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**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