

January 19, 2024

Via Email

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RE: AHCCCS Request for Proposal No. YH-24-0001

Dear Ms. LaPorte:

As you know, this firm, together with Henze Cook Murphy PLLC, represents Mercy Care in connection with its December 20, 2023 protest of the award in the above-referenced solicitation. By this letter, we respond briefly to the January 8, 2024 response submitted by Health Net Access, Inc. dba Arizona Complete Health-Complete Plan (“Health Net”). While AHCCCS’s regulations do not provide a basis for an interested party to appear as Health Net has, to the extent you consider its response, we trust you will carefully consider this reply in turn.

Introduction

We begin with some table setting to inform the discussion that follows. First, Health Net attempts to frame the evaluation of Mercy Care’s protest around “standards of review” for bid protests and the broad discretion to which agencies are entitled. But those standards of review, to the extent they even constitute persuasive authority in Arizona, govern *judicial* review of agency decisions. At this juncture, the protest remains very much within the purview of the agency. You, as the CPO, are not sitting in an appellate capacity, and you retain broad discretion to remedy the flaws identified by the protest without needing to clear a legalistic threshold of error. The decision before you is not whether to sustain or overrule any decisions made to date, but to determine which award is in the best interests of the state.

Second, Health Net points repeatedly to prior RFPs issued by AHCCCS, some in which Mercy Care has participated, to imply that Mercy Care should have anticipated the matters with which it now takes issue. That is wrong. To begin, Mercy Care is not aware of any prior AHCCCS RFP in which oral presentations alone accounted for nearly a third of all available points—it certainly was not the case during the 2018 ALTCS solicitation. Regardless, whatever AHCCCS might have done in a prior RFP is no indication of what it would do in this one. The protest is governed by the terms of *this* RFP, not prior ones. There has been no waiver here, because the bases on which Mercy Care protests could not have been known to it until the procurement file was posted on December 1, 2023.

I. Mercy Care should be awarded a third contract.

We began and ended our protest letter by requesting that Mercy Care be awarded a statewide or a third central GSA contract. Our point was that, even *with* the serious flaws identified in the remainder of our protest, Mercy Care still ranked third among all offerors. And because AHCCCS already said quite clearly that it “anticipates awarding . . . a maximum of three contractors *in the Central GSA*,” Instructions at 8 (emphasis added), it was appropriate to follow through with that intent and award a third central GSA contract to the third-ranked bidder. Indeed, evaluators were told in training that “AHCCCS *will* be awarding a total of three contracts.” *See* AHCCCS000032 (emphasis added).

Doing so would avoid having to reissue the RFP or grapple with the issues raised in the remainder of the protest. By arguing that AHCCCS was not *compelled* to award a third contract under the terms of the RFP, Health Net is responding to an argument Mercy Care never made. Regardless, a third contract would not come at the expense of Health Net’s award, and Health Net has not identified any way it would be prejudiced by Mercy Care receiving a third contract.

II. AHCCCS has said clearly that its Scope Team did not finalize the scoring methodology until November 15, 2023—well after the submission of proposals.

What we did argue was that AHCCCS improperly waited to establish the scoring criteria until after it had received, opened, and evaluated the offerors’ proposals. AHCCCS received and publicly opened the five proposals on October 2, 2023. *See* Executive Summary at 2. But AHCCCS’s own description of its procedures said:

Scoring Methodology

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.

Id.

The determination of the scoring methodology by the Scope Team happened concurrently with the Evaluation Team's review and evaluation of the proposals, the timeline for which is noted separately in the Executive Summary:

Evaluation Meetings

Scoring Training was held on October 2, 2023.^[1] The Evaluation Teams' first consensus meeting was held on October 12, 2023. At this meeting the Evaluation Team started to develop strengths and weaknesses for each proposal for their assigned submission requirement. The teams continued this process through November 15, 2023.

Id.

The Scope Team and the Evaluation Team *each* continued to meet through November 15, 2023. Health Net points to the minutes from a September 21, 2023 Scope Team meeting for the conclusion that "the scoring methodology and scoring tools were formally approved by the Scope Team" on that date. Resp. at 11; *id.* Ex. G. But the minutes from that meeting show only that the scoring *tools* were approved at that meeting, not the scoring *methodology*. See Resp. Ex. G. The scoring tools were simply Excel file templates used either for evaluators to enter their evaluations (in the case of the individual scoring tools) or to apply code to convert ranks to scores (in the case of the overall scoring tool). The September 21, 2023 minutes do not indicate that the Scope Team had done anything more than prepare blank Excel templates by that date. Notably, the materials from the October 3, 2023 training to evaluators did not note anywhere the weight that would be given to different submission requirements. See AHCCCS000029-76.

Further, the note in the "Evaluation Process Overview" document that "All scoring documents were locked down prior to October 2, 2023" does not indicate what the "scoring documents" were or if they included the scoring criteria. Finally, while

¹ Other documents in the file indicate that the scoring training was actually held on October 3, 2023.

the October 3, 2023 evaluator training presentation notes that evaluators were to rank offerors from first to fifth, neither the presentation deck nor any other document in AHCCCS's productions to date indicate that evaluators knew that their ranks would be converted to numerical scores or the relative weight each submission requirement would receive in scoring.

Simply put, AHCCCS said clearly and unequivocally that its Scope Team—not its Evaluation Team—met “through November 15, 2023, to determine the scoring methodology.” Health Net cannot manufacture “confusion over wording.” Resp. at 11, where the wording is clear. If AHCCCS's representation is true, the timing of its scoring determinations reflects a serious flaw that warrants its reissuance of the RFP.

III. The Oral Presentations were improperly scored and overweighed.

The RFP stated explicitly when an item would be scored: by its terms, only those “items which are designated for scoring in this RFP” would be scored. Instructions at 5. Logically, it follows that an item not specifically designated for scoring would not be scored.

The RFP said specifically that the Capitation Agreement/Administrative Cost Bid, Case Management Cost Bid, and Narrative Submission Requirements except for those specifically exempted would be scored. *Id.* at 6. The oral presentations were not part of the cost bids or the Narrative Submission Requirements; there was thus no indication that they would be scored. And while the RFP stated that the presentations would be audio recorded “for the Agency's use in the evaluation process,” there was no indication that the presentations would be evaluated in their own right as opposed to simply informing the scored Narrative Submission Requirements.

The problem is not just that the oral presentations were scored or that their “pop quiz” format was an exceedingly poor means by which to convey or evaluate the substance of any offeror's proposal: it is these defects *in conjunction* with weighing the oral presentations so heavily that prejudiced Mercy Care. What might otherwise be chalked up to whimsy became a manifest error when made to account for nearly a third of all points.

A contract of this magnitude and importance to the state should not be made to turn on a pair of half-hour presentations forced to be given on the fly. Mercy Care could not have objected to the undue weight given the oral presentations any sooner than it did, because AHCCCS did not disclose that the oral presentations accounted for 29% of all points until it announced the contract awards. Health Net's waiver argument misunderstands the nature of the error Mercy Care has identified.

While Health Net points to the 2018 ALTCS E/PD solicitation's use of an oral presentation component, that solicitation did not assign points specifically to oral presentations, let alone make them nearly a third of all points. Instead, it assigned points to the following categories: Access to Care/Network, Administration, Program, and Capitation. The 2018 solicitation, even if relevant, was scored very differently.

Notably, Health Net does not defend the decision to weigh the oral presentations so heavily, except to suggest that the presentations allowed AHCCCS to engage with an offeror's staff rather than with the consultants who it surmises probably drafted the narrative submissions. Resp. at 14–15. Of course, Health Net offers no support for its speculation that the narrative submissions were drafted by consultants. Regardless, the notion that AHCCCS could glean a more authentic view of an offerors' qualifications from a set of half-hour presentations during which it *asked no questions* borders on the absurd.

IV. The ranked scoring system overlooked the strengths of each proposal.

As explained in the protest letter, the ranking-based scoring system assigned artificially low scores to some offerors irrespective of their strengths and artificially high scores to others irrespective of their weaknesses. The final scores therefore did not reflect the individual merits of each proposal.

In response, Health Net again begins with a misguided waiver argument, suggesting that the protest clock began to run when AHCCCS refused to disclose scoring or weighting details in its solicitation amendments. Resp. at 17. But the error giving rise to the protest was not the refusal to disclose the methodology; the problem is the methodology itself, and Mercy Care could not have possibly challenged that methodology before it was disclosed on December 1, 2023. The RFP's reference to responses being "evaluated and weighted" to arrive at a "score" using "established [] scoring methodology," Resp. at 16, could not possibly have alerted Mercy Care or anyone else that AHCCCS would use the rank-scoring formula it disclosed in conjunction with the award.

The upshot is that the ranked scoring system created artificially large disparities between offerors where few or none might have existed and failed to account for the individual merits of each proposal. Whatever thoughtfulness might have gone into the evaluators' ranking decisions was lost when those ranks were converted to cold scores that ultimately determined the award. And while ties were possible, they were discouraged. *See* AHCCCS000060 (evaluator training slide stating "ties are ok but try to rank 1-5"). With five offerors, the delta between each score in a given category, absent a tie, would be 20%—a point Health Net does not

dispute. It was therefore impossible for the scores to reflect differences between offerors greater than a perfect tie but less than 20%.

The ranked scoring problem is another that is compounded by the heavy weight assigned to the oral presentations, where Mercy Care was ranked last or close-to-last despite having provided as robust and thoughtful answers as it could under the time constraints. By virtue of being ranked low in what should have otherwise been an unscored or at most unimportant performance category, Mercy Care fell from first place overall to third.

V. The CPO is not required to give deference in deciding which award is in the best interests of the state.

Health Net argues that the CPO should afford great deference to the evaluation team's scoring decisions and evaluation—positing that those decisions are not meaningfully subject to review at any stage of the protest process. Citing almost exclusively federal authority, Health Net argues that even at this very early stage of the procurement protest process, the CPO is not permitted to “second guess” the evaluators' scoring determinations. Health Net's reliance on federal law at this early stage is in error. Not only are the federal decisions it cites inapposite procedurally (each is at an administrative appeal or judicial review posture), but the holdings in those federal cases were expressly and unequivocally rejected by the only Arizona authority arguably on point, *Cigna Healthcare of Arizona, Inc. & Conn. Gen. Life Ins. Co. v. Ariz. State Procurement Off.*, 04-0008-ADM (May 6, 2005). Health Net cites *Cigna* favorably, at 8, but then promptly ignores its context.

Specifically, the ALJ in *Cigna* considered whether a highly deferential standard of review was appropriate for an administrative appeal of a CPO's decision to deny a procurement protest. The State Procurement Office, along with the successful contract awardee, argued that the ALJ should give great deference to the evaluators' scoring decisions and award recommendation, citing federal cases, and arguing that the evaluators' recommendation should be reviewed under an abuse of discretion or arbitrary and capricious standard. The ALJ refused to adopt such a deferential review, even at the administrative hearing stage of the protest: “The Administrative Law Judge rejects SPO's and United's assertion of the arbitrary and capricious/abuse of discretion formulation because it attempts to incorporate, at the hearing level, a highly deferential standard that in Arizona is reserved for review of an agency's final administrative decision.” *Id.* at 39 (emphasis added). Instead, the ALJ (himself sitting in an appellate posture reviewing of the CPO's protest decision), employed a far less deferential standard to analyze the propriety of the evaluators' award recommendation.

The same reasoning holds true with even more force here, where the CPO has been asked to review protest issues in the first instance. Consistent with *Cigna*, when AHCCCS reviews its own actions in response to a procurement protest, it must do so without deference, and with the express purpose of reaching the result most advantageous to the state. *See, e.g.*, A.A.C. R9-22-603 (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”). Based on AHCCCS’ regulations, the CPO must pursue the best interest of the state throughout the procurement process; and, as *Cigna* suggests and requires, it would be contrary to the best interest of the state if the CPO erected highly deferential “abuse of discretion” or “arbitrary and capricious” barriers at the earliest stage of administrative review.

The goal of protest resolution—particularly at this early stage—should not be, as Health Net suggests, to create unnecessary impediments to meaningful review by taking a defensive, deferential posture. Instead, the goal should be to get the award decision right, both for the agency and the agency’s clients (particularly vulnerable clients who may suffer in very real and material ways if the decision is in error), with openminded acknowledgement that a protesting party may raise genuine issues worthy of the CPO’s consideration. As *Cigna* suggests, the administrative protest and appeal process allows the CPO to engage in a good faith, genuine examination of the issues raised in the protest, including issues related to whether the evaluators properly evaluated and scored the proposals. Giving undue deference at this early stage of the protest process subverts that good faith effort.

For the reasons more fully articulated in Mercy Care’s protest, Mercy Care is confident that the CPO’s careful review of the evaluation of Mercy Care’s proposal—as compared to the two contract awardees—will lead the CPO to conclude that the state’s best interest is served by continuing its longstanding relationship with Mercy Care—whether as a statewide contractor or as a third contract for the central GSA.

Mercy Care will not engage in a point-by-point rebuttal of Health Net’s self-serving speculative arguments about the evaluation (though our decision not to engage should not be construed as agreement to any of those arguments; Mercy Care unequivocally rejects them). Generally, however, Health Net argues that: (a) consensus scoring is an accepted procurement practice; and (b) disagreement with the evaluators’ scoring decision is not a basis for protest.

First, Mercy Care did not challenge consensus scoring per se; instead, we identified (and Health Net does not dispute) that there were several specific instances where the individual rankings differed materially from the final, consensus scores on critical questions in the narrative submission. The consensus explanations provided

in the procurement file simply do not justify those changes, nor do the proposals themselves. And, of course, because of the forced ranking methodology, any change in ranking resulted in significant point swings. To ensure the integrity of the procurement process, the CPO should engage in a thorough review of the disparities between the individual and consensus rankings and identify whether those changes were supported by the record. For all the reasons set forth in Mercy Care's protest, we believe there is no question that they were not.

Second, as discussed above, evaluators' scoring decisions are absolutely a valid basis for protest. We need not address each of Health Net's scoring arguments to prove why the CPO should engage in a careful review of the evaluators' scoring decisions and why Mercy Care's protest was more than "mere disagreement" with the evaluators' judgment. But a simple example, among many, is illustrative. Namely, Mercy Care identified a material error in Health Net's proposal: its failure to meet the RFP's mandatory three-year timeline. Rather than addressing the substance of Mercy Care's argument (that Health Net's network will create material gaps in care and digression with respect to specialty services) Health Net hand waves its failure to appropriately respond to the timeline as an "immaterial mistake or informality" that AHCCCS could waive. That dismissiveness reveals the broader failure in Health Net's proposal—both its timeline and its network development strategy will cause severe disruption to ALTCS' members requiring specialty services, cause years-long gaps in those services, and decrease access to care.

AHCCCS specifically requested and required that offerors move the ALTCS system forward. Health Net's proposal—on its face—demonstrates that it will set the ALTCS program back, to the detriment of its most vulnerable constituents. The following critically important specialty programming is already in place in Mercy Care's network today but will be unavailable for more than a year minimum, under Health Net's proposal:

- SNF at Home [Health Net, not planned until 6/30/25, *see* Health Net Proposal at 71 (timeline)];
- SNF/ALF Care in Place for SUD/ODD Services [Health Net, not planned until 9/30/25, *id.*];
- Dementia Services [Health Net, not planned until 12/31/25, *id.*];
- SNF COEs [Health Net, not planned until 9/30/25, *id.*];
- Specialty TBI SNFs [Health Net, not planned until 9/30/26, *id.*];

Health Net's proposal will cause a significant delay in providing critical specialty care that ALTCS members already receive under Mercy Care. Health Net fails to offer outcomes to "increase service delivery" or "increase access to care;" its proposal represents a setback, creating gaps in specialty services for 1-3 years that

already exist under Mercy Care today. Health Net's proposal is not most advantageous to the state; it is not innovative or focused on outcomes, it does not meet the RFPs objectives or ALTCS' members immediate needs.

This one example demonstrates the critically important role the CPO plays in reviewing the evaluation—including scoring decisions—and the very real impact errors in the evaluation will have on the ALTCS population.

VI. AHCCCS should stay the contract award.

Health Net's opposition to Mercy Care's stay request is, at best, conclusory and overly technical, and it identifies no prejudice to Health Net, other than its own self-interest. Health Net speculates that a stay is not in the state's best interest, but it provides no evidence to support its conclusion (which, it just so happens, would also serve Health Net's best interest). In any event, when it submitted its proposal in response to the RFP, it did so knowing that the October 1, 2024 contract implementation date was subject to delay based on procurement protests: "In the event a protest or unforeseen circumstance delays the October 1, 2024, implementation in one or more GSAs, the current ALTCS E/PD Contractors *shall be required* to continue provision of services according to the terms of their existing Contract, *until such time as determined by AHCCCS and in the best interest of the State.*" Section H, at p. 8. Therefore, consistent with Health Net's own position, it waived any right to object to a delay of implementation because of Mercy Care's protest.

Further, the CPO should ignore Health Net's argument that a stay is not applicable here because, under R9-22-604(E), a stay is only available if the request is made before contract award. A stay request prior to contract award would have been a literal impossibility in this case, as the contracts were awarded even before the procurement file was made publicly available (or were awarded nearly simultaneously). The regulation certainly does not contemplate depriving potential protesting parties of the right to seek a stay if AHCCCS' contract award is made before the protest period has even begun to run. On this point, as Health Net acknowledges, AHCCCS can look to the Arizona Procurement Code (and its implementing regulations) for guidance. *See* R2-7-A902(A) (providing that stay relief is available if a protest was filed "before performance of a contract has begun").

A stay is appropriate and in the best interest of the state here to: allow the CPO to engage in a thorough review of the evaluation process; resolve Mercy Care's several critical protest issues; prevent disruption to ALTCS' population; and preserve specialty services for the most vulnerable members.

Meggan LaPorte
AHCCCS Chief Procurement Officer
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Conclusion

AHCCCS should either award an additional contract to Mercy Care consistent with its original intent, or it should reissue the RFP in a way that addresses the flaws Mercy Care has identified in the original solicitation. Health Net has not provided any persuasive reason not to sustain the protest.

Sincerely,

A handwritten signature in blue ink, appearing to read 'RH', with a long horizontal flourish extending to the right.

Roy Herrera