

February 7, 2024

Carmen Heredia  
Cabinet Executive Officer and Executive Deputy Director  
Arizona Health Care Cost Containment System  
701 E. Jefferson, MD5700  
Phoenix, AZ 85034  
[Carmen.heredia@azahcccs.gov](mailto:Carmen.heredia@azahcccs.gov)

Meggan LaPorte  
Arizona Health Care Cost Containment System  
Chief Procurement Officer  
701 E. Jefferson, MD5700  
Phoenix, AZ 85034  
[procurement@azahcccs.gov](mailto:procurement@azahcccs.gov)  
[RFPYH24-0001@azahcccs.gov](mailto:RFPYH24-0001@azahcccs.gov)  
[Meggan.laporte@azahcccs.gov](mailto:Meggan.laporte@azahcccs.gov)

**Re: Appeal of Procurement Officer's Decision on Protest of Contract Award under RFP YH24-0001 – ALTCS E/PD**

Dear Executive Deputy Director Heredia:

This firm represents Blue Cross and Blue Shield of Arizona (“BCBSAZ”) Health Choice (“BCBSAZ Health Choice” or “Health Choice”). Under Arizona Administrative Code (“A.A.C.”) R9-22-604, Health Choice appeals the Procurement Officer’s February 2, 2024 decision (“Decision”) on Health Choice’s protest (“Protest”) of the decision to award two statewide ALTCS E/PD Contracts under RFP number YH24-0001 (the “Contracts”) to Arizona Physicians IPA, Inc. dba UnitedHealthcare Community Plan (“United”) and Health Net Access, Inc. dba Arizona Complete Health-Complete Plan (“Health Net”). A copy of Health Choice’s Protest and the Procurement Officer’s Decision are attached hereto as **Exhibits 1 and 2**, respectively.

Health Choice appreciates its relationship with Arizona Health Care Cost Containment System (“AHCCCS” or “State”) and the individuals involved in evaluating the competing offers. However, but for the flawed evaluation process and material errors discussed below, Health Choice is confident that it would have been selected for a contract based on the RFP’s stated goal to provide the highest quality care to AHCCCS members who are Elderly and/or have a Physical Disability (E/PD) in the Arizona Long Term Care System (ALTCS) Program. *See* Solicitation Section D(1), p. 42-46. Health Choice feels compelled to appeal the procurement officer’s decision to ensure a sound scoring methodology and level playing field so that the right partners are selected in the best interests of the

State to serve this vulnerable population not only in this solicitation but also in future Medicaid solicitations.

Multiple flaws in the procurement became apparent once the scoring documents were released. First, the Executive Summary stated that AHCCCS did not determine and agree upon a scoring methodology until after the proposals were opened, thus creating the potential for the Evaluation Team to sway the scoring in favor of one offeror versus another after they reviewed the contents of the offers. Second, the scoring methodology chosen by AHCCCS (revealed for the first time after award) arbitrarily created artificially large disparities in the numerical scores that do not reflect the substantive differences between proposals. This flaw was exacerbated by the evaluation team's approach, which focused not on the substance of the proposed programs but the style of the written description. Third, AHCCCS refused to provide sufficient details to allow bidders to present the most responsive proposals, instead relying on extremely broad and vague criteria developed after the issuance of the RFP that did not provide sufficient guidance to either the bidders or the Evaluation Team. Fourth, there were numerous scoring flaws not only in the narrative scoring sections, but also with respect to past performance, CMS Stars quality performance, and cost. Not only did AHCCCS rely upon unstated evaluation criteria and ignore innovations and positive information from Health Choice's proposal, the scoring on two different questions was improperly biased toward incumbents. These errors infected the procurement process and absent these errors, Health Choice would have received a Contract award.

Health Choice timely protested the Contract awards on December 21, 2023, requesting that the awards to United and Health Net be set aside, and a new solicitation issued, or alternatively, the solicitation should be re-scored and a contract awarded to Health Choice. Mercy Care and Banner also filed their own protests. A few days later, the Procurement Officer notified the protesters that she was extending the time limit for her decision, but did not include "the date by which a decision shall be issued" as required by A.A.C. R9-22-604(G)(3). Health Net and United filed responses to the three protests, to which the protesters filed replies.

On Friday, February 2, 2024, at approximately 4:30 P.M., the Procurement Officer issued a 42-page single-spaced Decision denying the three protests. The Decision, however, rests upon a faulty foundation, namely the application of the wrong standard of review and burden of proof. The Decision positions the Procurement Officer as a trial court reviewing a final agency decision rather than an agency officer handling an initial bid protest. The highly deferential standard employed in the Decision is incorrect; it is not appropriate at the administrative hearing stage, much less the initial protest. This alone warrants overturning the Decision. Under the correct burden of proof, the Protest identifies several errors that merit re-solicitation or re-scoring.

Furthermore, the Decision does not resolve the issues with the timeline of the development of the scoring methodology and the evaluation criteria. Indeed, the Decision informed the protestors for the first time that AHCCCS developed the evaluation criteria after the RFP was issued. Ex. 2, p. 35. This is contrary to both AHCCCS regulations and fundamental procurement policies, which require AHCCCS to evaluate proposals based upon the criteria announced in the RFP, not some other

criteria developed afterwards. This flaw was exacerbated by AHCCCS' refusal to provide any scoring or weighting details, impeding full and fair competition.

The Decision also does not justify AHCCCS' use of the arbitrary forced inverse ranking system, which necessarily imposes artificial disparities between the bidders scores that do not reflect how well each proposal met the criteria, but how well they performed compared to the other bidders. This is not merely a hypothetical issue. The ranking on Question B10 (the OR review) in particular shows that the bidders were exceptionally close in terms of the percentage of fully met standards. Yet, by using the forced inverse ranking system and giving the incumbents an improper advantage, Health Choice was awarded only 20% of the total points despite being only 1.6% behind the first ranked bidder.

The Decision chooses not to even address the majority of the specific scoring errors in Health Choice's Protest, instead relying on an improperly deferential standard of review. Furthermore, the Decision does not identify information within the rationale spreadsheets to support the announced rankings.

Given all these flaws, the Decision should be overturned, and the awards to United and Health Net should be set aside, and a new solicitation issued, or alternatively, the solicitation should be re-scored and a contract awarded to Health Choice.

This appeal is timely filed pursuant to A.A.C. R9-22-604(I).

On December 7, 2023, Health Choice made a public records request to AHCCCS for several categories of documents, including documents produced in response to other bidders' public records requests. AHCCCS is still in the process of producing materials in response to the bidders' public records requests. The most recent production from AHCCCS was on February 2, 2024, after the Procurement Officer issued her Decision on the protests. AHCCCS also indicated on February 2 that it was in the process of searching for and producing additional communications from messaging platforms that had not previously been searched. AHCCCS anticipates that those documents will be produced sometime this week.

Health Choice is prejudiced by AHCCCS' delayed production of documents in response to its public records request, especially in light of AHCCCS' refusal to grant an extension of the appeal deadline after the Procurement Officer issued her Decision at approximately 4:30PM on Friday afternoon, thus ensuring that two of the five days to file a protest fell on a weekend. Furthermore, AHCCCS improperly put the burden on Health Choice to prove that the yet-to-be-produced documents are likely to contain relevant information. Health Choice reserves the right to amend or supplement this appeal based upon materials that AHCCCS has only recently or not yet produced.

The following information is provided in support of this appeal:

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

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

BCBSAZ Health Choice  
8220 N. 23rd Avenue  
Phoenix, AZ 85021

Shawn Nau, Chief Executive Officer  
BCBSAZ Health Choice  
8220 N. 23rd Avenue  
Phoenix, AZ 85021  
(480) 340-3452  
[shawn.nau@azblue.com](mailto:shawn.nau@azblue.com)

**2. The Signature of the Interested Party or the Interested Party's Representative.**

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

Kevin E. O'Malley  
Counsel for BCBSAZ Health Choice  
Gallagher & Kennedy P.A.  
2575 East Camelback Road, Ste. 1100  
Phoenix, Arizona 85016  
(602) 530-8430  
[kevin.omalley@gknet.com](mailto:kevin.omalley@gknet.com)

**3. Identification of the Solicitation Number.**

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

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

A detailed statement of the legal and factual grounds for Health Choice's Protest is set forth in its December 21, 2023 Protest, attached as **Exhibit 1**, and its January 19, 2024 Reply in support of its Protest, attached as **Exhibit 3**, both of which are incorporated in full herewith. Background regarding Health Choice's experience and the RFP is included on pages 3-5 of the Protest.



## 5. The Factual and Legal Errors in the Procurement Officer's Decision.

### A. The Decision Applied the Incorrect Standard of Review.

The Decision applies the incorrect standard of review and burden of proof at the initial protest stage, in at least three different ways.

#### 1. **The Standard for Judicial Review of a Final Agency Decision Does Not Apply at the Initial Protest Stage.**

First, the Decision applies the standard for *judicial review* of a final agency decision, which is not the correct standard for the procurement officer's review of a bid protest. *See* Decision, Ex. 2, p. 8, 11, 23. The Decision (at p. 8, 10, 11) goes so far as to rely on A.R.S. § 12-910(F), which governs the scope of review for judicial review of administrative decisions.<sup>1</sup>

At the initial protest stage, the Procurement Officer should have determined whether the protest stated a valid basis for protest and then decided the appropriate remedy based on a number of factors, including the seriousness of the deficiency, the degree of prejudice to the parties or the integrity of the RFP process and the best interests of the State. A.A.C. R9-22-604(H)(2).

Then, at the “administrative hearing level,” the party appealing the procurement officer's decision must prove “by a preponderance of the evidence, the following: (i) the procurement process was tainted by violations of applicable statutes or rules, by substantial irregularities in the proceedings, or by improper conduct by any of the participants to the process; (ii) such improprieties were materially prejudicial to [the protester], and (iii) but for such improprieties, there is a substantial probability that [the protester] would have been the recipient of the contract award.” *Cigna Healthcare of Arizona, Inc. & Conn. Gen. Life Ins. Co. v. Arizona State Procurement Off.*, 04-0008-ADM, at 37-39 (May 6, 2005)).

To be clear, even at the administrative hearing stage, the ALJ in *Cigna* rejected a “highly deferential” arbitrary and capricious/abuse of discretion formulation of the burden of proof because such a standard is “reserved for review of an agency's final administrative decision.” *Id.* at 38. On this point, the ALJ recognized that federal case law was not “directly analogous . . . because those decisions involved review of final agency decisions, and did not address the burden of proof applicable at the administrative hearing level.” *Id.*

The Decision entirely fails to address this decision, even though it was discussed in Health Choice's reply in support of its protest. *See* Ex. 3 at p. 2. Rather, the Decision relies upon both federal

---

<sup>1</sup> The Decision is also incorrect that a court reviewing an agency final action must defer to the agency's interpretation of its regulations. *See* Decision, Ex. 2, p. 15. A.R.S. § 12-910(F) provides that a reviewing court “shall decide all questions of law, including the interpretation of a constitutional or statutory provision or a rule adopted by an agency, without deference to any previous determination that may have been made on the question by the agency.”

and state case law involving final agency decisions, i.e. the very cases that the ALJ in *Cigna* distinguished as inapplicable to the appeal stage.

Under the Decision’s reasoning, the standard of review and the protestor’s burden of proof are the same in three separate stages: the initial protest to the procurement officer, on appeal to the director, and appeal to the superior court. Having the exact same standard of review and burden of proof at the initial agency review and the court’s review of a final agency decision simply doesn’t make sense, which is why *Cigna* refuses to apply an overly deferential standard of review at the administrative level.

This flaw infects the entire Decision. *See, e.g.*, Decision, Ex. 2, p. 11 (applying deferential “substantial evidence” test from judicial review cases). The application of the wrong standard of review and burden of proof merits reversal of the Decision. Applying the correct standard of review and burden of proof, Health Choice’s protest states valid grounds for re-solicitation or, alternatively, for re-scoring the proposals.

## **2. A Protest Can Be Based on Violations of Law and Fundamental Procurement Policies.**

Second, the Decision incorrectly purports to limit protests to outright violations of AHCCCS’ skeletal procurement regulations. *See* Decision, Ex. 2, p. 10 (the protestor may not go “outside the codified statutes and regulations directly governing the procurement activities of AHCCCS”). This approach is contrary to Arizona law.

For example, a recent Supreme Court decision reversed a trial court’s grant of summary judgment on a procurement claim because “disputed issues of material fact exist as to whether the City acted with a ‘fixed intent’ to award the license to [a bidder] throughout the RFP process and engaged in favoritism by canceling the RFP after [another bidder] submitted the more advantageous proposal.” *Neptune v. City of Scottsdale*, \_\_\_ Ariz. \_\_\_, ¶ 48, available at <https://www.azcourts.gov/Portals/0/OpinionFiles/Supreme/2024/CV230076PR.pdf>. Rather than relying solely upon violations of the applicable procurement code, the Supreme Court pointed to “anomalies” in the RFP process that favored the incumbent bidder, “which could lead a factfinder to reasonably find that the City acted arbitrarily and abused its discretion.” *Id.* ¶ 49.

As another example, the Decision in Appeal of GuideSoft Bid Protest, RFP BPM003913-MTS-MSP-Multi-Temporary Staffing Services-Managed Services Provider, Case No. 22F-003-ADM (May 22, 2023) (the “*GuideSoft* Decision”), attached as Ex. 1 to Health Choice’s Protest, upheld a protest based upon fundamental procurement policies rather than a violation of the State procurement code. Judge Eigenheer found that “[w]ithout preset Scoring Criteria, the members of the Evaluation Committee could easily sway the scoring in favor of one offeror or against another offeror.” *Id.* ¶ 26. “While nothing in the Arizona Procurement Code explicitly prohibits the formulation of Scoring Criteria after the bids are open and reviewed, such a process is antithetical to the purposes of the code. Rather, the requirement that Evaluation Tool and Evaluation Instructions be finalized prior to the

offers being opened demonstrates that the offers themselves should not affect the scoring.” *Id.* ¶ 29. Thus, even though the Evaluation Tool had been developed prior to opening bids, the failure to establish the Scoring Criteria, i.e. “the process of assigning numerical values to the proposal responses received” (*id.* ¶ 11), until after the evaluators reviewed the proposals was a sufficient flaw to sustain a bid protest. *Id.* ¶ 31.

Indeed, even where applicable statutes do not require competitive bidding, government entities have a “duty . . . to act in the public interest, to be fair, honest, prudent and to exercise a wise discretion in the awarding of its contracts.” *Hertz Drive-Ur-Self Sys., Inc. v. Tucson Airport Auth.*, 81 Ariz. 80, 85 (1956).

The Decision is wrong to suggest that Arizona courts ignore persuasive federal authority based upon *Go Servs., LLC v. City of Avondale*, No. 1CA-CV 16-0482, 2017 WL 6328004 (Ariz. App. Dec. 12, 2017). In *Go Services*, the court of appeals noted that Arizona had not “expressly adopted the federal approach” for reviewing a termination of a contract for convenience. *Id.* at \*1. But the court did not “decide whether to squarely adopt the federal approach” because under the facts of that case, there was no breach of the implied covenant of good faith and fair dealing under Arizona law. *Id.* at \*2.

In addition, the Decision’s reasoning conflicts with its recognition that ensuring “all scoring methodology materials are finalized and locked down prior to proposal due dates” is “a fundamental tenant of its procurement operations.” Decision, Ex. 2, p. 14.

Nor does the approach make practical sense. The AHCCCS procurement rules do not explicitly prohibit bribery, yet an award obtained as a result of a bribe must still be overturned as contrary to law, arbitrary and capricious, and an abuse of discretion.

In sum, in determining whether an agency has acted contrary to any applicable law, the procurement officer or hearing officer should look to common law procurement principles, which can be gleaned from relevant federal decisions. *See Ry-Tan Const., Inc. v. Washington Elementary School Dist. No. 6*, 208 Ariz. 379, 395, ¶ 53 (App. 2004); *see also Willamette Crushing Co. v. State By and Through Dept. of Transp.*, 188 Ariz. 79, 81 (App. 1997) (“This appeal involves a public Contract and issues on which there are no Arizona cases. For guidance, we look to the federal court of claims and the federal boards of contract appeals, for those specialty courts have expertise with public Contracts.”).

### **3. Health Choice Has Met Its Burden to Show Prejudice.**

Third, the Decision ignores caselaw holding that a protestor has shown a “substantial probability” of receiving a contract where a successful protest would result in the rebidding of the contract. *See VAS Realty, LLC v. United States*, 26 F.4th 945, 949 (Fed. Cir. 2022) (“a bid protester has standing when, assuming its protest is successful, it would have an opportunity to participate in a new procurement”). Furthermore, “any doubts concerning the prejudicial effect of the agency’s action” must be resolved “in favor of the protestor.” *Colonial Storage Co.—Reconsideration*, Comp. Gen. Dec. B-253501.8, 94-1 CPD 335.

Here, Health Choice asserted that the possibility of bias inherent in selecting a scoring methodology after opening and reviewing bids, the use of the flawed forced inverse ranking scoring method, and AHCCCS' failure to disclose the weighting of the evaluation factors and subfactors require re-solicitation. In addition, Health Choice raised issues regarding the scoring of Narrative Questions B4, B5, B6, B7, and B8; past performance (B11); compliance review (B10); and the non-benefit cost bid scores. Together, these questions count for 635 possible points, i.e. 63.5% of the total available points. If these questions were re-scored, Health Choice would be in a position to receive sufficient points to put it in first or second place, and thus be awarded a contract. Indeed, if Health Choice prevails with respect to the cost bid score alone, it would put Health Choice in third place, when the RFP specifically contemplated three contract awards. Accordingly, Health Choice has shown that it had a substantial probability of receiving a contract but for the errors identified in its protest.

**B. Health Choice's Protest Is Timely.**

The Decision overstates the applicable standard for timeliness of a bid protest. *See* Decision, Ex. 2, p. 9. Correctly stated, only errors apparent on the face the RFP must be protested prior to bid submission. *See* A.A.C. R9-22-604(D)(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.”).

Although the Decision states in the conclusion (p. 41) that “many of the arguments are untimely, as set forth above,” the Procurement Officer only found one argument untimely, specifically AHCCCS' failure to disclose evaluation criteria and specific scoring/weighting criteria Ex. 2, p. 14-15. This conclusion, however, ignores that Health Choice protested not only AHCCCS' failure to disclose the weighting of evaluation criteria, but also that AHCCCS failed to adhere to the evaluation factors listed in the RFP, *see* Ex. 1 p. 11, 15-18, which could not have been protested prior to bid submittal. These errors, along with the use of an arbitrary scoring methodology resulted in contract awards that cannot be shown to be in the best interests of the State.

For the avoidance of doubt, the other issues identified in Health Choice's protest were also timely raised. Any improper development of the scoring methodology after reviewing bids was not apparent from the face of the RFP, which told the bidders that AHCCCS had already “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.” RFP Section H, Paragraph 8, p. 5. Furthermore, the RFP did not inform the bidders that AHCCCS would use an arbitrary forced inverse rank scoring methodology. Nor could Health Choice have known prior to bid submission that AHCCCS would improperly score several questions.

**C. The Timeline of the Development of the Scoring Methodology and the Evaluation Criteria Warrants Re-Solicitation.**

The Procurement Officer admits that if the scoring methodology was developed after the opening of the bids, that would be a violation of AHCCCS' fundamental policies: “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.” Decision, Ex. 2, p. 14. *See also GuideSoft* Decision, ¶¶ 29-31 (upholding protest because formulation of Scoring Criteria after the bids are open and reviewed was a violation of fundamental procurement policy).

The Decision’s attempt to clarify the timeline of the development of the scoring methodology and evaluation criteria only creates more confusion. A hearing is necessary to resolve this issue.

Paragraph 8 of the Instructions to Offerors stated that “AHCCCS has established a scoring methodology to evaluate an Offeror’s ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with the AHCCCS mission and goals.” RFP, Section H, p. 5. In stark contrast, the Executive Summary provided that the “Scope Team met October 2, 2023, through November 15, 2023, to determine the scoring methodology and came to an agreement to apply the scoring methodology detailed in the Evaluation Process Overview document available in the procurement file.”

The Decision does not attempt to reconcile these two opposing statements. Instead, claiming that the Executive Summary misstated the facts, the Decision provides a *third* timeline, which still cannot be reconciled with the RFP. According to the Decision, the “Scope Team and the Executive 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.” Ex. 2, p. 6.

Thus, despite claiming in the RFP that AHCCCS “has established” a scoring methodology, that methodology was still being determined and finalized up until September 26, 2023, more than two months after the RFP was approved for publishing, and eight weeks (about two months) after the RFP was issued on August 1, 2023. *See id.*

And while the Decision minimizes the statement in the Executive Summary as a typo, the Decision’s new statement shows that the Executive Summary was wrong on not just one, but two different fronts: (1) the scoring methodology was developed by both the Scope Team and the Evaluation Team, not just the Scope Team; and (2) the date range during which the scoring methodology was developed and finalized was months off. This is clearly more than just an insubstantial typo.

Incredibly, the Decision takes the position that the bidders should have relied upon Scope Team minutes produced after the contract award over the Final Executive Summary, the document in the procurement file that describes the basis for the award itself and the award process. Indeed, the Decision relies entirely upon Scope Team meeting minutes to support the claimed timeline, rather than emails or the final documents themselves. *See id.* p. 13.<sup>2</sup> Even then, the minutes do not themselves establish the full timeline. The Decision states that the scoring methodology was locked down on

---

<sup>2</sup> The procurement file also did not contain documentary support establishing the date upon which the scoring documents were locked down.

September 28, 2023 (three days past the initial target date), but cites no minutes or other contemporaneous documents for support. The only document cited in the Decision is the overview that was prepared in connection with the contract awards. *Id.* p. 14.

Even if the timeline set forth for the first time in the Decision is correct, the Decision confirms a major issue noted in Health Choice’s Protest, namely that “at the time the evaluators were ranking proposals, they did not know what scoring methodology would be used or how the rankings would ultimately translate into point scores for each proposal.” Protest, Ex. 1., p. 7.

Specifically, the Decision admits that “[t]he weighting and points were not communicated as part of the scoring training, so the other 14 evaluators [who were not on the Scope Team] conducted evaluations without knowledge of the scoring values being impacted by their consensus evaluations and rankings of the Offerors on individual proposal elements.” Ex. 2, p. 20. Thus, 14 of the 22 evaluators would not have known that by ranking one proposal over another, the higher ranked bidder would receive 20% more points than the next bidder, regardless of the actual substantive differences between the proposals.

Apparently, AHCCCS believed that separating the Scope Team from the evaluation and withholding information regarding the scoring methodology from the evaluators would enhance the RFP process somehow. Yet AHCCCS did not actually keep the Scope Team separate from the Evaluation Team. Rather, Scope Team members participated in the evaluation of almost every single written submission and the oral presentations.<sup>3</sup> Given the overlap, whatever the perceived benefits of separating the Scope Team and Evaluation Team were lost and certain evaluators had knowledge regarding the scoring process that others did not have. This flaw in the process is exacerbated by AHCCCS’ use of an arbitrary forced ranking scoring methodology. It is reasonable to conclude that if an evaluator had known of the automatic 20% score reduction and the weighting of the various categories, the evaluator would have been inclined to find a tie of two substantively close proposals.<sup>4</sup>

The Decision’s timeline also reveals new facts regarding the development of the evaluation criteria that warrant re-solicitation. According to the Decision, evaluation teams met in August and September 2023 to “confer on the submission requirement and to develop, document, and finalize the evaluation criteria.” *Id.*, p. 35. The development of evaluation criteria after the RFP issued violates both fundamental procurement policies and AHCCCS regulations, which require the agency to “evaluate a proposal based on the GSA and the evaluation factors listed in the RFP,” A.A.C. R9-22-602(B)(2) (emphasis added).<sup>5</sup>

---

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

<sup>4</sup> The evaluator training materials discouraged the evaluators from finding ties. *See* AHCCCS000060 (“ties are ok but try to rank 1-5”).

<sup>5</sup> The State Procurement Code uses both “evaluation factors” and “evaluation criteria” to describe information that must be contained in the solicitation. *See* A.A.C. R2-7-B301(C) (solicitations for invitations for bid must include the “evaluation criteria”); A.A.C. R2-7-C302(C) (RFP solicitations



**D. The Forced Ranked Scoring Methodology Is Arbitrary and Capricious.**

Health Choice's Protest challenged AHCCCS' forced inverse rank scoring methodology as arbitrary and capricious because it improperly and arbitrarily discounted a large percentage of points that was not tied to substantive differences in the proposals.

The Decision appears to take issue with the use of the term "forced ranking" but that term accurately captures the methodology. As the Decision acknowledges, AHCCCS used the following scoring formula:  $\text{Maximum Points} / \text{Number of Offerors} * \text{Offeror's Inverse Rank} = \text{Score}$ . Ex. 2, p. 27. Here, because there were five bidders, this means that the bidder who was ranked first on a question received 100% of the possible points for that question, the second ranked bidder received 80% of the points, the third ranked bidder received 60% of the points, the fourth ranked bidder received 40% of the points, and the fifth ranked bidder received 20% of the points. *Id.* Although ties were possible, the evaluators were discouraged from finding ties. *See* AHCCCS000060 ("ties are ok but try to rank 1-5"). Indeed, the Decision notes that ties only happened twice in the final rankings and once in the initial individual rankings. Ex. 2, p. 25.

Thus, each decrease in rank resulted in an automatic 20% deduction of points even if the responses were nearly identical. For questions that were worth a significant number of points, that 20% decrease represents a substantial deduction. For example, on B5, the 20% difference equated to 29 points, i.e. 2.9% of the total possible points. The formula forced the 20% decrease regardless of the actual qualitative difference between two proposals. Put another way, no matter how close two bidders were in terms of merits, the lower ranked bidder always received 20% fewer points for that question. Thus, the Decision is wrong to suggest that the evaluators could "closely rank" the bidders. *See* Ex. 2, p. 25.

In its Protest, Health Choice offered an example of the arbitrary nature of the scoring methodology. Suppose that the bidders' proposals would be rated as 100, 99, 98, 97, and 96 on a 100-point scale. Even though all five proposals would be considered an A+ score with minimal differences, under AHCCCS' scoring formula, the second ranked bidder whose proposal was practically perfect would only receive 80% of the points. And it only gets worse from there. The fifth ranked bidder (the 96 score) would only receive 20% of the available points despite submitting an A+ answer. Although this was raised in Health Choice's Protest, the Decision does not address this clear illustration of the faulty scoring system.

But that isn't the only illustration of an arbitrary resulting score. One could easily imagine the reverse scenario, in which all of the bidders fail miserably on a certain question, albeit some are

---

must contain the "evaluation factors"); *see also* Arizona State Procurement Manual, § 6.2.11 Evaluation Criteria ("The RFP must present the criteria that will be used for the evaluation of proposals."), available at <https://spo.az.gov/sites/default/files/Arizona%20State%20Procurement%20Manual%20DC%2009%20r0.pdf>.



marginally better than others. Yet, under AHCCCS' scoring methodology, a bidder who qualifies for a failing grade would still receive 100% of the points merely because the bidder's proposal was slightly better than the others.

One can also envision a scenario where one bidder was by far and away the best, while the four remaining bidders were relatively close, but substantively much worse than the top bidder. Even in this scenario, AHCCCS' forced inverse ranking methodology would create a 20% point gap between each of the bidders, which doesn't reflect the true substantive differences between them.

Furthermore, the forced inverse ranking system does not make sense when used for objective factors like OR compliance or cost. For B11, as discussed further below, AHCCCS evaluated each bidders' percentage of operational standards that were fully met. And yet, despite having a percentage figure that could easily translate directly into points, AHCCCS instead used its forced inverse ranking system, which artificially widened the differences between the bidders. *See supra*, p. 19-20.

The math example on page 28 of the Decision is a simple demonstration of the principle that the 20% differential remains no matter the total number of points to which it is applied. That's just a result of the forced inverse ranking system, which keeps the 20% ratio regardless of the total points available on a specific question. But the Decision does not and cannot show that for every written submission, oral presentation, or cost bid, one bidder's proposal was 20% better than the one ranked below it. In short, the formula is not rationally tied to the actual comparative differences in substance between proposals.

In contrast, common methods of assigning values to evaluation criteria allow the evaluation committee to set point values that correspond to how well the proposals meet the criteria (instead of solely determining how they rank against each other). For example, Section 6.8.2 of the Arizona Procurement Manual<sup>6</sup> discusses two such typical methods. In the first method, the evaluators themselves assign a point score up to the maximum point value for each evaluation criteria category. *Id.* Thus, if each proposal merits top points for that category, the evaluation team awards the appropriate points. In the second described method, evaluators consider the technical criteria on a "pre-established scale" such that an excellent response falls within a certain range of the potential points available, a good response is within a lower range, and a poor response is in the lowest range. *Id.* Again, under this method, if all the proposals were technically excellent, they would be scored within the excellent range.<sup>7</sup>

Here, the values assigned reflected the assigned ranking rather than how well the proposal met the RFP criteria. *See* Decision, Ex. 2, p. 34 ("Evaluators then ranked the comparative strengths of the

---

<sup>6</sup> Available at

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

<sup>7</sup> It is our understanding that AHCCCS previously used a version of this method to score proposals, which provided both bidders and reviewers sufficient information to determine how the proposals were scored.

proposals against one another.”); *see also* AHCCCS000068 (description of the Consensus Ranking process instructs to “Rank the comparative position of each submission” and “Compare strength of a response relative to the responses submitted by other Offerors”).

This is contrary to the principle that proposals must be evaluated based on the evaluation criteria set forth in the RFP. *See* A.A.C. R9-22-602(B)(2) (“The Administration shall evaluate a proposal based on the GSA and the evaluation factors listed in the RFP.”); *Orion Tech. Res., LLC v. Los Alamos Nat. Sec., LLC*, 2012-NMCA-097, ¶ 12, 287 P.3d 967, 972 (“Under the laws . . . the city was required to apply the criteria set out in the RFP—and no others—in evaluating the proposals”) (internal citation omitted).

The Decision wrongly claims that Health Choice seeks to improve only its score but not remedy similarly favorable gaps between other bidders. Ex. 2, p. 29. To the contrary, Health Choice argues that AHCCCS’ use of a flawed, arbitrary forced ranking formula can only be remedied by a re-solicitation. Protest, Ex. 1, p. 8-10.

The Decision also incorrectly puts the burden on Health Choice to prove that its score would have improved such that it would have received the contract award. *See* Ex. 2, p. 29-30. Where a bidder shows that the scoring system itself is arbitrary and capricious and thus requires re-solicitation, a bidder has met its burden to demonstrate prejudice. *See VAS Realty, LLC*, 26 F.4th at 949 (“a bid protester has standing when, assuming its protest is successful, it would have an opportunity to participate in a new procurement”).

AHCCCS’ reliance on points derived from forced rankings that do not reflect how well each individual evaluation met the RFP’s goals was arbitrary and capricious and an abuse of discretion. Accordingly, the solicitation should be re-solicited.

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

The RFP only listed two scored portions” in relative order of importance: (1) “Programmatic Submission Requirements”; and (2) “Financial Submission Requirements.” RFP, Section H, Paragraph 8. AHCCCS refused to provide any further scoring or weighting details. *See, e.g.*, RFP Amendment No. 1, Response to Question 24.

When the contract awards were announced, the offerors learned for the first time that AHCCCS gave the most weight to the narrative summary scores (55.5% of the overall points), followed by the oral presentations (29%), non-benefit cost bid (10%), and past performance (5.5%). AHCCCS has never explained why weighting subjective components like the written narratives so much heavier than objective components such as price and performance furthers the State’s goals announced in the RFP.

The failure to provide sufficient information to the bidders regarding AHCCCS’ evaluation factors is a violation of fundamental procurement policies. *See Isratex, Inc. v. U.S.*, 25 Cl. Ct. 223 (1992)

(“As a matter of sound procurement policy, the fullest possible disclosure of all of the evaluation factors and their relative importance is to be preferred to reliance on the reasonableness of the offerors’ judgment as to the relative significance of the various evaluation factors.”) (quotation omitted).

The Decision argues against disclosure of more detailed evaluation criteria and weightings, claiming that such information allows bidders to “game” the process. Ex. 2, p. 16. This argument completely misunderstands the purposes of the bid process.

Solicitations are not meant to be a game of hide the ball to see which bidders can best guess what the government entity is seeking in terms of a proposal. Rather, the goal is to find the best solutions to the government’s needs. A more fulsome disclosure of the agency’s evaluation factors results in proposals that are better designed to meet the agency’s needs. *See, e.g., Common Sense Adoption Servs. v. Dep’t of Pub. Welfare*, 799 A.2d 225, 231 (Pa. Commw. Ct. 2002) (“[A] fair competition necessitates an understanding on the part of all competitors of the basis upon which the award will be made. This is also essential to assure the proposals will be as responsive as possible so the agency can obtain the best possible proposal.”).

Contrary to what the Decision asserts, it is completely appropriate, and indeed desirable, for bidders to focus their proposals where the most points will be awarded because those areas are, by definition, the most critical aspects of the solicitation. It is arbitrary and capricious and an abuse of discretion to purposefully withhold information that is necessary for full and fair competition.

For these reasons, the Government Accountability Office (“GAO”) criticized Puerto Rico for failing to “include information about the relative importance of proposal evaluation factors” in its Medicaid procurements, noting that failing to include such information “may compromise fair competition and agencies’ ability to obtain proposals that are as responsive as possible . . . .” GAO-21-229, CMS Needs to Implement Risk-Based Oversight of Puerto Rico’s Procurement Process, February 201, at p. 10, available at <https://www.gao.gov/assets/720/712348.pdf>.

Here, the bidders should have been informed of the new approach to ensure the proposals would be as responsive as possible, especially because AHCCCS took a different approach to weighting and evaluation criteria than in prior procurements.<sup>8</sup> By failing to follow widely accepted procurement standards regarding the disclosure of the weighting or relative importance of evaluation factors, it is doubtful whether this RFP provided for maximum free and open competition. Moreover, the failure to disclose the weighting of evaluation factors and subfactors exacerbated the other errors identified in this protest.

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

---

<sup>8</sup> While the Decision asserts that the bidders could not reasonably believe that AHCCCS would use the same evaluation considerations, weightings, or point distributions as in past procurements, at the same time, the Procurement Officer relies on prior procurement practices when it supports denial of the protests. *Compare* Decision, Ex. 2, p. 19 and 23.

Numerous scoring errors were committed when the evaluators reviewed and ranked the narrative responses (B4-B9), past performance (B10 and B11), and the non-benefit cost bid (C1-C4). In large part, the Decision entirely fails to address Health Choice's arguments as to individual scoring errors but rather cites the discretion afforded to the agency at the judicial review stage.

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

The Ranking and Rationale spreadsheets that were produced with the procurement file do not actually provide an explanation as to how each proposal met or did not meet the evaluation criteria announced in the RFP.

Although the Decision claims that evaluators were trained to look for responses that "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," Ex. 2, p. 35, the Ranking and Rationale spreadsheets do not reflect such a substantive inquiry.

Rather than describe whether a proposed initiative met the State's goals, the rationales merely observe the level of detail in the proposals or rely on catchphrases. Over and over again, the rationales note whether an offeror "described" or "clearly described" or "did not clearly describe" a particular item, but the rationales do not evaluate the substance of what is being described or how that substance would further the RFP's stated goals, such as accessibility of network, collaboration with stakeholders, or consistency of services. *See also* Protest, Ex. 1, at p. 12-15 (describing examples from B4, B5, B6, and B7).

In response, the Decision does not point to a single instance in which the Ranking and Rationale Spreadsheets evaluate whether a proposed solution would further the goals announced in the RFP or would be in the best interest of the State. *See* Decision, p. 41. Rather, the Decision effectively admits that such information is missing by stating that "the Rational 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." *Id.*

But the agency must put forth sufficient explanation to establish that the scores awarded are not arbitrary and "are in accord with the evaluation criteria listed in the RFP. *General Security Services Corp.*, B-280388, B-280388.2, 99-2 CPD ¶49, 1998 WL 1012362 (Comp. Gen 1998) (citations omitted). What is missing here is a documented link between the rankings and how well each of the bidders met the evaluation criteria. *See* A.A.C. R9-22-603 ("The contract file shall contain the basis on which the award is made.").

As an example, compare Health Choice's scores on B9 and OP1 with its scores on B4 and B5. Health Choice received high scores on B9 and OP1 for its innovative approaches. Yet, when those

same approaches were noted in B4 and B5, as they pertained to those questions, Health Choice was not given sufficient credit and was ranked fourth on B4 and fifth on B5.<sup>9</sup> The Decision's only response is that offerors "may" have described those plans better in person than in writing. Decision, Ex. 2, p. 37. But the Decision entirely fails to find any such difference between Health Choice's written submission and its recorded oral presentation. The Decision's reliance on what "may" have occurred rather than actual facts does not deserve any deference.

Because the rationale spreadsheets do not adequately explain how the rankings reflect the substantive merits of the proposals, the scoring cannot stand.

## **2. The Final Rankings Cannot Be Reconciled with the Individual Rankings.**

In addition, Health Choice's Protest noted several instances in which the final consensus rankings cannot be reconciled with the tentative individual evaluator rankings. *See* Protest, Ex. 1, p. 13-15.

For example, on both B4 and B5, the three individual rankings all placed one of the bidders above another bidder. *See id.* Yet, the consensus rankings reach the entirely opposite conclusion, placing the lower ranked bidder above the initially higher ranked bidder. If all three individually found that one proposal met the criteria better than another, meeting as a group shouldn't alter that conclusion. Yet that happened more than once. There is no support in the ranking and rationale spreadsheets for all three evaluators changing their minds in this manner.

In addition, there were multiple examples, including in B5, B7, and B9, where one evaluator found that a proposal should receive the highest ranking yet another evaluator looking at the very same proposal felt it should be ranked last. *See id.* These examples demonstrate not only the ambiguity of the evaluation criteria, but also the arbitrariness of the forced inverse rank scoring given that the proposals were clearly close in terms of substance.

The Decision misunderstands Health Choice's argument. The issue isn't just that the individual rankings for Health Choice were better than the final rankings (although that is true), there is no rational explanation how all three evaluators could individually find one proposal better than another but then reverse those rankings after meeting together to discuss their individual notes.

Although the Decision claims that the Protestors ignore instances where the initial rankings would result in a lower score for the bidder than the final consensus ranking, the Decision does not identify any such instances for Health Choice (only one instance for Mercy Care). Decision, Ex. 2, p. 40.

---

<sup>9</sup> The only difference in the evaluation panel between B5 and OP1 was that Jakenna Lebsock, the Health Care Services Assistant Director, participated in OP1 but not B5.

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

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

Health Choice's Protest discussed examples in B5, B6, and other questions where the evaluation committee improperly marked down Health Choice for failing to provide information that was not part of the question asked or gave "extra credit" to offerors for concepts included in the narratives that were not actually responsive to the question presented. *See* Protest, Ex. 1, p. 15. This is contrary to the "fundamental tenet" that "proposals must be evaluated in accordance with the terms of the solicitation." *AshBritt, Inc. v. United States*, 87 Fed. Cl. 344, 374, *opinion clarified*, 87 Fed. Cl. 654 (2009).

The Decision does not respond to Health Choice's arguments on these questions.<sup>10</sup> Because of these errors, Health Choice's protest should be sustained.

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

Health Choice's Protest noted examples of instances in B4, B5, B6, B7, and B8 where the evaluation committee failed to properly give Health Choice credit for information in its proposal. *See* Protest, Ex. 1, p. 15-17. In these cases, the committee positively noted that other offerors had provided this exact same information. Thus, the evaluation committee erred by unfairly failing to recognize similar information in Health Choice's Proposal.

The Decision does not address any of the examples discussed in Health Choice's Protest, much less articulate any basis for the committee's failure to recognize information in Health Choice's proposal. These errors support the need for re-solicitation, or alternatively, rescoring the solicitation.

**5. AHCCCS Relied upon Undisclosed Evaluation Criteria to Score B11 (STAR rating).**

The Decision entirely fails to address Health Choice's argument regarding the scoring of B11. It is undisputed that BCBSAZ-Health Choice and United were the only two DSNPs in 2022 that received 4 STARS. Yet, United was ranked 1st and Health Choice was inexplicably ranked 4th on this

---

<sup>10</sup> Unfortunately, it is apparent from the Decision that the Procurement Officer criticizes Health Choice and the other protestors for not providing sufficient detail when the documents necessary to provide that detail haven't been provided, yet when Health Choice did provide specific detailed examples of errors, the Decision entirely ignores them.



question, behind Banner-University Care Advantage and Mercy Care, who tied for second even though they had 3.0 STAR ratings.

The Decision offers no explanation for this ranking, and does not address Health Choice's argument on this question at all. Nor does the Ranking and Rationale Sheet. It appears that AHCCCS may have penalized Health Choice for submitting a rating from an Arizona HIDE SNP plan rather than from an Arizona FIDE SNP plan. But such a penalty was never disclosed within the RFP and would not be reasonable given that the acuity of the populations served by the two plan types is virtually identical. The RFP did not inform the offerors that they would be scored negatively for an Arizona HIDE SNP plan as compared to an Arizona FIDE SNP plan.<sup>11</sup>

The use of undisclosed scoring criteria renders a decision arbitrary and capricious. *See, e.g., Hunt Bldg. Co. v. United States*, 61 Fed. Cl. 243, 273, *modified*, 63 Fed. Cl. 141 (2004) (noting that “agency's failure to follow its own selection process embodied in the Solicitation” lacks a rational basis and is “also a prejudicial violation of a procurement procedure established for the benefit of offerors”).

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

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

---

<sup>11</sup> By contrast, the RFP did express a preference with respect to contracts not in Arizona: “If the Offeror does not have a D-SNP STAR Rating in Arizona, the Offeror shall cite its 2023 STAR rating with the corresponding Medicare Contract Number, from one of the states for the Medicaid contracts cited in Submission Requirement B2, using the preference order detailed below. Preference order for STAR Rating from another State: a. FIDE SNP/DSNP Plan, b. Another type of SNP, or c. Medicare Advantage Plan.” RFP, Exhibit H, B11, as amended (emphasis added).



Health Choice should have tied for first for B11. Under AHCCCS' arbitrary forced ranking method, this would mean that Health Choice and United would have received 18 points rather than the full 20 points. But there is no rational reason to award less than full points simply because another bidder also had the same performance rating. This is yet another demonstration that the point scores measure how the bidders compared to each other rather than how well they met the evaluation criteria.

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

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

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

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

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

The RFP did not, however, disclose to the bidders how the compliance review would be evaluated. The most logical and straightforward scoring process would have been to give a straight percentage score based on overall compliance with the individual operating review ("OR") standards as AHCCCS has historically used in both reporting and past procurements.

Instead, AHCCCS scored this section based upon the percentage of the number of standards that were fully met (95-100%) for each plan. In short, it essentially created a "pass/fail" test for each standard, entirely ignoring partial compliance even if it was just a small percentage away from full compliance. Again, as with the narrative rankings, this formula artificially and arbitrarily creates large differences that do not accurately reflect an offeror's performance.

The Ranking and Rationale spreadsheet does not actually provide sufficient detail to know how AHCCCS arrived at its conclusion because a straightforward comparison of the percentage of fully met standards would have resulted in a different ranking, as shown in the below table:

<b>Offeror</b>	<b>Fully Met Standards/Total Standards</b>	<b>Percentage of Fully Met Standards</b>	<b>Ranking Based Solely on Percentage</b>	<b>Actual Ranking</b>
United	138/173	79.769%	5	3
Banner	145/173	83.815%	1	1
Health Choice	125/152	82.236%	3	5
Health Net	129/154	83.766%	2	4
Mercy Care	142/173	82.080%	4	2

In order to make sense of the rankings, Health Choice’s Protest reasoned that AHCCCS may have placed greater importance on certain categories and standards over others. We now know from that the difference arose from an improper incumbent bias. Specifically, the Decision states that the evaluators noted whether the operational review was for the ALTCS E/PD Program, “resulting in a higher overall consensus score for those offerors who were Incumbent EPD Contractors.” Decision, Ex. 2, p. 24. In short, AHCCCS admits that it scored incumbents more favorably on this criterion than non-incumbents. AHCCCS’ bias in favor of incumbents on this criterion was arbitrary and capricious or an abuse of discretion. But for AHCCCS’ improper incumbent bias, Health Choice would have been ranked third on B10, thus raising its score from 7 points to 21 points and decreasing Mercy Care and United’s scores correspondingly.

This question also provides a concrete example of the arbitrariness of the forced ranking model in this procurement. In terms of percentages of fully met standards, the bidders were all within four percentage points of each other (from 79.8% to 83.8%), yet despite how close the bidders were in terms of performance, the forced ranking model arbitrarily inserted a 20% point differential between each of the bidders. And the last ranked bidder receives only 20% of the possible points despite being four percentage points behind the number one ranked bidder. This confirms that points were not awarded based on how well the bidders met the criteria but instead on how well they compared against each other.

In addition, Health Net appears to have been scored based on their last ALTCS OR result in 2021 rather than their more recent ACC or RBHA OR, as was the case with all other current non-ALTCS contractors. AHCCCS acted arbitrarily and capriciously by treating Health Net differently than the other offerors and contrary to the RFP, which required the use of “the most recent finalized AHCCCS Operational Review.” See *TLT Constr. Corp. v. United States*, 50 Fed. Cl. 212, 216 (2001) (“A fundamental principle of government procurement is that [the agency] treat all offerors equally and consistently apply the evaluation factors listed in the solicitation.”). The Decision does not address this argument at all.

**7. Errors in the Non-Benefit Cost Bid Scores.**

Health Choice was ranked third for B12, the Cost Bid, even though Health Choice’s proposed total administrative rates were the second lowest. It is unclear how AHCCCS reached this ranking based on the documents that were produced. It appears that Health Choice’s ranking may



have been reduced based on a comment that Health Choice “submitted total administrative rates . . . that appear to consistently decrease as membership increases, which does not appear reasonable absent further explanation.” But it is common-sense that rates would decrease as membership increases and fixed costs can be spread out across a larger population. Indeed, with the exception of Banner, all of the other bidders also proposed rates that decreased as membership increased. While the Decision claims that Health Choice’s rates decreased “disproportionally to other offerors,” p. 31, it cites no support for that claim. Health Choice should have received second place on its non-benefit cost bid, thereby receiving a score of 80 points instead of 60 points (and correspondingly decreasing Mercy Care’s score by 20 points).

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

#### **G. Conclusion.**

Here, there was a series of compounding errors that resulted in contract awards that cannot be shown to be in the best interests of the State and are thus an abuse of discretion/arbitrary and capricious.

The RFP announced two scored categories (Programmatic Submission Requirement and Financial Submission Requirements) rather than specific evaluation criteria or weightings. After the RFP was published, the evaluators developed extremely vague “criteria” that was not published to the bidders and was subject to differing interpretations by the evaluators as evidenced by the scoring anomalies noted above. Without sufficiently definite criteria tied to the State’s needs and goals, the evaluation team focused upon style rather than substance. The rationale spreadsheets do not provide the information necessary to determine how AHCCCS evaluated the substance of the proposals against the RFP criteria or arrived at the announced rankings. Then those rankings were plugged into a forced inverse ranking system that created arbitrarily large point differentials divorced from how well each proposal met the State’s articulated needs. Compounding these flaws, AHCCCS placed the majority of weight on the bidders’ written answers to the broad narrative questions. Taken together, these issues raise serious concerns about the use of a scoring methodology that appears designed to create an opaque evaluation in order to frustrate a protest rather than to clearly establish the support for a determination that certain proposals are the most advantageous to the State.

The Decision does not engage in a determination of whether the Contract awards are in the best interest of the State. Instead, the Decision relies upon the incorrect standard of review to deny the Protest rather than address the myriad flaws discussed above.

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

For the reasons explained above, the recommended award is arbitrary and capricious, clearly erroneous, and an abuse of discretion. *Achen Gardner, Inc. v. Superior Court*, 173 Ariz. 48, 55, 839 P.2d

1093, 1100 (1992); *Brown v. City of Phoenix*, 77 Ariz. 368, 377, 272 P.2d 358, 364 (1954). AHCCCS should reverse the Procurement Officer's Decision, cancel the awards to United and Health Net, and order that the procurement be re-solicited, or alternatively, that the solicitation be rescored, and award a contract to Health Choice based upon the new scoring of the solicitation. *See* A.A.C. R9-22-604(H) (listing possible remedies).


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

### **7. Request for Hearing.**

Health Choice requests a hearing on this appeal pursuant to A.A.C. R9-22-604(I)(2)(d).

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By: 

Kevin E. O'Malley

Enclosures  
CC: Hannah Porter  
Bill Richards

# **EXHIBIT 1**

December 21, 2023

Meggan LaPorte  
Arizona Health Care Cost Containment System  
Chief Procurement Officer  
701 E. Jefferson, MD5700  
Phoenix, AZ 85034  
[procurement@azahcccs.gov](mailto:procurement@azahcccs.gov)  
[RFPYH24-0001@azahcccs.gov](mailto:RFPYH24-0001@azahcccs.gov)  
[Meggan.laporte@azahcccs.gov](mailto:Meggan.laporte@azahcccs.gov)

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

Dear Ms. LaPorte:

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

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

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

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

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

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

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

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

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

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

The following information is provided in support of this Protest:

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

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

BCBSAZ Health Choice





8220 N. 23rd Avenue  
Phoenix, AZ 85021

Shawn Nau, Chief Executive Officer  
BCBSAZ Health Choice  
8220 N. 23rd Avenue  
Phoenix, AZ 85021  
(480) 340-3452  
[shawn.nau@azblue.com](mailto:shawn.nau@azblue.com)

## **2. The Signature of the Interested Party or the Interested Party's Representative.**

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

Kevin E. O'Malley  
Counsel for BCBSAZ Health Choice  
Gallagher & Kennedy P.A.  
2575 East Camelback Road, Ste. 1100  
Phoenix, Arizona 85016  
(602) 530-8430  
[kevin.omalley@gknet.com](mailto:kevin.omalley@gknet.com)

## **3. Identification of the Solicitation Number.**

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

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

### **A. Background.**

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

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



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

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

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

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

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

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

---

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

AHCCCS told the bidders that “AHCCCS has established a scoring methodology to evaluate an Offeror’s ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with the AHCCCS mission and goals.” Section H, Instructions to Offerors, Paragraph 8 p. 5 (emphasis added). Thus, the bidders were notified that their proposals would be scored in line with the stated mission and goals according to a methodology that had already been developed.

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

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

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

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

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

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

Paragraph 8 of the Instructions to Offerors stated that “AHCCCS has established a scoring methodology to evaluate an Offeror’s ability to provide cost-effective, high-quality contract services in a managed care setting in accordance with the AHCCCS mission and goals.” Section H, p. 5. Yet, when the awards were released, the RFP Executive Summary revealed otherwise. The Executive

Summary provides that the “Scope Team met October 2, 2023, through November 15, 2023, to determine the scoring methodology and came to an agreement to apply the scoring methodology detailed in the Evaluation Process Overview document available in the procurement file.”

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

---

<sup>4</sup> Available at

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

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



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

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

By failing to provide an explanation of how the proposals met the RFP evaluation criteria, the evaluation team's rankings are effectively unreviewable by a neutral decision-maker. "[A]gency evaluation judgments must be documented in sufficient detail to allow review of the merits of a protest, to show that they are not arbitrary, and to show that they are in accord with the evaluation criteria listed in the RFP." *General Security Services Corp.*, B-280388, B-280388.2, 99-2 CPD ¶49, 1998 WL 1012362 (Comp. Gen 1998) (citations omitted). "Specifically, the agency must articulate the reasons for its procurement decision including a rational connection between the facts found and the

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

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

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

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

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

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

---

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

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

The rankings for B4 are also similarly confusing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

In addition, Health Net appears to have been scored based on their last ALTCS OR result in 2021 rather than their more recent ACC or RBHA OR, as was the case with all other current non-ALTCS contractors. AHCCCS acted arbitrarily and capriciously by treating Health Net differently than the other offerors and contrary to the RFP, which required the use of “the most recent finalized AHCCCS Operational Review.” *See TLT Constr. Corp. v. United States*, 50 Fed. Cl. 212, 216 (2001) (“A fundamental principle of government procurement is that [the agency] treat all offerors equally and consistently apply the evaluation factors listed in the solicitation.”). Accordingly, the scores for B10 cannot stand.

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

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

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

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

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

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


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

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

Meggan LaPorte  
December 21, 2023  
Page 21

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By:   
Kevin E. O'Malley

Enclosures  
CC: HHP





# **EXHIBIT 1**

Guidesoft Inc., DBA Knowledge Services

No. 22F-003-ADM

v.

**ADMINISTRATIVE LAW JUDGE  
DECISION**

ARIZONA DEPARTMENT OF  
ADMINISTRATION

---

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

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

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

---

**FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

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

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

### 28 **CONCLUSIONS OF LAW**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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



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

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

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

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

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

15 **RECOMMENDED ORDER**

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

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

21 Done this day, May 22, 2023.

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

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

25 Elizabeth Alvarado-Thorson,  
26 Department of Administration

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

1 Joshua Grabel  
2 DICKINSON WRIGHT PLLC  
3 jgrabel@dickinsonwright.com

4 By: OAH Staff  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

# **EXHIBIT 2**

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](mailto:roy@ha-firm.com)  
c/o Henze Cook Murphy, PLLC  
Kiersten Murphy  
722 E. Osborn Road, Suite 120  
Phoenix, Arizona 85014  
[kiersten@henzecoockmurphy.com](mailto: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](mailto: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](mailto:drosenbaum@omlaw.com)  
c/o Perkins Coie LLP  
Matthew P. Gordon  
12201 Third Avenue, Suite 4900  
Seattle, WA 98101  
[mgordon@perkinscoie.com](mailto: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.<sup>1</sup>

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.

---

<sup>1</sup> 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:

<b>Offeror</b>	<b>Total Score</b>	<b>Rank Based on Total Score</b>
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).<sup>2</sup> 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;”<sup>3</sup>
- **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;”<sup>4</sup>
- **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;<sup>5</sup>
- **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;”<sup>6</sup>
- **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 2<sup>nd</sup>,” 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 13<sup>th</sup>;”<sup>7</sup>
- **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;”<sup>8</sup> and

---

<sup>2</sup> 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.

<sup>3</sup> See July 10, 2023, Scope Team meeting minutes AHCCCS000376

<sup>4</sup> See July 19, 2023, Scope Team meeting minutes AHCCCS0000382

<sup>5</sup> See July 20, 2023 Scope Team meeting minutes AHCCCS000383

<sup>6</sup> See July 26, 2023, Scope Team meeting minutes AHCCCS000384

<sup>7</sup> See August 2, 2023, Scope Team meeting minutes AHCC000411

<sup>8</sup> 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.”<sup>9</sup>

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.

---

<sup>9</sup> 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 presentations<sup>10</sup>, 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

---

<sup>10</sup> 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.”)].<sup>11</sup>

**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

---

<sup>11</sup> 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.<sup>12</sup>

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.**

---

<sup>12</sup> 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.<sup>13</sup> 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.**

---

<sup>13</sup> 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.<sup>14</sup> 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.

---

<sup>14</sup> 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: 1<sup>st</sup> (highest overall score) Health Net (total score of 715 points); 2<sup>nd</sup> APIPA (total score of 668 points); 3<sup>rd</sup> Mercy Care (total score of 557.50 points); 4<sup>th</sup> BCBSAZ (total score of 537 points); and 5<sup>th</sup> 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.<sup>15</sup>

---

<sup>15</sup> 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.<sup>16</sup> 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**

---

<sup>16</sup> 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.”<sup>17</sup> 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].”<sup>18</sup> 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 ....”<sup>19</sup> 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

---

<sup>17</sup> See 12-20-23 Mercy Care Bid Protest at p. 28

<sup>18</sup> See 12-20-23 Mercy Care Bid Protest at p. 12

<sup>19</sup> 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).<sup>20</sup>

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

---

<sup>20</sup> 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.<sup>21</sup> 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

---

<sup>21</sup> 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 Protestors envision.

Moreover, the Protestors' 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 Protestors 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 Protestors 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 Protestors 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 Protestors' 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 Protestors, 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 2<sup>nd</sup> 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](mailto:Procurement@azahcccs.gov)

CC;

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

# **EXHIBIT 3**



January 19, 2024

Meggan LaPorte  
Arizona Health Care Cost Containment System  
Chief Procurement Officer  
701 E. Jefferson, MD5700  
Phoenix, AZ 85034  
[procurement@azahcccs.gov](mailto:procurement@azahcccs.gov)  
[RFPYH24-0001@azahcccs.gov](mailto:RFPYH24-0001@azahcccs.gov)  
[Meggan.laporte@azahcccs.gov](mailto:Meggan.laporte@azahcccs.gov)

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

Dear Ms. LaPorte:

I write on behalf of Blue Cross and Blue Shield of Arizona Health Choice (“Health Choice”) in reply to the opposition submitted by Health Net Access, Inc. dba Arizona Complete Health-Complete Care Plan (“AzCH”) to Health Choice’s protest of the contract award in AHCCCS RFP number YH24-0001 (the “Opposition”). Mindful of the concerns noted in your January 12, 2024 letter, this reply will not endeavor to address every argument raised in AzCH’s 30-page opposition, but will instead focus on a few critical points. Health Choice maintains all of the arguments and positions raised in its bid protest letter.

AzCH’s Opposition is built upon an incorrect burden of proof and meritless waiver arguments, none of which withstand scrutiny. Health Choice’s protest demonstrated several compounding errors with the procurement, which resulted in contract awards that have not and cannot be shown to be in the best interests of the State. AzCH’s Opposition does not show otherwise. Health Choice’s protest should be sustained, and the contract awards set aside and the procurement re-solicited, or alternatively, the solicitation should be re-scored and a contract awarded to Health Choice.

**A. Health Choice Has Standing to Protest; AzCH Applies the Incorrect Standard of Review.**

First, AzCH misstates the burden of proof and standard of review that applies at this initial stage of the protest. AzCH argues for the burden of proof applied by an ALJ in an appeal of a denial of a bid protest by the State Procurement Office. *See* Opposition at 8 (citing *Cigna Healthcare of Ariz., Inc. & Conn. Gen. Life Ins. Co. v. Ariz. State Procurement Off.*, 04-0008-ADM, at 39 (May 6, 2005)). But the *Cigna* decision addressed the “burden of proof applicable at the administrative hearing level,” not the standard for the initial bid protest. *Id.* at 37-38.

At this stage, the procurement officer must determine whether the protestor states a valid basis for protest and then decide the appropriate remedy based on a number of factors, including the seriousness of the deficiency, the degree of prejudice to the parties or the integrity of the RFP process and the best interests of the State. A.A.C. R9-22-604(H)(2).

But even if the same burden of proof applied to protests and appeals, AzCH incorrectly applies it. Even at the administrative hearing stage, the ALJ in *Cigna* rejected a “highly deferential” arbitrary and capricious/abuse of discretion formulation of the burden of proof because such a standard is “reserved for review of an agency’s final administrative decision.” 04-0008-ADM, at 38. On this point, the ALJ recognized that federal case law was not “directly analogous . . . because those decisions involved review of final agency decisions, and did not address the burden of proof applicable at the administrative hearing level.” *Id.*

Furthermore, AzCH wrongly asserts that Health Choice must show that but for the alleged improprieties, “Health Choice would have received a contract.” *See* Opposition at 9, 10. *Cigna* requires only that a protestor show a “substantial probability” of receiving a contract, not that the protestor would have necessarily received the contract, as AzCH repeatedly claims. *See Cigna*, 04-0008-ADM, at 38. This standard is met where a successful protest would result in the rebidding of the contract. *See VAS Realty, LLC v. United States*, 26 F.4th 945, 949 (Fed. Cir. 2022) (“a bid protester has standing when, assuming its protest is successful, it would have an opportunity to participate in a new procurement”). Moreover, “any doubts concerning the prejudicial effect of the agency’s action” must be resolved “in favor of the protestor.” *Colonial Storage Co.—Reconsideration*, Comp. Gen. Dec. B-253501.8, 94-1 CPD 335.

Here, Health Choice asserted that the possibility of bias inherent in selecting a scoring methodology after opening and reviewing bids, the use of the flawed forced inverse ranking scoring method, and AHCCCS’ failure to disclose the weighting of the evaluation factors and subfactors require re-solicitation. In addition, Health Choice raised issues regarding the scoring of Narrative Questions B4, B5, B6, B7, and B8; past performance (B11); compliance review (B10); and the non-benefit cost bid scores. Together, these questions count for 635 possible points, i.e. 63.5% of the total available points. If these questions were re-scored, Health Choice would be in a position to receive sufficient points to put it in first or second place, and thus be awarded a contract. Indeed, even AzCH acknowledges that if Health Choice prevails with respect to the cost bid score alone, it would put Health Choice in third place, Opp. at 28, when the RFP specifically contemplated three contract awards. Accordingly, Health Choice has shown that it had a substantial probability of receiving a contract but for the errors identified in its protest.

## **B. Health Choice’s Protest Is Timely.**

Second, AzCH’s arguments regarding waiver and timeliness should be rejected. As AzCH itself acknowledges, only patent errors in the RFP must be protested prior to bid opening. *See* Opposition at 12; A.A.C. R9-22-604(D)(1) (“A protestor 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.”). Here, the errors regarding AHCCCS’ scoring methodology and the scoring of the proposals were not apparent from the face of the RFP.

The first issue raised in Health Choice’s protest was AHCCCS’ improper development and selection of the scoring methodology after it opened and reviewed the bids. *See* Health Choice Protest at 5-8. Health Choice could not have challenged this impropriety before the bids were due because the RFP did not inform the bidders that it would select the scoring methodology after review of the proposals. To the contrary, the RFP explicitly told the bidders that AHCCCS had already “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.” RFP Section H, Paragraph 8, p. 5. It was not until the awards were released that the bidders learned the truth: the Scope Team met and agreed upon the scoring methodology to be applied in the period from October 2, 2023 through November 15, 2023, i.e., after the evaluation teams reviewed and ranked the proposals. Because this impropriety was not apparent in the RFP itself, Health Choice’s protest on this issue is timely.

Health Choice also protested the arbitrary forced inverse rank scoring methodology selected by AHCCCS because the system improperly and arbitrarily discounts large percentages of points in a manner that does not reflect the substantive difference in the proposals. *See* Health Choice Protest at 8-10. Again, this error was not apparent on the face of the RFP. The RFP informed the bidders that “Programmatic and Finance Requirements will be evaluated and weighted” and that “Narrative Submission Requirements will be scored for each Offeror and the score for that Offeror will be applied to all GSAs bid.” RFP Section H, Paragraph 8, p. 6. Thus bidders knew only that AHCCCS would score and weigh the two announced evaluation factors. But AHCCCS kept the bidders in the dark as to the details of the scoring methodology or how point scores would be computed. In the amendment process, AHCCCS refused to provide additional information, taking the position that “AHCCCS will not be providing scoring or weighting details.” *See* RFP Amendment No. 1, Response to Question 24. Because AHCCCS did not disclose in the RFP that it would use a forced inverse rank scoring methodology, Health Choice’s protest of that methodology is timely.

The mere fact that AHCCCS has used a consensus ranking approach in previous evaluations does not change the analysis. Again, only errors apparent on the face of the RFP must be protested prior to the due date for receipt of proposals. An agency’s past practices are not incorporated into an otherwise silent RFP. Every solicitation must stand on its own. Surely AHCCCS does not take the position that it must use consensus ranking in every solicitation going forward simply because it has done so in the past. Accordingly, the bidders were not on notice that AHCCCS would use its arbitrary forced inverse ranking system at the time the RFP was issued. Indeed, the most reasonable inference is to the contrary because the RFP anticipated a situation where the difference in scores between the highest bidders would be negligible, yet the forced inverse ranking method essentially precluded that possibility.

Lastly, AzCH incorrectly argues that Health Choice waived its argument regarding the scoring of B11 (STAR rating). The RFP only announced a preference with respect to STAR ratings

for certain contracts outside of Arizona. RFP Exhibit H, B11. The RFP did not express such a preference for Arizona contracts. Thus, Health Choice could not have known that AHCCCS would rely upon unstated evaluation criteria for B11.

**C. AzCH Engages in Unfounded Speculation Regarding AHCCCS' Development of the Scoring Methodology.**

AzCH does not and cannot reconcile the conflicting statements in the Executive Summary and Paragraph 8 of the Instructions to Offerors regarding the timing of AHCCCS' development and selection of the scoring methodology used to score this solicitation. Instead, AzCH ignores the plain language of the Executive Summary to support the interpretation that most suits AzCH. Because AzCH was not privy to AHCCCS' decision-making, AzCH's speculation regarding AHCCCS' intent lacks foundation and should be entirely disregarded.

**D. The Forced Inverse Rank Scoring Methodology Used by AHCCCS Is Not Appropriate.**

AzCH's attempts to defend the forced inverse rank scoring methodology all fail. Again, AzCH relies upon AHCCCS' past practices. But prior use alone does not show that it was appropriate in this solicitation.

AzCH does not argue that the point differentials for each scored item actually reflect how well each proposal met the criteria being evaluated. It cannot be disputed that the points reflect only the straight rankings, regardless of the actual substantive differences between the proposals. AzCH also fails to truly consider Health Choice's example involving the submission of all A+ proposals, resorting instead to emphasizing its total point score. But as Health Choice abundantly made clear in its protest, the scoring system is designed to create arbitrarily large point gaps. Thus, AzCH's assertion underscores the flaws in AHCCCS' methodology.

AzCH's discussion regarding B11, the Past Performance STAR Rating measure, further demonstrates the arbitrary, flawed nature of AHCCCS' scoring methodology. AzCH argues that even if Health Choice is correct that it should have received proper credit for its 4.0 STAR rating, Health Choice still would not have received the full points available for B11 because another bidder also had a 4.0 STAR rating. In that situation, AzCH argues that both first-place finishers would receive 18 points rather than the full 20 points. *See* Opposition at 26.


There is no rational reason to penalize a bidder's score simply because another bidder also met that criterion. What if two bidders had both submitted the same cost bid that was far and away better than the other bids? Should they receive less than full points, just because they happened to propose the same exceptional cost bid? This flaw shows that AHCCCS was not scoring the bidders on how well they met the criteria but how they compared to the other bidders, which itself is improper.

**E. Conclusion.**

Health Choice submitted a timely protest that fully demonstrates the prejudice it suffered as a result of the several errors committed during the procurement process. But for the errors identified in its protest, Health Choice would have likely received a contract. AHCCCS should cancel the awards to United and AzCH and order that the procurement be re-solicited, or alternatively, that the solicitation be rescored. Health Choice requests a stay of the implementation of the contract awards in order to preserve its remedies.

Very truly yours,

GALLAGHER & KENNEDY, P.A.

By:   
Kevin E. O'Malley

Enclosures  
CC: HHP