



February 19, 2016

Ms. Marilyn Bottrell
Materiel Division Administrator
Administrative Services
P.O. Box 94847
Lincoln, NE 68509-4847

VIA HAND DELIVERY

Materiel Division
Administrative Services
1526 K Street, Suite 130
Lincoln, NE 68508

RE: Protest by AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan relating to Request for Proposal (RFP) 5151Z1

Dear Administrator Bottrell:

AmeriHealth Nebraska, Inc. d/b/a Arbor Health Plan ("AmeriHealth") hereby protests the State of Nebraska's intent to award contracts to UnitedHealthcare of the Midlands, Inc., Nebraska Total Care, Inc., and Coventry Health Care of Nebraska, Inc. d/b/a Aetna Better Health of Nebraska to provide Medicaid managed care services and FFS claim broker services pursuant to the RFP referenced above, as posted on February 5, 2016.

Based on our analysis of the RFP, the proposals submitted by each bidder, and the scoring sheets and related materials, we have identified significant and material deficiencies, errors and inaccuracies in the RFP and the scoring and evaluation of the proposals submitted in connection therewith. As a result of those deficiencies, errors and inaccuracies, neither the RFP nor the award of contracts thereunder is compliant with applicable Nebraska law, as more specifically set forth in the attached Exhibit "A," incorporated herein by this reference. The award of contracts based upon the deficient RFP and scoring and evaluation process is arbitrary.

AmeriHealth reserves its right to raise additional issues based upon its continuing review of documents and correspondence and to supplement this letter, Exhibit "A," and the positions taken herein and therein. Specifically, AmeriHealth has not received responses to its second records request to DAS or its original records request to DHHS. AmeriHealth also reserves its right to request a meeting with you and the Director of Administrative Services as provided pursuant to Nebraska law.



The point of contact for purposes of this protest will be Thomas J. Culhane, Erickson | Sederstrom, P.C., L.L.O., 10330 Regency Parkway Drive, Suite 100, Omaha, Nebraska 68114. You may also call Mr. Culhane at 402-397-2200 or e-mail him at tculh@eslaw.com.

Sincerely,

A handwritten signature in blue ink that reads "J. Michael Jernigan". The signature is fluid and cursive.

J. Michael Jernigan
President

JMJ:kab
Enclosure

EXHIBIT “A”

PROTEST BY
AMERIHEALTH NEBRASKA, INC. D/B/A ARBOR HEALTH PLAN
RELATING TO
REQUEST FOR PROPOSAL (RFP) 5151Z1
FEBRUARY 19, 2016

INTRODUCTION

The notice of intent to award contracts as posted February 5, 2016 in connection with the above referenced RFP (the “Award”) is not in the best interests of the State of Nebraska or its citizens. The scoring system was contrary to Nebraska law in that it did not allow for consideration of the factors required by Nebraska law to be considered in awarding a contract under the RFP. It was contrary to the terms of the RFP in that it failed to allow evaluators the proper discretion to properly value the substantive answers provided relevant to the required elements. The lack of proper instruction, guidance and oversight provided to the evaluators resulted in an arbitrary scoring process. For the foregoing reasons, the results of the scoring of the RFP provide no proper basis for the Award.

I. THE SCORING SYSTEM USED IN AWARDING CONTRACTS UNDER THE RFP CONFLICTS WITH NEBRASKA LAW AND WITH THE EXPRESS TERMS OF THE RFP.

A. THE SCORING SYSTEM CONFLICTS WITH APPLICABLE NEBRASKA LAW, AND RESULTED IN AN ARBITRARY AWARD.

The scoring system used in connection with the RFP did not allow evaluators to consider the elements they were required by Nebraska law to consider in determining the lowest responsible bidder and awarding contracts under the RFP. Accordingly, the Award does not comply with applicable Nebraska law, and was arbitrary, insofar as the elements required to be considered in determining the lowest responsible bidder were not considered.

Under Nebraska law, contracts for services in excess of \$50,000.00 must be competitively bid. Neb. Rev. St. § 73-504(2). All contracts which by law are required to be based on competitive bids must be made to the “lowest responsible bidder.” Neb. Rev. St. § 81-161(1). In determining the lowest responsible bidder, certain elements must be considered in addition to price. *Id.* Those elements include (1) the quality of performance of previous contracts and (2) the previous and existing compliance by the bidder with laws relating to the contract. Neb. Rev. St. §§ 81-161(1)(d)-(e); 9 NAC 4-001.

The Nebraska Supreme Court “ha[s] recognized that public officials do not act ministerially only, but exercise an official discretion when passing upon the question of the responsibility of bidders.” *Rath v. City of Sutton*, 267 Neb. 265, 283-84, 673 N.W.2d 869, 886 (2004) (internal quotations omitted). The scoring system applied to the RFP, as set forth in the scoring sheets, renders the evaluators’ scoring of the bidders regarding certain factors ministerial only, and removes the proper discretion from the process.

For example, four (4) questions in the RFP required an evaluator to enter one of two scores, an all-or-nothing approach, or one of three scores, a full-, partial-, or no-credit approach. The evaluators were allowed no discretion in the points to be awarded on these questions (“Non-Discretionary Questions”). The first Non-Discretionary Question required, among other things, “disclosure of any and all judgments, litigation, or other real or potential reversals.” The second required a description of any instances in which the bidder had a contract terminated for default. The third required a description of regulatory actions and sanctions, letters of deficiency and corrective actions required relating to Medicaid and CHIP contracts. The fourth requested disclosure of any criminal or civil investigation by a state or federal agency.

As demonstrated above, the format of the Non-Discretionary Questions does not allow for substantive consideration of the required elements, but only for consideration as to whether a bidder provided an answer and whether that answer was complete. For example, a bidder that completely disclosed its history of investigations, which included one non-meritorious civil investigation, would receive the same score as a bidder that disclosed multiple meritorious criminal investigations, because both provided full disclosure. This is contrary to Neb. Rev. St. § 81-161(1) and 9 NAC 4-001, which require substantive consideration of previous and existing compliance with laws relating to the contract.

As a concrete example of the fallacy of this approach, Nebraska Total Care, Inc. disclosed in its bid a March 9, 2015 regulatory action taken against an affiliate, Kentucky Spirit Health Plan, Inc., by the Secretary of the Kentucky Cabinet for Health and Family Services and the litigation associated with the dispute that is the subject of that regulatory action. This disclosure was made in response to the question found in Section V.A.2.b on page 196 of the RFP relating to Financial Statements (the “Financial Question”). Total Care, Inc. received a score of five (5), the highest score possible for that question, from three (3) out of five (5) evaluators.

That regulatory action likely also fits within the purview of a later question, number 2 contained in Attachment 19 to the RFP, requiring each bidder to “Identify and describe any regulatory action or sanction, including both monetary and non-monetary sanctions imposed by any federal or state regulatory entity against the MCO’s organization within the last five years” (the “Regulatory Sanctions Question”). It was not disclosed in response to the Regulatory Sanctions Question. As to that question, Nebraska Total Care, Inc. received a score of five (5) from all five (5) evaluators. Nebraska Total Care, Inc.’s failure to disclose the regulatory action in response to the Regulatory Sanctions Question improperly deprived the evaluators, and DAS, of the ability to analyze that regulatory action in connection with the RFP. But Nebraska law required the evaluators and DAS to evaluate the quality of performance of previous contracts and the previous and existing compliance by the bidder with laws relating to the contract. Neb. Rev. St. §§ 81-161(1)(d)-(e); 9 NAC 4-001.

Moreover, even had the regulatory action been disclosed in connection with the Regulatory Sanctions Question, Nebraska Total Care, Inc. would have received the same score, as the scoring sheet required the evaluator to enter “0 for no response, 5 for response,” rendering the act of scoring the bidders ministerial only, contrary to *Rath, supra*. The same is true of the Financial Question, which required the evaluator to enter “0 if no response, 3 if partial response, 5 if complete response.” The content of the response was not substantively relevant to the score received in connection with either question, leading to the perverse result that Nebraska Total

Care, Inc. was actually rewarded for disclosing that it has had a sanction of forty million dollars (\$40,000,000.00) entered against it in connection with its performance of a contract for Medicaid managed care services. That is contrary to Nebraska law, which requires consideration of the quality of performance of previous contracts in determining the lowest responsible bidder, not just whether the bidder provided an answer.

Because the scoring system did not allow for substantive consideration of the elements required by Nebraska law to be considered in determining the lowest responsible bidder, but required the evaluators to “act ministerially only,” it was contrary to Nebraska law. It was therefore deficient, and produced an arbitrary result, and provides no proper basis for the Award.

B. THE SCORING SYSTEM MATERIALLY DEVIATED FROM THE INTENTION AND EXPRESS PROVISIONS OF THE RFP, RENDERING THE AWARD ARBITRARY.

The scoring method, as set forth in the scoring sheets, also failed to comport with the intentions explicitly set forth in the RFP. Specifically, the question set forth in Section V.A.2.g in the Corporate Overview section of the RFP, related to Contract Performance, requires that the bidder submit full details of all termination for default experienced during the past five (5) years, including specific information regarding the other party and the bidder’s position on the matter. It explicitly provided, “The State will evaluate the facts and will score the bidder’s proposal accordingly.” However, as specifically discussed previously, the scoring sheet required the evaluators to enter “0 for no response, 5 for response.” There was no evaluation of the facts, or if there was, it did not have any impact on the score to be awarded. The RFP, as drafted, contemplates compliance with Nebraska law through consideration of the required factors. The scoring system as implemented, however, varied from the express terms of the RFP, and rendered the process non-compliant with Nebraska law.

Similarly, the question set forth in Section V.A.2.b in the Corporate Overview section of the RFP, related to Financial Statements, requires, “If the bidder is not a publicly held corporation, either the reports and statements required of a publicly held corporation, or a description of the organization, including size, longevity, client base, areas of specialization and expertise, and any other pertinent information must be submitted in such a manner that proposal evaluators may reasonably formulate a determination about the stability and financial strength of the organization.” However, the scoring method as set forth on the scoring sheet allows no discretion to an evaluator in light of the evaluator’s “determination about the stability and financial strength of the organization.” The evaluators were required to enter “0 if no response, 3 if partial response, 5 if complete response.” The scoring sheet therefore eviscerates the purpose of the disclosure as required by the RFP, because it removes any truly evaluative or comparative function served by the evaluators. Nebraska law requires consideration of “the ability, capacity and skill of the bidder to perform the contract as required,” not just whether the bidder answered the question. Neb. Rev. St. § 81-161(1)(a); 9 NAC 4-001.11. The method of scoring undertaken in connection with the RFP fails to comply with this requirement, or with the express intent behind the disclosure, as spelled out in the RFP.

Because the scoring system used in connection with the RFP did not permit the evaluators to properly consider the elements required by Nebraska law and failed to implement the express provisions of the RFP, the Award is arbitrary and contrary to Nebraska law. Because the Award is contrary to Nebraska law, it should be withdrawn, and all bidders’ submissions

should be re-evaluated using a legally sufficient scoring system administered by new and independent evaluators, either internal or external.

II. SCORING ERRORS AND INCONSISTENCIES DEMONSTRATE A LACK OF PROPER CONTROL AND OVERSIGHT OVER THE SCORING PROCESS, RESULTING IN AN ARBITRARY AWARD, WHICH SHOULD BE WITHDRAWN.

It is clear from a review of the scoring sheets that evaluators were not provided proper instruction, guidance or oversight in evaluating the bidders' submissions, and the results of the evaluations are therefore arbitrary, and do not provide a proper foundation for the Award. The lack of consistent or concrete evaluation criteria provided to the evaluators is established by the significant, material and numerous mistakes, inaccuracies and inconsistencies contained in the scoring materials and the responses of the evaluators.

The extreme variation among evaluators as to the scores awarded in certain categories demonstrates the lack of any defined or consistent standard among the evaluators in the process of scoring. Arbor Health has ranked the bidders as to each category of questions, as scored by each evaluator. Arbor Health has further identified those categories in which a bidder received one evaluator's highest score and also received another evaluator's lowest score. There were twenty-five (25) categories out of one hundred twenty (120) in which a single bidder received one evaluator's highest score and also received another evaluator's lowest score, which is a variance of five (5) places in the bidder's rank relative to the other bidders [first to sixth]. In an additional thirty eight (38) categories, a single bidder received one evaluator's second-highest score and received another evaluator's lowest score, or received one evaluator's highest score and received another evaluator's second-lowest score, which is a variance of four (4) places in the bidder's rank relative to the other bidders [second to sixth or first to fifth].

Many of the questions contained in the RFP were drafted vaguely, such that they allow for a purely subjective analysis by each evaluator, with no defined standards or criteria for distinguishing between responses or evaluating them with relation to one another. For example, Section IV.D of the RFP under Staffing Requirements required the bidders to "Describe the organization's number of employees, lines of business, and office locations." Bidders were also required to submit an organizational chart including the organization's parent(s), affiliates and subsidiaries.

Based on the materials received and reviewed by Arbor Health, evaluators were given no guidance as to how to evaluate the substantive answers to the question relative to the number of points available, other than to award between zero (0) and twenty (20) points. Evaluators apparently applied their own arbitrary standard to the appropriate or optimal number of employees, and the appropriate or optimal number and location(s) of offices. Evaluators apparently also used an arbitrary scale to award a value to the bidders' responses based on their conception of the best responses, as evidenced by the wide range of scores discussed above. Since the evaluators did not have an established standard against which to grade the bidders' responses, or even a set of criteria by which to analyze the responses in relation to one another, the resulting evaluations are arbitrary.

The arbitrary nature of the evaluation process in light of the lack of clarity in the RFP questions is established by the variation in rankings of the bidders described above. In over half of the categories considered by the evaluators, a bidder's rank varied by four or five spots from evaluator to evaluator. This indicates that the evaluators were not applying a concrete set of criteria to score the bidders relative to one another, or at least were not applying it consistently. Had there been a sufficiently definite set of criteria applied consistently, the variance in bidder ranks would not be as extreme as is it was.

Moreover, in many instances, the evaluators failed to properly score the bidders as instructed in the scoring sheets. For example, as to each of the Non-Discretionary Questions, at least one (1) evaluator awarded an improper score to one (1) or more bidders. This is also indicative of the lack of consistency among the standards applied by the evaluators, and an inconsistency in the methods used for evaluating the bidders. It also indicates that the evaluators did not receive appropriate instruction, guidance or oversight. This inconsistency and lack of instruction, guidance or oversight renders the results of the evaluations arbitrary.

CONCLUSION

Arbor Health has been partnered with the State of Nebraska since July 1, 2012, serving the least accessible and medically underserved areas of the state in the rural and frontier counties. Arbor Health's associates work every day to connect nearly 25,000 Medicaid beneficiaries, many of whom have chronic illnesses and/or comorbid conditions, to needed health care and social services through the 8,749 providers who are currently contracted in Arbor Health's provider network to serve our members. The Award threatens to disrupt continuity of care and the care plans that have been put in place and sow confusion by forcing members to change providers or repeat assessments that have already been completed, and are therefore not in the best interests of the State of Nebraska, as required by Nebraska law, or the citizens that it seeks to serve.

Because the evaluators received insufficient instruction, guidance and oversight, and as a result failed to evaluate the bidders based on any consistent or definite criteria, and in certain instances, flatly failed to follow the instructions in the score sheets, the evaluations produced in connection with the RFP were arbitrary, at best. They therefore provide no proper basis for the Award. The Award should be withdrawn, as it does not comply with Nebraska law. All bidders' submissions should be re-evaluated using a legally sufficient scoring system administered by new and independent evaluators, either internal or external.