NEBRASKA
AdministrativeServices

Byron L. Diamond
Director

Pete Ricketts, Governor

April 7, 2016

Thomas C. Culhane
William T. Foley
Erickson | Sederstrom, P.C., L.L.O.
10330 Regency Parkway Drive, Suite 100
Omaha, NE 68114

RE: AmeriHealth Nebraska d/b/a Arbor Health Plan - Protest of Award of March 8, 2016
RFP No. 5151 Z1 - *Full-Risk Capitated Medicaid Managed Care Program for Physical Health, Behavioral Health and Pharmacy Services*

Dear Messrs. Culhane and Foley:

We are in receipt of your letter dated March 22, 2016, regarding your protest of the Intent to Award posted March 8, 2016 in connection with the above-captioned RFP. After careful review and consideration of the matter, we provide the following response:

1. **Reevaluation Decision and Process:**

The protests repeatedly give opinions about what the state should have done and speculates about what the outcome would have been under various reevaluation processes; always providing an opinion and recommending a re-evaluation process most favorable to the protesting bidder. The State must conduct an evaluation process that is fair and impartial, that ensures a level playing field for all bidders, and ensures that the state finds the best bidders at the best price. The process is designed to benefit the State and its taxpayers, not an individual bidder or bidders. The State is a fiduciary to its citizens and represents their best interests, whereas a bidder is a fiduciary unto itself and represents its own pecuniary interests. Thus, the State is always in the best position to determine what best benefits the State and its citizens.

The protests received by Administrative Services in response to the Intent to Award dated February 5, 2016, revealed that Evaluator #2 [as well as Evaluator #3 on at least one question] did not follow the Corporate Overview scoring instructions. To eliminate the possibility of an evaluator manipulating the award outcome by either an attempt to preserve the previous scores or alter the scores to produce a desired result, it was determined that permitting an evaluator to "correct" his or her score was not preferable to a rescore by new evaluators.

Upon reviewing the questions improperly scored, the State recognized a flaw in the scoring instructions. On three questions the evaluators were instructed to award either zero (0) or five (5) points. On one question the evaluators were instructed to award zero (0), three (3) or five (5) points. These four questions were seeking potentially negative information from the responding bidders. The previous scoring method provided points for merely providing information regardless of how negative it was, and potentially provided no points if a bidder had no potentially negative information to report. The revised scoring method corrected the flaw and allowed for evaluators to score in accordance with their individual evaluation of the information provided.

On February 29, 2016, the State posted its Notice of Withdrawal of Intent to Award stating that the State would be performing a limited reevaluation of the Corporate Overview section of all bids received. The State conducted the reevaluation exactly as intended and published. The reevaluation was 'limited' in that a reevaluation of the entire RFP was not performed; in fact the reevaluation was limited to the Corporate Overview section.

The limited reevaluation did not materially or substantially change the scoring criteria as published in the original evaluation criteria developed for the RFP for the Corporate Overview. The State did not change the total points allowed; nor did it change the points allowed for the subcategories within the Corporate Overview. The State did not increase nor decrease the total points allowed for any sections contained in the RFP, and therefore preserved the original scoring ratio. Evaluators were merely allowed to score each of the four questions within the original range of zero (0) to five (5) points. While Evaluator #2 did not score the questions in accordance with the instructions, applying a zero (0) to five (5) range as Evaluator #2 did, was the logical way to score the questions or items of requested information. The State finds no prejudice or advantage was gained by any bidder as the total points did not change, nor did the weight given to any section change. Each bidder was subject to the same scoring criteria, and was evaluated independently and fairly.

The point values for the evaluation criteria are set by the agency requesting the contract, not DAS. The Department of Health and Human Services (DHHS) made a conscience decision that the information to be derived from the four questions in the corporate overview be worth a total of 20 points. The agency is in the best position to determine the needs of the agency, to design an RFP to meet those needs, and to evaluate proposals effectively.

Due to the alternative scoring instructions for four questions and the State determination that new evaluators should be used (as described above) for the reevaluation, the State determined that, rather than mix scores from the original evaluators with the scores of new evaluators, it would rescore the Corporate Overview section with five new evaluators.

1. **Selection & Qualifications of Evaluators:**

The State exercised its discretion in deciding to have the new evaluators look at all seven questions of the Corporate Overview rather than just the four questions for which the scoring instructions were adjusted. New evaluators would provide a fair, impartial, coherent and consistent review of the bidders' responses to the Corporate Overview section.

The State selected five evaluators that had not been involved in the prior evaluation of the Corporate Overview. The State determined that the evaluators chosen had sufficient knowledge and experience to evaluate the Corporate Overview section. The evaluators are chosen or approved by the bidding agency, in this case DHHS. The bidding agency is in the best position to determine the qualifications of its evaluators, not a bidder.

As previously stated, the State sought evaluators who had not evaluated the Corporate Overview previously. While it is true that some evaluators are supervised by other individuals involved in this process; in state government virtually everyone is supervised by someone. The protestor's definition of 'independent' as being completely independent from all working relationships would have been burdensome at best and impossible at worst. The protests misconstrue the State's use of the term independent. 'Independent' refers to each evaluator performing his/her evaluation individually, i.e. independent of the other evaluators. Each evaluator independently evaluated the Corporate Overview

section such that it was not a group evaluation but a group of individual evaluations. The protests do not allege any actual undue influence upon the evaluators.

The range of scores for the Corporate Overview for the first set of evaluators was 14.4 points, while the range or scores for the second set of evaluators was 7.6 points. This reflects that the second set of evaluators were more consistent overall in scoring the Corporate Overview than the first set of evaluators. Due to the reevaluation being limited in scope to the Corporate Overview, the State believes that the time allowed was more than sufficient for a complete and adequate reevaluation.

The State has determined that sufficient guidance was given to the evaluators. Evaluators are expected to use their individual training, experience, and judgment to assign points to a submission. The scoring method used by the State utilizes the average of these individual scores to derive at a final score. The State believes this method is superior to assigning predetermined points for specific responses. If the scoring criteria specified points for specific responses or information, in essence one individual could determine the result of any RFP. The method of averaging individual scores offsets the influence of any one individual and provides for a more fair and unbiased result.

2. **Incumbent Consideration:**

Incumbents are not entitled to favoritism or preference. The evaluators can only consider the information provided. It is up to the procuring agency to determine what information is to be elicited from bidders, and thus what information is to be evaluated. It is irrelevant whether individual evaluators were aware which bidder was incumbent; in fact, this absent information may be preferable. As previously stated, the procuring agency is in the best position to determine what information to elicit, what to evaluate, and how said information is to be weighted.

3. **Procurement Manuals:**

The State wishes to make clear that the Procurement Manual for Services, and any other Procurement Manual drafted by the State Purchasing Bureau, are guides developed by the State Purchasing Bureau to assist agencies and vendors with the procurement process. Such Manuals do not have the authority of law, rule or regulation. They are not subject to promulgation or the Administrative Procedures Act. The State does not believe that process was deviated from in this bid; however even if it had been, it would not be a violation of law. The State believes that the process was completed in full compliance with Nebraska law and State Purchasing Bureau procedure.

4. **Responsiveness of Bidders and Disclosures:**

The State believes that all awarded vendors were fully responsive to the RFP and disclosed all required information. Further, all information disclosed was previously and fully known to DHHS, the procuring agency. The performance of the various contractors supporting Medicaid across the United States is well known to DHHS. The federal government and the various states share information regarding contractors' performance. Issues in Medicaid also receive significant press coverage. In the instant case, DHHS was aware of all the incidents mentioned in the protests prior to receiving the bids, and was fully aware of the facts and outcomes. Under the terms of the RFP, the State has the right to reject a bid based upon the type of information reviewed in the Corporate Overview regardless of the evaluators' scores in this category. Per the discretion of the decision maker, DHHS, nothing in the protests, RFP submissions, or within the knowledge of DHHS warranted disqualification of any of the bidders.

Conclusion:

The protests confuse the proper legal standard for contract procurement in Nebraska. Specifically, in Nebraska, if an "...administrative body, in exercising its judgment, acts from honest convictions, based upon facts, and as it believes for the best interests of its municipality, and where there is no showing that the body acts arbitrarily, or from favoritism, ill will, fraud, collusion, or other such motives, it is not the province of a court to interfere and substitute its judgment for that of the administrative body." Rath v. City of Sutton, 267 Neb. 265, 673 N.W.2d 869 (2004), citing Best v. City of Omaha, 138 Neb. 325, 328, 293 N.W. 116, 118 (1940). Indeed, "[i]n other words, whenever a public body has discretion to make a decision during the bidding process, a court is essentially limited to reviewing that decision for bad faith." Id. (internal citations omitted). The protests assert that a different or more limited method more favorable to the protester should have been used to correct the "errors." However, nothing raised in the protests provide any showing that the State acted arbitrarily from favoritism, ill will, fraud, collusion, or other such motives.

Based on careful consideration and review of all relevant information, we find that there is no reason to overturn the award it is our determination that the contract award will stand and the protest submitted by Arbor Health Plan is hereby denied.

We thank you for your interest in doing business with the State of Nebraska.

Sincerely,

Bo Botelho, Chief Operations Officer & Materiel Administrator
Administrative Services – Materiel Division

cc: Michelle Thompson, Buyer
Brad Gianakos, DHHS

BB:jls