

Pete Ricketts, Governor

May 31, 2016

Thomas J. Kenny
Kutak Rock LLP
1650 Farnam Street
Omaha, NE 68102

RE: Aetna Better Health of Nebraska - 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 Mr. Kenny:

Thank you for your presentation of May 19, 2016. We have carefully considered the presentation both separately and in concert with the arguments raised in your March 21, 2016, letter. As much of the information was the same, I do not believe it will be productive to rehash our prior response. Instead my intent is to address what we perceive as "new" information or argument.

1. Prejudice to Aetna

We are not aware of any law or authority that suggests an after-the-fact analysis is the standard upon which our discretionary rescoring process will be judged. Further, we are aware of no authority that prejudice can be shown by a result that is different when a new process is utilized when the original process was flawed in its application. The fact that you did not get a contract is also not evidence of prejudice. On the contrary, the entire point of the original protest was that the result was flawed because the process was flawed. In agreeing that the scoring methodology was not followed during the original process, it is not illogical to assume a different result will follow.

Instead, we continue to assert that the appropriate legal standard is whether the State, when using its discretion during the bidding process, acted in bad faith. Rath v. City of Sutton, 267 Neb. 265 (2004), citing Best v. City of Omaha, 138 Neb. 325, 328, (1940). Because there continues to be no allegation of bad faith and our review of our process has found none, we do not agree with your assessment that the differing result provides evidence to the contrary. Additionally, to the extent you are alleging that an arbitrary and capricious action is bad faith; we also find no evidence supporting your conclusions. In order to be arbitrary and capricious, a decision must be without reason and result in a conclusion that "is apt to change suddenly; it is freakish, whimsical, humorsome [sic]." Central Platte Natural Resources Dist. v. City of Fremont, 250 Neb. 252, 256 (1996).

As outlined in our response of April 5, 2016, our decision was reasoned and discretionary. We understand that you are dissatisfied with the result, but that, again, is not evidence of unreasonableness. Even assuming, arguendo that the proposed solutions offered by you and AmeriHealth (which, unsurprisingly, have conflicting results) were both reasonable does not prove that our decision was unreasonable. Instead, it merely establishes that there may have been many reasonable solutions to address this matter, each of which may have had differing results. Because we chose a course of action that was reasoned and kept everyone on the same level playing field, by definition, our discretionary decision was not arbitrary or capricious.

2. DAS Procurement Manual:

Although we continue to disagree that the Procurement Manual has the force of law, it is worth pointing out that the complaints raised by the protest regarding the manual involve areas of discretion. For example, complaints regarding the composition of the evaluation committee do not reference mandatory procedures in the manual. Instead, the manual states that committee size and composition is "recommended" and that there "should" be representatives from other agencies. None of this language is mandatory; therefore, there was no violation of the procedure, and thus no violation of law, even if the manual had the force of law.

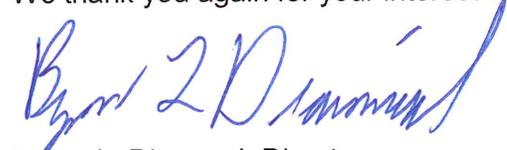
While we agree that the statutes require our processes to be fair and open, you have provided no law, and we can find none, that support your overly strict interpretation of Neb. Rev. Stat. § 73-503(2). Further, the legislature clearly intended to provide DAS with discretion in the plain language of the statute. To argue otherwise results in an absurd and draconian process in which the manual would have to contemplate every possible grievance scenario and contracts would have to become overly complicated by trying to identify what the manual may have missed. This is not supported by law or by common practice in public letting.

3. Failure to Address All Arguments:

We acknowledge that we have not addressed every argument or nuance thereof. We have taken this position because when applied to the standard of review that governs this matter, to do so would result in substantial duplication. That is not to say we have not considered your arguments in good faith. For example, we have considered your arguments that other bids were non-responsive. We merely disagree and are not persuaded by them. Again, because Nebraska Medicaid is in the best position to determine what is right for them, we do not believe the fact that a disagreement exists constitutes bad faith. The same holds true with regard to the weighting of the Corporate Responsibility section. DHHS is in the best position to determine how much weight it wants and needs to give a particular section. There has been no showing that DHHS acted in bad faith in determining that the technical aspects of the contract were more important to DHHS than the Corporate Responsibility Section.

For these reasons and for the reasons originally outlined in our letter of April 8, 2016, I find that there is no basis to overturn the award. I believe this contract has been awarded in good faith and pursuant to law, therefore, it is determination that the contract award will stand and the protest submitted by Aetna is hereby denied.

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



Byron L. Diamond, Director
Department of Administrative Services

cc: Bo Botelho, Materiel Administrator
Michelle Thompson, Buyer
Brad Gianakos, DHHS

BD:cmf