evaluation process. That training explained that the evaluation process included individual evaluator consideration and assessment of potential ranking of proposals for the proposal element being evaluated by the evaluation team to which the individual evaluator belonged. The training explained that the evaluation process continued thereafter with the consensus evaluation and ranking process from which the final rankings (and correlated scores) for the various proposals on each evaluated proposal element would be derived. For example, the training explained:

- “**You** have been chosen because of your subject matter expertise and **your** knowledge. Do not worry what someone else may think or how they may interpret the response;”
- “Rank each of the offerors how **you** believe they scored 1-5;”
- “All areas will be discussed during your Consensus Meeting(s);”
- “Utilize only your assigned scoring tool;”

- “You will be performing **your** individual initial review based on your interpretation of what has been submitted by the Offers;”
- “**DO NOT** be concerned with what anyone else may think or how anyone else may interpret the submission;”
- “Remember the purpose of doing an individual review is for your perspective;”
- “Enter your notes (strengths/weaknesses) of each Offerors response within the column of the Tool;” and
- “Provide your ranking based on Your interpretation.” (emphasis original)

See ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023, (AHCCCS000060, and AHCCCS000062). Thus, the training repeatedly emphasized the value and individual responsibilities of each evaluator, counteracting any possibility that a single evaluator, intending to manipulate the scoring, might somehow control scoring on any individually scored element.

Furthermore, the evaluation process limited each evaluator to evaluating only those areas to which they were assigned, and gave them no opportunity to influence scores outside those limited areas. *Id.* (at AHCCCS000042-0068), and see Consensus Meetings (AHCCCS000077). The evaluation process also invoked the consensus evaluation and ranking model, requiring detailed and robust discussions amongst the various evaluators for a scored item, and expressly limited the evaluators’ considerations to the proposal material submitted, with no consideration to the points value at stake for the relevant subject. See Procurement File, Evaluation Process Overview, Overview of RFP Evaluation Process ¶ Consensus Evaluation (pgs. 1-2); see also, Consensus Meetings (AHCCCS000077). This consensus process has been used repeatedly by AHCCCS for past procurements through which it has awarded contracts for awardees to provide managed care organization services. Not only were supervisory individuals and evaluators responsible for the work of the evaluation team members here familiar with the roles and responsibilities elaborated by the formal Scoring Training, but the Procurement Officer’s personal experience with such prior consensus evaluation processes provides substantial confidence that the evaluation process was neither subject to, nor influenced by, untoward or unfair individual evaluator manipulations.

Additionally, the Consultants’ process for facilitating consensus ranking would not allow such manipulation to occur. *Id.* Through the consensus evaluation meeting(s), the assigned team members established a consensus ranking for each requirement they were evaluating (narrative submission requirement, oral presentations, cost bid), which was then approved and signed by each evaluator for that element, and then incorporated into a consensus ranking document. *Id.*; see also, *id.*, Consensus Meetings (AHCCCS000077). Also, the Scoring Training made clear that the Consultant’s role included making sure all voices were heard and ensuring all team members genuinely endorse the final ranking and rationale write up. See Procurement File, ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000067). The guided and interactive nature of such an evaluation process would expose someone who was not genuinely engaged in the consensus process but instead out to assist or harm a particular offeror. *Id.* (at AHCCCS000042-0068).

The foregoing instructions, training and procedural safeguards make the scoring system used here reasonable and appropriate, and make it especially inappropriate for anyone to second-guess the specific reasoning of the rankings that resulted from the consensus process. *Beta Analytics Int'l, Inc. v. United States*, 67 Fed. Cl. 384, 400-401 (Fed. Cl. 2005) (rejecting Protester arguments over failure of evaluators to detail their specific reasons for scores as unhelpful to the court because “this involves precisely the type of second-guessing about the [evaluation and scoring] minutiae that Courts are ill-qualified to perform.”); *see also, Frawner Corp. v. United States*, 161 Fed.Cl. 420, 450 (Fed. Cl. 2022 (citing *E.W. Bliss Co. v. United States*, 77 F.3d 445, 449 (Fed. Cir. 1996) (holding court will not “second guess” agency’s “technical ratings” which “deal with the minutiae of the procurement process”))).

The allegations that AHCCCS erred by departing from the scoring system, and the relative scoring importance or weights, that AHCCCS has used in past procurements are equally insufficient to overturn the award decisions here. Those particular objections – especially those aimed at adding substantial point emphasis for past performance issues - seem most designed to capture a specific advantage for the complaining Protester or inflict specific point damage on an awardee. However, nothing in the AHCCCS regulations or statutes requires in any way that AHCCCS forever lock itself into the exact same evaluation criteria and weighting and scoring systems it has used in the past. In fact, doing so just for the sake of consistency over the years suggests an arbitrary policy itself and undermines the value of the procurement process “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.” Nothing in the AHCCCS statutes or regulations, and nothing in the RFP, provided the Protesters reason to believe that AHCCCS would use exactly the same evaluation considerations, weighting of proposal submission requirements, or point distribution methodology it had used in specific, past procurements. Instead, given the applicable law and the discretion it vests in the procuring agency, that belief would not be reasonable.

Moreover, the Protesters have a mistaken perspective on what AHCCCS has or has not done for scoring on other similar procurements in the past. Past performance history has only recently been evaluated as part of managed care procurements by initially adding a past-performance submission requirement in the ACC RFP NO. YH19-0001 under Narrative Submission Requirement #18. These documents were also on the AHCCCS website at the time the RFP was issued - (<https://azahcccs.gov/PlansProviders/Downloads/RFPinfo/YH19/ACCRFP11022017.pdf>). There is no embedded history of particularized weighting and scoring of offerors’ past performance in prior procurements for similar services that entitles the Protesters to demand here that past performance, or any other factors or evaluated elements, be weighted or allocated points differently than they were here.

Also, the percentage of points assigned to the Programmatic factor in the ACC RFP NO. YH19-0001 (90%) procurement closely aligns with the Programmatic factor weighting in this procurement. Additionally, ACC RFP NO. YH19-0001 Narrative #18 and ALTCS E/PD NO. YH24-0001 B10 both evaluated the offeror's operational compliance reviews required under federal regulation. In the current procurement, RFP past performance was evaluated under B10 (35 points) and B11 (20 points). *See* Procurement File, Evaluation Process Overview-Overview of Overall Scoring Tool (p. 3); *see also*, ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000048-0049); *see also*, Procurement File, Overall Scoring Tool. And, the current ALTCS E/PD solicitation did provide substantial emphasis on prior performance experience. *Id.* Narrative Submission Requirement B10 named the Operational Review documents that would be utilized for evaluation for Incumbent EPD Contractors, Incumbent non-EPD Contractors, and non-Incumbent Offerors. *Id.* These documents were also available on the AHCCCS website at the time the RFP was issued- <https://azahcccs.gov/Resources/OversightOfHealthPlans/OpReviews.html>

Also, in this case, LTSS-specific experience was included as an evaluation consideration for Narrative B10 as relayed in the B10 Ranking and Rationale document where it states: *"Offeror's operational review was for the ALTCS E/PD Program, which includes a comprehensive LTSS benefit package,"* resulting in a higher overall consensus score for those offerors who were Incumbent EPD Contractors. See Procurement File, EPD RFP YH24-0001, Scoring Tool, Final Ranking and Rationale – B10.

It is AHCCCS' standard practice to identify the overarching factors that will be evaluated and it is not required to, and does not, disclose the relative weighting of such factors with issuance of the RFP. AHCCCS has not deviated in the past decade or more from evaluation practices used in past procurements for similar services. AHCCCS is neither required to consider nor precluded from considering past performance, and the Agency has the discretion to assign the weight it deems to be appropriate. In accordance with A.A.C. § R9-22-602, AHCCCS is required to include, among other things, the factors used to evaluate a proposal. See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, Instructions to Offerors, ¶ 8 "Evaluation Factors and Selection Process" (pgs. 5-6). Scoring method, specific numerical weighting, and/or other detailed scoring information is not required. Thus, the Protesters' assertions that somehow the current RFP abandoned a historically recognized emphasis on the offerors' past performance of similar contracted services is factually incorrect. See EPD RFP YH24-0001, Scoring Tool, Final Ranking and Rationale – B10, see also Overall Scoring Tool.

Finally, the argument that the scoring tool deployed in this procurement did not match the RFP criteria is not accurate. See Overall Scoring Tool. All Scoring Tools included evaluation considerations for each submission requirement, including Narratives, Oral Presentations, and Cost Bid, which were developed and finalized prior to the submission of proposals on October 2, 2023. The finalization of evaluation considerations resulted from evaluation team RFP Scoring Pre-Discussion meetings in which team members reviewed their assigned Submission Requirement and associated Scoring Tool. The teams worked to confer on the RFP's submission requirements and to develop, document, and finalize the evaluation considerations consistent with the RFP requirements. The evaluation considerations utilized on the scoring tools aligned with the RFP criteria as described in RFP Section H, Instructions to Offerors.¹³ See EPD RFP YH24-0001 Scoring Tools (AHCCCS000078-0132); see also, Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, Instructions to Offerors ¶ 8 "Evaluation Factors and Selection Process" (pgs. 5-6); see also, ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000029-0076); see also Consensus Meetings (AHCCCS000077); see also, Procurement File, Evaluation Process Overview, Overview of RFP Evaluation Process ¶ Consensus Evaluation (pgs. 1-2).

The Protesters have failed to prove that AHCCCS's exercise of its procurement authority and its development, adoption and utilization of the evaluation considerations, weighting and scoring methodology for this RFP was: (1) contrary to law, (2) arbitrary or capricious, or (3) an abuse of the agency's delegated discretion. See, e.g., *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz. App. 1, 3 (1973). Therefore, the challenges concerning AHCCCS' evaluation, weighting and scoring system for the ALTCS E/PD procurement do not present valid grounds for protest and provide no basis to question the award decision.

Protest Issue #5: AHCCCS erred by using a "forced ranking" system.

¹³ The Protests also argue that the evaluation process used here failed to adequately or appropriately consider the risk or reality of service disruptions to ALTCS E/PD eligible members that could result from a change in the incumbent ALTCS E/PD managed care contractors. For the reasons explained in the discussion under Protest Issue #9 below, such allegations are factually inaccurate, rest on unsubstantiated assumptions about service disruption risks and negative impacts on ALTCS E/PD eligible members, and do not provide a valid basis for protest.

The Protesters' challenge the ranking system used by AHCCCS in this RFP. They allege:

- That AHCCCS erred when it adopted and used a ranking system during evaluations that allowed evaluators to rank order each offeror on each scored proposal element, and then offered the number 1 ranked proposal 100% of the total points available for that element, the number 2 ranked proposal 80% of the total available points, and so on with the number 5 ranked proposal being assigned only 20% of the total points available for the relevant scored proposal element; and
- That this ranking system arbitrarily and unfairly skews perceptions of the true differences in the quality and responsiveness of the proposals because it means that a proposal nearly equal to higher ranked proposals can appear deserving of far fewer points and therefore materially inferior when that was not the evaluators' conclusion.

AHCCCS' Response

The Protesters have independently introduced the term "forced ranking" in their protest documents. "Forced ranking" is not a term defined by or used by AHCCCS, nor in any relevant Arizona law. The consensus ranking methodology used in this procurement is consistent with what has been used by AHCCCS in prior managed care procurements. The Protesters' position regarding the ranking and point allocation system misconstrues how the evaluators were trained to use the system, and how the system actually worked in its application. See Procurement File, Evaluation Process Overview-Overview of Overall Scoring Tool (pgs. 3-6)); see also ALTCS E/PD RFP No. YH24-0001, Scoring Training, October 3, 2023 (at AHCCCS000048-0049); see also, Procurement File, ALTCS E/PD RFP No YH24-0001, Section H, Instructions to Offerors, ¶ 8 "Evaluation Factors and Selection Process" (pgs. 5-6); see also, Procurement File, Overall Scoring Tool.

The ranking and point allocation system did not require that the evaluators assign every offeror a different rank on each evaluated and scored proposal element. See Procurement File, Evaluation Process Overview, ¶ Consensus Evaluation (pgs. 1-2); see also, *id.*, Evaluation Process Overview-Overview of Overall Scoring Tool (pgs. 3-6); see also, *id.*, Overall Scoring Too; see also, *id.*, ALTCS E/PD RFP No. YH24-0001, Scoring Training, October 3, 2023, (AHCCCS000042-0068); see also, Procurement File, Consensus Meetings (AHCCCS000077). Instead, the ranking and scoring system, and the instructions given to the evaluators, allowed them to consider similarly evaluated proposals as "tied", with a shared ranking and identical distribution of points on any ranked and scored submission requirement. *Id.* Under the ranking approach AHCCCS used, the evaluators were free to rank every one of the five proposals as equal on any of the evaluated and scored submission requirements. *Id.* In fact, the procurement record reflects that the evaluators took that training seriously and, on several occasions, evaluators provided different offerors equal ranking and points for a given proposal requirement. For instance, in the final rankings under Narrative Submission Requirement B6, the evaluation team members assigned the proposals of APIPA and Banner an equal final rank of 3. The evaluators of the second oral presentation question similarly assigned the proposals of Banner and Mercy Care equal final ranks of 4. Also, the records of the initial individual evaluator rankings for narrative submission requirement B8 show that one of the three evaluators assigned BCBSAZ and Health Net identical ranks of 4.

The selected RFP evaluation process further allowed AHCCCS to rank proposals as closely ranked or even tied across many, or even all, the scored proposal submission requirements. The RFP itself confirmed that this option existed, as it offered additional factors that AHCCCS could consider to determine the proposal whose selection was in the best interest of the State where the evaluation scoring resulted in negligible total point differences between two or more competing proposals. These additional factors included:

- “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;” and
- “Administrative burden to the Agency.”

See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, ¶ 8 “Evaluation Factors and Selection Process” (p.5-6). Thus, there is no proof that the ranking approach forced the evaluators to create point differentials reflecting material differences in proposal value or quality even when the evaluators saw no such difference between particular proposals. See Procurement File, Evaluation Process Overview, ¶ Consensus Evaluation (pgs. 1-2); see also, *id.*, Evaluation Process Overview-Overview of Overall Scoring Tool (pgs. 3-6); see also, *id.*, Overall Scoring Tool; see also ALTCS E/PD RFP YH24-0001, Scoring Training, October 3, 2023, (AHCCCS000042-0068); see also, Consensus Meetings record (AHCCCS000077). The evaluators were instead allowed to do just the opposite and assign equal ranks (resulting in equal scores) if they truly felt that any proposal was equal to another on a given scored proposal submission requirement.

The procurement record reflects that AHCCCS procurement personnel and the AHCCCS Consultant for the ALTCS E/PD procurement conscientiously trained the evaluators that they had discretion and could rank (and thereby score) relatively equal proposals identically. See *id.* The Consultant took care to remind the evaluators through the consultant facilitation of the consensus evaluation discussions and ranking exercises of their power in that regard. Each proposal was scored based on required submissions for the Programmatic and Financial submissions detailed in RFP Section H, Instructions to Offerors. See Procurement File, Evaluation Process Overview-Overview of Overall Scoring Tool (pgs. 3-6); see also, *id.*, Overall Scoring Tool. The Programmatic and Financial Submissions were scored on a statewide basis. *Id.* The Offerors had the opportunity to earn/score a maximum total of 1000 points as follows: **Programmatic Submissions:** (1) Narrative Submission Requirements: B4 through B11, for a maximum of 610 points; (2) Oral Presentations: Oral Presentation 1 & 2, for a total maximum of 290 points; and **Financial Submission:** (3) Capitation Agreement/Administrative and Case Management Cost Components Bid, for a maximum of 100 points. *Id.*

In general, when the evaluators performed their consensus rankings, the most favorable rank (1) was given to the best submission for the requirement being evaluated using the evaluation considerations established on the relevant scoring tool, and the next most favorable rank (2) was given to the second most favorable

submission applying that same approach.¹⁴ The ranking process continued in this same manner until all offerors' proposals were ranked on the relevant evaluation element. *Id.* The rankings on each submission element were then given by the DHCS Contract and Policy Administrator to the DBF Finance Team for input into the Ranking Summary tab in the ALTCS E/PD Overall Scoring Tool file. *See* Evaluation Process Overview- Overview of Overall Scoring Tool (p. 4). In addition, for the Cost Bid, a Best and Final Offer (BAFO) process was utilized. *Id.* The ALTCS E/PD Overall Scoring Tool file utilized an Excel model for computing the overall RFP scores and contained the Ranking Summary, and a Scores Statewide worksheet. *Id.* The worksheet had a column for each offeror and a series of rows for each ranked/scored submission element. The rows for each submission element were programmed to retrieve and display each offeror's rank from the Ranking Summary tab and calculate the score for the specific submission requirement. *Id.* The following formula was used to calculate the individual score of an offeror for each scored submission element: "Maximum Points/Number of Offerors X Offeror's Inverse Rank = Score." *Id.*

The foregoing formula counted the number of offerors, and the maximum points for each scored submission element were then divided by the number of offerors. *Id.* The quotient was then multiplied by the offeror's inverse rank resulting in each offeror receiving a proportion of the points consistent with their consensus rank for the scored element. *Id.*

All points were rounded to the second decimal place. The following is a hypothetical example of how the ranking/scoring process worked. Assume that a scored element was worth a maximum of 100 points. The 100 points would be divided by the five offerors, resulting in the quotient 20. Assuming that the evaluators did not find any of the offerors tied on the evaluated element, the highest ranked (number 1) proposal would receive 5 x 20 points, or a total of 100 points for the element. Likewise, the lowest ranked (number 5) proposal would receive only 1 x 20 points, or a total of 20 points for the element. *See id.* (at p. 5); *see also* Overall Scoring Tool. The Scores Statewide worksheet calculated a total score for each of the offerors' proposals by summing the points assigned to their proposals for all submission elements. *Id.*

For the Cost Bid portion of the proposal submissions, AHCCCS utilized a call for Best and Final Offers ("BAFO"), meaning the Cost Bid submissions were re-evaluated and re-ranked by the Evaluation Team(s) after receipt and consideration of the BAFO submissions. *See* Procurement File, Evaluation Process Overview-Overview of Overall Scoring Tool (p. 6); *see also, id.*, Overall Scoring Tool; *see also, id.*, APIPA – Best and Final Offer; *see also, id.*, Banner – Best and Final Offer; *see also, id.*, BCBSAZ – Best and Final Offer; *see also, id.*, Health Net – Best and Final Offer; *see also, id.*, Mercy Care – Best and Final Offer. The revised ranks were provided to the DBF Finance Team by the DHCS Contract and Policy Administrator, and entered into the ALTCS E/PD Overall Scoring Tool file to calculate the final overall scores for each offeror's proposal. *See* Procurement File, Overall Scoring Tool.

A worksheet in the ALTCS E/PD Overall Scoring Tool file labeled "Overall Points All Offerors" calculated a final Total Score by offeror. *See* Procurement File, Evaluation Process Overview - Overview of Overall Scoring Tool (p. 6). The offerors and their respective ranks for each scored submission element were also electronically populated in the Ranking Summary All Offerors worksheet of the ALTCS E/PD Overall Scoring Tool file. *Id.* The Overall Final Score worksheet retrieved the total points by offeror from the Overall Points All Offerors worksheet and a formula arranged the total points by offeror in descending order. *Id.*; *see also*, Procurement File, Overall Scoring Tool.

¹⁴ Protestor BCBSAZ Health Choice is incorrect that the ranking did not reflect how well the proposal met the RFP requirement. In fact, just the opposite, the evaluation process used here ensured that the ranking would reflect the consensus differentiated assessment by the evaluation team members of how well or how poorly a proposal addressed the submission requirement being evaluated.

The Offerors received the following respective final ranks and total scores: 1st (highest overall score) Health Net (total score of 715 points); 2nd APIPA (total score of 668 points); 3rd Mercy Care (total score of 557.50 points); 4th BCBSAZ (total score of 537 points); and 5th Banner (lowest overall score) (total score of 522.50 points). See Procurement File, Overall Scoring Tool; see also, Procurement File, Executive Summary: Overall Final Score by Offeror, and Ranking Summary for Offerors by Submission Requirement (pgs. 4-5).

The process for consensus ranking and conversion of the same to total points here did not, therefore, automatically “force” disparities amongst equally strong proposals on any scored proposal submission element. The procurement record reflects instead that the evaluators followed their training and instruction and granted proposals equal rankings, and hence equal point totals, for proposal submission elements on which the assigned evaluators determined two proposals demonstrated equally strong submissions. See Procurement File, Overall Scoring Tool; see also, *Id.*, Executive Summary: Overall Final Score by Offeror, and Ranking Summary for Offerors by Submission Requirement (pgs. 4-5). The Protesters have therefore failed to demonstrate that the ranking system ever resulted in the skewed and inaccurate perceptions of the relative strength of any proposal that the Protesters complain of.

The use of a ranking system that can result in 20 percent point spreads on individually scored proposal submission elements for proposals that were not equal in quality does not violate any standard of procurement fairness applicable under Arizona law. Moreover, the procurement record affirms that the evaluators knew they could rank equivalent proposal submissions as equals, and did so where they felt appropriate, meaning they properly followed their instructions. Plus, attempts to inquire into the individual evaluator rationale for each evaluation or ranking decision is not appropriate, as it asks the reviewing official to second-guess the discretionary decisions of evaluators who were properly trained and whose work product shows they were following the evaluation and ranking instructions in a consistent manner for all offerors. See, e.g., *Beta Analytics Int'l, Inc.*, 67 Fed. Cl. at 400-401 (confirming that such second-guessing is inappropriate for reviewing courts).

In addition, the decision to set the scoring so that relative ranking would have an easily discernible impact on point totals for each evaluated element is not improper, and removing the step in which the AHCCCS team converted final rankings on each narrative or oral submission requirement to points would not change the relative point differential between the offerors on any particular submission requirement. Selection of the point totals assigned to any individual evaluation element is a matter left to the discretion of the procuring agency. See, e.g., *Blue Cross & Blue Shield of Maryland, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 718 F. Supp. 80, 86 n. 15 (D.D.C. 1989) (court will not second guess the agency evaluation plan because “[d]ecisions as to point allocation and proper weight to be assigned to the various cost elements are matters within the discretion of the [agency], to which this Court must give due deference.”); see also *E.W. Bliss Co. v. United States*, 33 Fed. Cl. 123, 141 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996) (“[I]n negotiated procurements such as this one, “[p]rocurement officials ... enjoy a greater degree of discretion in determining which proposal is most beneficial to the Government.”) (*cited in Frawner Corp.*, 161 Fed.Cl. at 450. Here, the ranking and point scoring system were established after lengthy review and input from personnel with considerable expertise in the delivery of services required by AHCCCS for its ALTCS E/PD programs. The decision that the ranking system and point totals for each submission requirement were appropriate and is entitled to deference.

Furthermore, if all the evaluators did was stop at the rankings and assign a point total corresponding to the ranking for each proposal for each submission requirement is – i.e., 5 points for the highest ranked proposal, 4 points for second highest ranked, 1 point for lowest ranked proposal, etc. – the offerors’ respective point totals would still maintain 20% differentials based on ranks. In other words, a proposal that was ranked highest (number 1) on six submission elements would achieve a score of 30 (5 X 6) points, whereas a different proposal that

received the third highest rank (number 3) on the same six elements would score only 18 (3 X 6) points. Mathematically, the lower-ranked proposal's total score would only be 60 percent (60%) of the highest scored proposal's total score. Yet, this would reflect the same degree of point differential as the two proposals would experience applying the scoring system used here and applying a total of 100 points to each of the same submission elements. In the latter case, the highest ranked proposal would achieve 100 points per element, for a total score of 600 points. The lower ranked proposal would receive a total of 60 points per element for a total score of only 360 points. Again, the total score of the lower ranked proposal would only be 60% of the highest ranked proposal's total score.

Given the foregoing, the relative difference in point totals between the various proposals on any given scored submission requirement would have been mathematically the same if AHCCCS had never converted the ranks to points. Therefore, the argument that the method AHCCCS used to convert the consensus rankings on each scored element to a point total somehow illegitimately exaggerated the evaluators' perspectives on differences between the proposals is inaccurate.

Implicit in the Protests is the assumption that each Protester's submissions were so nearly as strong as the highest ranked proposal for each scored element that even a ranking variance of 5 to 4 could not be justified. There are three principal problems with that assumption, however. First, the Protesters are asking the Procurement Officer to independently assess and second-guess the rankings completed through the comprehensive AHCCCS consensus ranking process, which is not appropriate in reviewing a procurement decision. Second, the Protesters have not demonstrated specific facts that would justify any second-guessing of the evaluator rankings, even if such reconsideration were appropriate.

The Protesters have also selectively applied their assumption of equivalency to demand elevation of their ranks and scores whenever they are lower than those assigned to the higher ranked proposals, but never acknowledging that such presumed equivalencies among the proposals would require that the favorable gaps between the Protesters' own higher ranks and higher points on various evaluated elements be substantially reduced. For example, the final rankings for Narrative Submission Requirement B8 placed Mercy Care's proposal in the highest ranked position. However, Mercy Care does not contend that APIPA's ranking of 2, or Banner's ranking of 3, or Health Net's ranking of 4 should be elevated to be roughly equivalent to its own. The Protesters thus apply the type of selective, self-serving assumptions that were rejected in *Beta Analytics Int'l, Inc.*, 67 Fed. Cl. at 400-401. There, the protester's argument that it was unfair to allow evaluators to award proposals extra points for exceeding the minimum RFP requirements implied "that every offeror whose proposal meets a[] S[tatement]O[f]W[ork]'s requirements should receive a perfect score." *Id.* But the reviewing court noted that "[t]his is a formula for *more*, not less, discretion, which would actually increase the chance of arbitrary awards—since contracting officers would often be picking between offerors who are exactly even in evaluated quality. And, in any event, if evaluators can be trusted to determine if proposals meet the requirements, there is little reason to suspect that they cannot figure out when requirements are exceeded." *Id.*

The Protesters cannot demand that only their proposals' ranks and scores, and no others', be improved. To do so would unfairly compress all other offerors' ranks and scores across the evaluated procurement submission requirements. And, that artificially compressed scoring would require the ultimate award decision to select between proposals that are virtually even in evaluated quality, even though the evaluation teams saw material differences in how well or how poorly the individual proposals met the RFP requirements. This would unjustifiably increase the chance for arbitrary selection decisions.

Finally, because the Protesters are unable to establish any proof that the ranking system caused their proposals to be inaccurately characterized and perceived as weaker than a competing proposal that was really its

equal, the Protesters are unable to prove through their arguments about the ranking system the required prejudice to their chance to obtain a contract award. At best, the Protests amount to speculation on this point, which is not an appropriate basis for granting a protest and disturbing a contract award.

Protest Issue #6: AHCCCS erred by failing to properly train its evaluation personnel.

To the extent the Protests assert a failure by AHCCCS to adequately train its evaluation personnel, the procurement record and discussion above establishes the opposite. The description above of the discussions and coaching provided to the evaluation team members in the August and September 2023 ALTCS E/PD RFP Scoring Pre-Discussion meetings, the formal evaluation training for the evaluators on October 3, 2023, and the coaching, feedback and facilitation provided by AHCCCS' experienced consultants during the consensus evaluation process for each submission requirement demonstrates that the training and guidance of AHCCCS evaluators was comprehensive, interactive and continuous.

The procurement record also demonstrates that the AHCCCS approach to evaluator training and guidance was designed to ensure the evaluators' advance understanding of the evaluation process and standards, and to thereafter observe, test and, if necessary, improve that understanding as experienced consultants monitored and facilitated the ongoing evaluation discussions.

Any accusations about a lack of training further ignore the baseline knowledge and experience of AHCCCS officials acting as evaluators, many of whom had participated previously in, or had knowledge of, similar procurements using the AHCCCS enhanced evaluation process for requirements involving managed care organizations. The integration of such experienced personnel in the evaluation process here, combined with the AHCCCS implementation of a robust consensus evaluation process in which experienced consultants actively encouraged evaluators to freely share their input, meant that less experienced evaluators, or those evaluators that might develop questions about the evaluation process and standards, could receive reliable, immediate guidance and feedback from their evaluation team colleagues or facilitating consultants.

None of the Protesters has demonstrated a lack of adequate training and guidance for the evaluators, and none of shown that any lack of training caused any material departures from the established evaluation process, or any improprieties or inaccuracies in the evaluation and scoring of proposals. None of the Protesters has demonstrated any prejudice to them resulting from any inadequate training. Therefore, the allegations about inadequacies in AHCCCS training of evaluators is factually inaccurate and unsupported, and provides no basis for questioning or overturning the evaluation results or award decisions.

Protest Issue #7: AHCCCS erred in its Cost Bid analysis which purportedly only valued the lowest-priced proposal.

Protesters Banner and Health Choice claim AHCCCS erred in its Cost Bid analysis. Banner claims that AHCCCS did not evaluate the most cost-effective proposals, but rather solely rewarded Offeror(s) who made the lowest-cost proposals. Health Choice similarly claims that AHCCCS conducted its evaluation arbitrarily and without transparency.¹⁵

¹⁵ Mercy Care did not criticize AHCCCS' cost bid evaluation or analysis. Mercy Care received the second-highest score for its cost bid submission.

AHCCCS' Response

Banner's claim that AHCCCS conducted its Cost Bid evaluation and analysis for the sole purpose of awarding the lowest-cost proposals is factually incorrect. AHCCCS considered multiple components in the Cost Bid evaluation. AHCCCS' Cost Bid analysis also evaluated and required offerors to agree and accept AHCCCS developed capitation rates; required submission of an administration cost component of the capitation rates; required submission of a case management cost component of the capitation rates; and, required development and submission of a signed actuarial certification. See Procurement File, ALTCS E/PD RFP No. YH24-0001 Section H at ¶ 20 "Submission Requirements". Included within the evaluation were consideration of the soundness of the actuarial certification of the proposals' Cost Bid information.

Health Choice's claim that AHCCCS did not provide sufficient transparency or directions for its Cost Bid evaluation is also factually incorrect. AHCCCS gave offerors three documents with the solicitation related to Rate Development Information: 1) Rate Development Documentation (discussing rate development information); 2) Non-Benefit Costs Bid Requirements (discussing the bid requirements); and, 3) Non-Benefit Costs Bid Submission (providing an excel workbook for Offerors to use for submission of their bids). See YH24-0001 – ALTCS E/PD Bidders' Library Data Supplement for Offerors Section F – Rate Development Information. Specifically, the "Non-Benefit Costs Bid Requirements" document gave Offerors directions for the completion of their submission, and the "Non-Benefit Costs Bid Submission" workbook gave Offerors a pre-filled excel sheet for the Offerors to populate and comply with the submission requirements. In addition to these three documents, multiple other documents containing additional information were made available in the Data Supplement for Offerors in the Bidders' Library available upon publication of the solicitation.

Further, AHCCCS allowed Offerors to submit questions and seek clarification from AHCCCS administration about the RFP if necessary. AHCCCS responded to these questions through amendments to the RFP, and AHCCCS issued three (3) amendments. This question and answer process included the ability for Offerors to submit questions and seek clarification about the Cost Bid Submission Requirements. AHCCCS also implemented a best and final offer (BAFO) process that allowed modification of the Cost Bid submissions for all Offerors.

The AHCCCS cost bid evaluation team members appropriately considered and evaluated all Cost Bid components that were included in the RFP submission requirements. See YH24-0001 - ALTCS E/PD Procurement Final Evaluation Report "Cost Bid Ranking and Rational". The evaluation team was guided by the pre-determined evaluation methodology, which required evaluation of all sections of the RFP submission requirements.¹⁶ Although Health Choice claims that other Offerors provided a similar rate structure where administration rates would decrease as membership increases, Health Choice decreased its rate structure disproportionately to other offerors. The procurement record indicates that Health Choice's and Banner's cost bid submissions were evaluated and scored appropriately.

Protest Issue #8: AHCCCS erred by not awarding three contracts in the central GSA

¹⁶ One of the Protests challenges the potential bias of one of the members of the Cost Bid evaluation team, claiming the members' prior employment with one of the selected awardees. However, the Procurement Officer finds no basis for contending that the evaluator was prohibited by law from acting as a member of the evaluation team, and the protest challenge does not identify how the evaluator exhibited bias or how that supposed bias actually prejudiced the Protester. Therefore, the suggestion of evaluator bias does not create a valid basis for protest of relief.

Protester Mercy Care, as the third highest scored offeror, “seeks an award of a statewide contract, or in the alternative, a contract for the central Geographic Service Area (GSA), as contemplated in the RFP.”¹⁷ The Protester claims that language in the RFP created an enforceable expectation that AHCCCS would award at least three contracts.

AHCCCS Response

Mercy Care argues that “AHCCCS previously stated that it anticipated awarding up to **three** contract awards in the central GSA [emphasis original].”¹⁸ The Protester posits that “[a]warding Mercy Care the third contract for the central GSA – consistent with the AHCCCS’ stated intent ... unquestionably would be in the best interest of the state”¹⁹ The Protester suggests that AHCCCS committed itself to award at least three contracts, and that it is a violation of the RFP terms for AHCCCS to award only two contracts. The Protester’s argument is factually incorrect and rests on a partial or inaccurate reading of the RFP statements about the number of awards that might be made at the close of the evaluation process. See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, ¶ 11 Award of Contract (pgs. 7-8); see also *id.*, Section H, ¶ 12 Rejection of a Proposal – Responsibility, Responsiveness, Susceptibility, and Best Interest (pgs. 9-10). It also disregards the discretion that the agency retains about how many contracts to award.

Under the RFP, AHCCCS anticipated awarding a maximum of two Contractors in the North GSA, a maximum of two Contractors in the South GSA, and maximum of three Contractors in the Central GSA. See Procurement File, ALTCS E/PD RFP No. YH24-0001 Section H, ¶ 11 Award of Contract (p. 8). Per the RFP terms, a successful offeror might be awarded a contract as follows, *except as otherwise determined by AHCCCS and in the best interest of the state*:

- “Both the Central GSA and the North GSA;”
- “Both the Central GSA and the South GSA;”
- “The Central GSA, the South GSA, and the North GSA;” or
- “The Central GSA only.”

Id. Thus, the RFP expressly acknowledged that AHCCCS retained discretion about how many contracts to award.

The RFP further stated: “AHCCCS intends to make a total of three awards for this RFP, awarding GSAs based upon the winning bids in each GSA and may also consider Order of Preference indicated in Section I, Exhibit B: Offeror’s Bid Choice Form.” *Id.* However, the RFP also clarified that “[a]wards may result in zero, one, or two statewide Contractors.” *Id.* The latter language made clear that the word “intends” did not connote any sort of guarantee about the number of contracts that would be awarded. The terms of the RFP therefore expressed the discretion AHCCCS retained to determine the number of awarded contracts as well as the number of statewide contracts awarded for this procurement. The terms of the RFP do not mandate that AHCCCS award any particular number of contracts. See Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, ¶ 8 Evaluation Factors and

¹⁷ See 12-20-23 Mercy Care Bid Protest at p. 28

¹⁸ See 12-20-23 Mercy Care Bid Protest at p. 12

¹⁹ See 12-20-23 Mercy Care Bid Protest at p. 12

Selection Process (pgs. 5-6); *see also, id.*, Section H, ¶ 11 Award of Contract (pgs. 7-8); *see also, id.*, Section H, ¶ 12 Rejection of a Proposal – Responsibility, Responsiveness, Susceptibility, and Best Interest (pgs. 9-10).²⁰

The RFP language contained other acknowledgements of the broad discretion AHCCCS retained regarding any award decisions, and foreshadowing AHCCCS' right to award less than three contracts. For instance, the RFP provided:

- Pursuant to A.R.S. § 36-2903, *et seq.*, 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. *See* Procurement File, ALTCS E/PD RFP No. YH24-0001, Section H, ¶ 8 “Evaluation Factors and Selection Process” (pgs. 5-6).
- The final decision regarding the particular Offerors awarded Contracts would be made by AHCCCS. *Id.* “The decision will be guided, but not bound, by 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 Section H, ¶11 “Award of Contract”, in this Section.” *Id.* (at p.5); *see also, id.*, Section H, ¶ 11 “Award of Contract” (pgs. 7-8).
- “In Accordance with applicable procurement regulations and best practices, at any time after the Proposal due date and time or during the evaluation of the Proposal, AHCCCS may reject an Offer based upon a determination that Offeror is not responsible, or that the proposal is not responsive or susceptible for award. AHCCCS may reject the Offer if doing so is in the best interest of the State.” *See id.*, Section H, ¶ 12 “Rejection of a Proposal – Responsibility, Responsiveness, Susceptibility, and Best Interest” (pgs. 9-10).

In sum, AHCCCS' regulations at A.A.C. §§ R9-22-602, R9-28-602, R9-22-603, R9-28-603, and the RFP at Section H, ¶ 8 “Evaluation Factors and Selection Process” (pgs. 5-6), Section H, ¶ 11 “Award of Contract” (pgs. 7-8), and Section H, ¶ 12 “Rejection of a Proposal – Responsibility, Responsiveness, Susceptibility, and Best Interest” (pgs. 9-10), made it clear to the Protesters that AHCCCS would only award a contract or contracts that were determined to be most advantageous to the state, pursuant to A.R.S. § 36-2903. *See* RFP, Section H, ¶ 8 “Evaluation Factors and Selection Process” (pgs. 5-6). AHCCCS' regulations further require AHCCCS to determine that multiple contract awards “are in the best interest of the state” before it is authorized to ever issue more than one award, which restriction was expressed in the Section H, ¶ 8 “Evaluation Factors and Selection Process” terms. *Id.* Given all the express prerequisites to award of even one additional contract, and the uncertainty going into the procurement evaluation process that AHCCCS would ever make the findings required for multiple awards, no offeror could claim to have reasonably relied on an assurance that AHCCCS would, without fail, award a third contract.

Additionally, even assuming the language of the RFP had somehow unequivocally stated “no matter the circumstances or proposal evaluation results, AHCCCS will be awarding three ALTCS E/PD contracts” (it did not), the Arizona courts have determined that no bidder or offeror in a government procurement has any legal right to be awarded a contract. For instance, the Supreme Court of Arizona held in *City of Scottsdale v. Deem*, that Arizona's statutes governing public procurement exist only to protect the public, and therefore create no private

²⁰ To the extent the Protest arguments rely on any statements in any documents that were shared only internally at AHCCCS and not published to any of the Protestors or other offerors, such records would not have created any expectations amongst the offerors, and would not create any binding obligations on AHCCCS to award a third contract.

rights in a bidder. See *City of Scottsdale v. Deem*, 27 Ariz. App. 480, 482 (1976) (“[T]he authority for letting public contracts is derived for the public benefit and is not intended as a direct benefit to the contractor.”); see also, *Grand Canyon Pipelines, Inc. v. City of Tempe*, 168 Ariz. 590, 592–94 (App. 1991). From this, the Arizona Court of Appeals has concluded “that Arizona follows those jurisdictions that find a bidder has no claim of entitlement to a public works contract and, therefore, no property interest in the contract.” *Grand Canyon Pipelines, Inc.*, 168 Ariz. at 593–94 (citing *Sowell's Meats & Services, Inc. v. McSwain*, 788 F.2d 226 (4th Cir.1986) (applying South Carolina law); *Coyne–Delany Co., Inc. v. Capital Development Board*, 616 F.2d 341 (7th Cir.1980) (applying Illinois law); *City Communications, Inc. v. City of Detroit*, 650 F.Supp. 1570 (E.D.Mich.1987); *ARA Services, Inc. v. School District of Philadelphia*, 590 F.Supp. 622 (E.D.Pa.1984) (disagreeing with *Three Rivers* holding by Western District Court of Pennsylvania); *Kendrick v. City Council of Augusta, Georgia*, 516 F.Supp. 1134 (S.D.Ga.1981); *Estey Corp. v. Matzke*, 431 F.Supp. 468 (N.D.Ill.1976); *Rice*, 526 N.E.2d 1193 (applying Indiana law); *Teton Plumbing & Heating, Inc. v. Board of Trustees*, 763 P.2d 843 (Wyo.1988). The Arizona law is clear, and the RFP created no enforceable expectation for the award of a third contract.

As a matter of law, neither Mercy Care nor any other Protester here can claim a protected property interest in the award of a contract, irrespective of what the RFP said about the number of contracts that may be awarded. The protest arguments to the contrary provide no basis to disturb the award decision here and award a third contract.

Protest Issue #9: AHCCCS conducted an arbitrary evaluation and its final consensus ranking is not supported by the record.

The Protesters claim that the Consensus Rankings are unsubstantiated and erroneous for various reasons. These protests grounds include:

- AHCCCS solely evaluated the Narrative Submission Requirements on whether offerors included key words within their written responses rather than how an offeror would meet the goals and standards of AHCCCS within this RFP.
- Similarly, AHCCCS utilized arbitrary evaluation considerations for the Oral Presentations that resulted in inexplicable differences between an offeror’s Narrative Submission performance and its Oral Presentation performance.
- AHCCCS cannot explain why individual evaluators changed their rankings of Offerors between the early creation of their individual rankings and the development of the final consensus rankings.
- AHCCCS’ final consensus rankings are not supported by the record. Instead, AHCCCS conducted an arbitrary and inconsistent evaluation and the record does not support the finding of disparities among the offerors’ proposals that support certain ranking decisions.

AHCCCS’ Response

Each of these arguments must be reviewed in the context of the evaluation and scoring process actually applied to the proposals. For the evaluations, AHCCCS used a rigorous evaluation methodology that incorporated national best practices and was consistent with previous AHCCCS procurements. Evaluators documented the relative strengths and weaknesses of each proposal with respect to delineated submission requirements. Evaluators then ranked the comparative strengths of the proposals against one another. That ranking process

provides for a clearer differentiation between offerors than can be achieved simply by awarding points in exchange for mere repetition or recitation of program standards or “key words”.

Evaluators arrived at final rankings through a consensus process that encouraged and allowed multiple evaluator perspectives to be shared and considered for each proposal and reduced the chance that relevant information about each proposal would be overlooked or misinterpreted during the evaluation. The consensus discussion was facilitated by a consultant with expertise in ensuring that evaluators reach a decision in accordance with the RFP terms and without bias.

The majority of the RFP evaluators (16 of the 22 individuals) selected to rank the proposals were experienced veterans of the AHCCCS managed care evaluation process and have participated in similar evaluations in past AHCCCS procurements. Further, the RFP evaluators were subject-matter experts specifically placed on a submission requirement evaluation team in their area of experience and expertise.

Prior to the public announcement of the RFP, AHCCCS had assigned the RFP evaluators to various interconnected teams for the development of the RFP and its evaluation considerations. The RFP evaluators used their experience and expertise to assist in the development of the RFP submission requirements in accordance with the goals of AHCCCS. Through this process, AHCCCS developed and issued a forward-looking RFP that addressed issues and objectives AHCCCS seeks to address and accomplish through the full contemplated contract term.

During periods in August and September 2023, but prior to the submission deadline for proposals, evaluation teams met as part of the ALTCS E/PD RFP Scoring Pre-Discussion meetings to review the submission requirement(s) they were assigned to evaluate and the associated Scoring Tool for the requirements. The teams worked to confer on the submission requirement and to develop, document, and finalize the evaluation criteria. Extensive time was dedicated to review the relevant submission requirement for each team, and what ideal offeror responses would entail. Coaching was also provided to the evaluators on how to objectively evaluate responses, looking beyond key buzz words, and instead focusing on the evaluation considerations the agency had assigned to the scoring tool they were using, which incorporated characteristics like whether a proposal submission contained comprehensive descriptions, expressed feasible or implementable plans and programs, and clearly answered the AHCCCS expectations expressed in the RFP submission requirements.

AHCCCS provided evaluation training to evaluators on October 3, 2023. Training for the assigned evaluators was led by experienced subject matter experts in the AHCCCS ALTCS Program, contract administration, and procurement personnel.

Over the years, AHCCCS has enhanced RFP evaluation process for requirements involving managed care organization services, in part to provide greater emphasis on strategic innovation, achievement, accomplishment, and furtherance of the AHCCCS program’s mission and vision. To that end, evaluators learn through their training and the consensus ranking process to look for and value offeror submissions that present a thorough, detailed, and clear explanation in their responses to the submission requirements that explore critical program strategies, as well as offeror responses that reflect or demonstrate commitment to AHCCCS’ guiding principles and values, successful historic achievement of relevant responsibilities, concrete accomplishments, innovation, flexibility, and the ability to execute strategic partnerships to name a few examples. Less emphasis, and hence lower scores, result from offeror responses that are more general in nature, or that merely promise compliance with or commitments to policies and program strategies with minimal detailed examples of how such commitments will be executed.

The actual evaluation process incorporated and capitalized on the foregoing by encouraging evaluators to first engage in initial independent and individualized study and assessment of proposals against delineated RFP submission requirements and evaluation considerations. But the evaluators know that these individual assessments are just preliminary. In fact, the Individual Scoring Tools for the ALTCS E/PD RFP specifically identified these individual rankings as “Draft Notes” and requested that individual evaluators provide a “Draft Ranking.” See *e.g.*, Individual Scoring Tool B6 at AHCCCS001489.

The individual assessments are followed by the evaluators sharing their observations, impressions, and concerns with their fellow evaluators for their assigned submission requirement during the refining discussions of the consensus meetings. By having each evaluator hear, consider, and comment upon their fellow evaluators’ impressions of each proposal, the consensus process allows evaluators to either obtain or provide clarifications and insights that build deeper, collective understanding and appreciation for the strengths and weaknesses of each proposal as it relates to the evaluators’ assigned submission requirement. It is not unusual for individual evaluator assumptions and assessments about the strengths, weaknesses, credibility, and feasibility of a proposal to change as a result of information and perspectives exchanged in the consensus discussions. And it is not unusual for this deeper perspective on a proposal to alter an evaluator’s thoughts on the appropriate ranking of a proposal amongst its peer proposals.

The following discussion addresses how the foregoing evaluation process is evident in, and impacted, the various individual requirement scoring decisions that have been protested here.

First, the Protesters claim AHCCCS conducted evaluations of the narrative submission requirements through consideration of whether the offerors included certain “buzz-words” in their proposals. The Protesters claim that the evaluators merely evaluated whether an offeror included key words without consideration of the actual substantial effects an offeror’s approach would have on AHCCCS’ goals described within the RFP. Further, the Protesters claim that the evaluation considerations included in the Final Ranking and Rationale spreadsheet supported the assertion that the evaluation considered only whether an offeror described certain information sufficiently, rather than whether the offeror could fulfil the goals and objectives of AHCCCS. The Protesters are factually incorrect.

The RFP and evaluation process considered not only whether an offeror responded fully to the submission requirement being evaluated, but considered whether an offeror provided AHCCCS forward-looking initiatives, solutions, and implementation strategies that coincide with AHCCCS’ stated goals, objectives, and issues AHCCCS intends to resolve or achieve over the life of any contract awarded pursuant to the RFP. Generally, the narrative submission requirements requested offerors provide a description of how they monitor an identified issue or challenge that AHCCCS’ members and their care managers face. The evaluation considerations that the AHCCCS team had provided evaluators for each submission requirement encouraged consideration of relevant characteristics of each proposal, such as whether an offeror described how it collects and uses program data, appoints task forces, or utilizes organizational groups to identify and track the identified issues and common objectives related to the managed care services provided to E/PD individuals. Generally, the offerors, each of whom are highly sophisticated parties experienced with prior AHCCCS RFPs and other RFP processes nationally, rarely failed to describe at least generally how they identify, monitor, or handle each covered issue. But, consistent with the structure of the RFP as seeking the proposal(s) that are most advantageous to the state, AHCCCS’ evaluators looked for more than merely superficial recognition of the basic RFP service expectations for each submission requirement. Instead, AHCCCS’ evaluators, as trained and guided subject-matter experts with expertise in the issues covered by their assigned narrative submission requirements, considered whether each

offeror's response demonstrated a detailed and clear understanding of the AHCCCS requirements, communicated a deep grasp of the service challenges posed by the RFP and potential solutions for those challenges, and further demonstrated that the offeror would provide responsive and effective solutions that could actually be implemented over the life of the contract award.

Thus, the AHCCCS evaluation process valued forward-looking responses that evidenced the offeror could and would deliver effective solutions to the issues and objectives AHCCCS identified in each narrative submission requirement. The evaluation considerations provided to the various evaluation teams emphasized to the evaluators the appropriate consideration of whether offerors described viable solutions and had concrete and workable plans for implementation. *See e.g.*, Final Ranking and Rationale – B4 (evaluating how offeror will use collected data in the development and implementation of ALTCS Case Management best practices); Final Ranking and Rationale – B5 (evaluating how implementable an offerors' person-centered service planning strategies); Final Ranking and Rationale – B6 (evaluating offeror on how they collect, use, and apply data, like performance metrics, to initiate improved solutions); Final Ranking and Rationale – B7 (requesting action steps and a three-year timeline on how offeror will work in an integrated fashion to identify and address network needs); Final Ranking and Rationale – B8 (requesting offeror identify its workforce development strategy and how it will achieve its desired outcomes); Final Ranking and Rationale (requesting offeror describe how it will implement best practices to address social risk factors). Contrary to the claims asserted by Mercy Care and Health Choice, the evaluation teams of designated, seasoned subject-matter experts thoughtfully applied evaluation criteria that differentiated offerors based upon how well these offerors' strategies and solutions would be implemented, and how well AHCCCS' objectives would be met, if the offeror were awarded a contract this cycle. The offerors claim that AHCCCS solely considered "buzz-words" in its analysis is factually incorrect, and therefore provides insufficient grounds for a successful protest.

Similar to their criticisms of the narrative submission requirement evaluations, the Protesters claim that AHCCCS conducted an arbitrary oral presentation process, likening the oral presentation process to a surprise "pop-quiz". Moreover, Mercy Care claims that AHCCCS utilized arbitrary evaluation considerations when evaluating the oral presentations. Meanwhile, Banner and BCBSAZ Health Choice, although raising similar arguments, focus on the fact that BCBSAZ Health Choice performed well on the Oral Presentation portion, but somehow did not perform similarly on the narrative submission portion, as if the inconsistency must reflect an error in evaluation rather than a material difference between the quality of the BCBSAZ Health Choice narrative submissions and its oral presentation.

In response to arguments made by Health Choice and Banner, AHCCCS evaluators evaluated Oral Presentation submissions solely on what the offerors prepared and presented within the confines of the strictly controlled oral presentation environment. This protocol implemented what AHCCCS had informed offerors in the RFP, namely, that Oral Presentations did not have "any impact to the other areas of the submission or evaluation process." *See* ALTCS E/PD RFP No. YH24-0001 Oral Presentation General Script (at AHCCCS000341). This is also consistent with the instructions and processes provided by AHCCCS for evaluation of the narrative submissions and Cost Bid, where evaluators were generally instructed to restrict their evaluation to the responsive information included in the designated section within each proposal. So, the Protesters' attempt to make an issue of differences between how an individual offeror performed on the narrative submissions versus the oral presentations is unmerited. Where the evaluators on the oral presentations were properly following their instructions not to allow information from outside the oral presentations to inform their rankings, and vice versa when it came to evaluating the written narrative submissions and Cost Bid, it is no surprise that some offerors may have done a much better job of communicating their mastery of the requirements and their plans in writing

as opposed to oral presentations, and vice versa. Any disparities in oral presentation rankings, narrative submission requirement rankings, and Cost Bid rankings therefore do not suggest evaluation or scoring deficiencies and provide no grounds for a successful protest.

Mercy Care, on the other hand, claims that AHCCCS evaluated the Oral Presentations arbitrarily, but does so by claiming that AHCCCS conducted the Oral Presentation evaluation process inconsistent with the goals stated in the RFP. Mercy Care's claim that the Oral Presentation questions and evaluation criteria do not align with the objective of the RFP is unfounded.

Oral Presentation Question # 1 inquired how offerors identify the needs of family caregivers as it pertains to how ALTCS eligible members are served in the least restrictive setting. Oral Presentation Question #1 further requested that offerors describe what tools and resources they would use to assess risks and needs of family caregivers, and how they will use those tools to engage family caregivers and provide them needed supports and services. AHCCCS supplied the evaluators for Oral Presentation #1 the following considerations about the characteristics of the oral presentations to use in evaluating and ranking the proposers on that oral presentation requirement:

- Innovation
- Implementation
- Addresses-Person-Centered Service Planning
- Improves Outcomes (Quality/Member) and,
- Other Notable Considerations.

AHCCCS proposed to the evaluators the aforementioned evaluation considerations in alignment with the forward-looking nature of the question posed for Oral Presentation #1. Oral Presentation #1 asked the Offerors to identify how they recognize the needs of family caregivers and required a proposed solution or plan for how the offeror will address that issue if awarded a contract. Given the requirement for presentation of a forward-looking future action plan, AHCCCS evaluators reasonably considered whether the plan and methods proposed by each offeror were innovative and implementable, and whether they might improve the outcomes and quality of services provided to the members. Thus, similar to the evaluations of the narrative submission requirements, AHCCCS evaluated the Oral Presentations through the use of subject-matter experts who considered not only what methods or solutions an offeror could provide for a sensitive issue like family caregiver support, but whether the programs and methods described by the presenter could be implemented and produce effective results for AHCCCS ALTCS E/PD members during the life of any contract that might be awarded. The evaluations for Oral Presentation #1 did not conflict with the RFP requirements and the oral presentation requirements at all.

Mercy Care claims AHCCCS scored Oral Presentation Question #2 inconsistently with the information required by the question. But Oral Presentation Question #2 requested Offerors describe how they will commit to prevent, protect, and ensure the safety and security of its members. The question explicitly acknowledges that this is one of the goals of the State of Arizona—to enhance prevention of abuse, neglect, and exploitation of vulnerable adults. As an example of how broad the State's interests are in this area, the Arizona Legislature enacted and expanded the Adult Protective Services Act ("APSA"). Arizona's APSA provides protection of vulnerable adults from not only physical harm, but also financial exploitation and emotional abuse. See A.R.S. § 46-451, *et. seq.* Also in recent years, the Office of the Governor had established the Abuse and Neglect Prevention Task Force in connection with Executive Order 2019-03, ordering AHCCCS, DES and ADHS to engage in various actions to protect individuals with disabilities.

AHCCCS provided the evaluators for Oral Presentation Question #2 with the following considerations about the characteristics of the oral presentations to use in evaluating and ranking the proposers oral presentation under Question #2:

- Training and Commitment
- Includes Case Management Principles
- Proactive Strategies and,
- Reactive Strategies.

Mercy Care claims that these evaluation considerations did not coincide with the topics Oral Presentation Question #2 required offerors to address. But this position expresses a misunderstanding of how broad the State of Arizona/AHCCCS objectives are when it comes to protecting ALTCS member interests.

The Oral Presentation #2 evaluation considerations encompassed how an offeror planned to enhance prevention of abuse, neglect, and financial exploitation of vulnerable adults. Reasonably, AHCCCS evaluators could consider how an offeror utilized its Case Managers, those in direct contact and oversight of the members, to monitor and prevent abuse, fraud, and financial exploitation. Further, AHCCCS evaluators could reasonably consider how an offeror trained its staff, including Case Managers, to monitor, identify, prevent, and protect its members from abuse, neglect, and exploitation. Finally, AHCCCS evaluators considered how an offeror reacts to abuse, neglect, or exploitation reports and occurrences, and how they work to prevent those instances before they occur. An offeror that understands the national and statewide concerns about the protection of vulnerable adults would have known that these considerations would be considered for any long-term care organization like AHCCCS. In fact, the evaluators noted positive reactions to Mercy Care providing responsive information that addressed these key considerations.

Mercy Care further claims that Health Net, the offeror that received the highest ranking under Oral Presentation #2, gave a “wholly nonresponsive answer” because it included considerations about how it could address financial fraud/exploitation risks a vulnerable adult may face. Mercy Care went as far to say that “there is nothing in Health Net’s answer” that describes its commitment to prevent protect and ensure the safety and security of ALTCS’ members. This statement is unsupported. Health Net’s response acknowledging and committing answers to protection of vulnerable members from financial exploitation is directly relevant to the goals of the State of Arizona and AHCCCS as expressed in the multi-tiered protections incorporated in APSA, A.R.S. § 46-451 *et. seq.* The procurement record also indicates that Health Net gave sufficient responses addressing the physical abuses and exploitation vulnerable adults may face in a managed-care setting. Thus, Mercy Care’s extreme interpretation of the Oral Presentation #1 assignment as relating only to protection of members from physical abuse or neglect is a misreading of the presentation requirement. The evaluation and ranking of Health Net under Oral Presentation #2 does not suffer from any errors and provides insufficient grounds for a successful protest.

The Protesters further claim that AHCCCS cannot validly explain the ranking changes from individual draft rankings to the final consensus rankings for the Oral Presentations. On October 3, 2024, AHCCCS provided training and ensured that the individual evaluators had familiarity with the ALTCS E/PD Evaluation and Consensus Ranking process. AHCCCS explained to evaluators, as they were already aware, that there would be an Individual Evaluation process, and a Consensus Ranking process. See ALTCS E/PD RFP No. YH24-0001, Scoring Training, October 3, 2023 (AHCCCS000029-0076). During the Individual evaluation process, the evaluators made preliminary notes and rankings based upon their own unique perspective and review of the narrative submission requirement they were assigned based on their subject matter expertise, uninformed by the perspective of the

co-experts on their evaluation teams. But, as is abundantly clear from the procurement record, the individual evaluation process served as a mere preliminary starting point for discussions in the consensus discussion and ranking process.

In accordance with the established AHCCCS consensus evaluation process, after the individual evaluation process, the evaluators met with their assigned team. A consultant experienced in the consensus evaluation process joined each Consensus meeting and facilitated the evaluation process. During that process, the evaluators initially reviewed and discussed their individual notes and rankings with the other evaluators on their team, collectively considered, discussed, and evaluated the strengths and weaknesses of each offerors' submission in connection with the evaluation considerations on their scoring tool, shared their unique perspectives on both the proposals and, where appropriate, on the opinions or observations made by other evaluators about a proposal. During this team deliberation, the Consultant was expected to encourage each individual evaluator to share their thoughts and positions, comment on the other evaluators' perspectives and comments, and ensure that no individual evaluator dominated the Consensus Ranking process.

The cooperative consensus process also helped prevent unintended errors that might have arisen during the individual ranking process, like when an evaluator gave their top choice a fifth place ranking rather than the first place ranking they were supposed to use to denote the highest ranked proposal.²¹ Using this sort of consensus-building, give-and-take discussion, the evaluators ranked the relative position (1-5) of each proposal. It is no surprise that such a sharing and consensus-building process would result in reassessment and modification of initial evaluator conclusions and opinions. In fact, it would be surprising if such discussions never resulted in the better-informed evaluators changing their initial rankings.

At best, Protesters have hand-picked a few examples where a preliminary individual ranking from one evaluator was better than their final Consensus Ranking. But this does not prove any evaluation error. Moreover, the Protesters are careful not to discuss any examples in which the consensus process may have improved an evaluator's ranking decision *in favor of* the Protester. For instance, Protester Mercy Care received a ranking of "3" from one of the evaluators during individual assessments of narrative submission requirement B8, but that evaluator eventually agreed with their colleagues that Mercy Care should receive the highest ranking of "1" on that requirement. If the Protesters are correct that AHCCCS should disregard modifications made from the initial rankings, then they must consistently accept any deductions in ranking this causes for them. As they have offered no such adjustments, the Protesters' arguments are patently self-serving and not objective.

Given the foregoing, the Protesters' arguments relying on any changes between individual ranking notes and final Consensus Ranking for any submission requirements provide no grounds for the Procurement Officer to set aside the awards.

To the extent the Protesters infuse their challenges to ranking decisions made for their and others' proposals on the alleged failure of AHCCCS to consider and reach negative or adverse conclusions based on risks of member disruption or concerns with risks to member services, care or experience associated with transitioning to a relationship with a new managed care services provider, those arguments are without sufficient factual foundation and make unwarranted assumptions about such risks. The history of servicing eligible members under the Arizona ALTCS program has created substantial institutional knowledge within AHCCCS, the managed care organizations it contracts with, and service providers who those organizations utilize for service delivery about member transitions. The deliberate planning process for this RFP, and the established schedule for any member

²¹ The procurement record indicates this error was addressed and did not result in inaccurate scoring of any proposal.

transitions that may be required within the 2024 year as a result of AHCCCS' award decisions reflect that the agency has used that substantial institutional knowledge to address and mitigate with as much precision as possible any risks of member service disruption or other adverse impacts on ALTCS E/PD eligible members. The Protestors falsely assume large and unmanageable risks to the members served by the ALTCS E/PD program, and inaccurately assume that the AHCCCS evaluators ignored such issues entirely. Instead, the record affirms that AHCCCS and the subject matter experts involved with this RFP have conscientiously considered, planned for, and structured the procurement trajectory to ameliorate the types of chaotic transition dynamics the Protesters envision.

Moreover, the Protesters' arguments about failure to consider service disruption and member impacts fails to identify persuasive evidence that evaluators were required to consider such issues in any particular way for any particular element of the proposal evaluations, or that they consciously disregarded such issues in any particular circumstance. The Protesters have also failed to establish the proof of prejudice caused by such alleged evaluation oversights that would be necessary to support a valid protest. In summary, the arguments amount to

Finally, the Protesters claim AHCCCS cannot support the evaluators' Consensus Ranking for narrative submission requirements because the evaluators' Rationale and Major Observations, as included in each Narrative Submission Requirement Scoring Tool/Final Ranking and Rationale Spreadsheet, did not express substantial differences among offerors. The Protesters address this claim in different ways. Banner generally claims that the Final Ranking and Rationale Spreadsheets did not sufficiently document the agency's decision, and thus AHCCCS lacks sufficient rationale for the final ranking distinctions. Health Choice and Mercy Care criticized the Ranking and Rationale spreadsheets for not sufficiently explaining how various offerors whose final ranking exceeded theirs on a given requirement met the State's goals and evaluation considerations better than their proposal did.

Again, the Protesters' arguments are one-sided and fail to consider the negative implications of accepting their analysis on their own proposals. But they also fundamentally mischaracterize and ignore the details of the complete evaluation process. The consensus process is an organic discussion that is guided by an experienced consultant and encourages evaluators to actively share their perspectives, even as they may be actively modified by the contributions of their co-evaluators to the discussion. The entire consensus discussion is not recorded, and the Rationale Spreadsheet notes are never intended to capture the full set and detail of the rationale by which each individual evaluator eventually agreed to the final ranking numbers. Nor does anything in the Arizona statutes, the AHCCCS regulations, any other aspects of Arizona law, or the RFP require that the spreadsheet fully explicate all the reasons why the evaluators agreed on the final rankings they chose. Instead, the details, guidance, training, and use of skilled and experienced evaluators who understand through their training that the consensus ranking process guarantees that the rankings are arrived at after detailed consideration and elaboration through active dialog about the relative strengths and weaknesses of each proposal in relation to the RFP submission requirement being evaluated and the evaluation considerations established in the scoring tool for the requirement. That process affirms that the purported absence in any portion of the Rationale Spreadsheet comments of strong distinctions between two proposals receiving different ranks on a submission requirement does not signal an error in the ultimate rankings.

V. Conclusion

Having considered the details of the arguments made by the Protesters, many of the arguments are untimely, as set forth above. The remaining arguments reflect a misunderstanding or misrepresentation of the evaluation methodology applied to the RFP evaluations, and further frequently reflect self-serving, selective challenges that, if turned against the Protester, could also result in their own proposal losing substantial points.

None of the challenges made by the Protesters meet their burden of showing that AHCCCS has acted arbitrarily and capriciously, has abused its discretion in this procurement process, or has acted contrary to any applicable law. Nor has any Protestor demonstrated the type of prejudice caused to them by the procurement deficiencies they claim that would be required to prevail on a protest. Therefore, the Protests do not state any grounds for modifying the award decision made by AHCCCS. The Protests are denied. This letter constitutes the final Procurement Officer Decision of AHCCCS with respect to the ALTCS E/PD RFP NO. YH24-0001.

DATED this 2nd day of February, 2024.

A handwritten signature in black ink, appearing to read "M LaPorte", is written over a horizontal line.

Meggan LaPorte, MSW, CPPO
AHCCCS Chief Procurement Officer
Procurement@azahcccs.gov

CC;

Lorry Bottrill, Lorry.bottrill@mercycareaz.org
James Stringham James.Stringham2@bannerhealth.com
Shawn Nau Shawn.Nau@azblue.com
James Stover James.V.Stover@azcompletehealth.com
Jean Kalbacher jean_kalbacher@uhc.com
Gina Relkin, gina.relkin@azahcccs.gov
Carmen Heredia carmen.heredia@azahcccs.gov
Bill Richards BRichards@rmazlaw.com