THE NEW MEXICO HUMAN SERVICES DEPARTMENT’S DISCUSSION REGARDING PROTEST OF THE REQUEST FOR PROPOSAL NO. 18-630-8000-0001 BY MOLINA HEALTHCARE OF NEW MEXICO, INC.

BACKGROUND

The New Mexico Medicaid program is a State and Federal cooperative program authorized by Title XIX of the Social Security Act, 42 U.S.C. ch. 7. The Medicaid program, which is jointly funded by the state and federal government, provides services for physical health, behavioral health and long-term services and supports for qualified low income and disabled New Mexicans. New Mexico Medicaid serves more than 850,000 residents of this state. The New Mexico Human Services Department (“HSD”) is the single state agency legislatively authorized to administer the state’s Medicaid program. NMSA 1978, § 27-2-12 (2006).

In September 2017, HSD issued a request for proposal, RFP No. 18-630-8000-0001 (the “RFP”). The purpose of the RFP was to select managed care organizations to provide managed care Medicaid services through the State’s “Centennial Care” program. “Centennial Care” is the name of the Medicaid managed care program that was launched in January of 2014 and provides a comprehensive delivery system for Medicaid members. The managed care portion of the program currently serves approximately 700,000 members and is presently administered by four managed care organizations (“MCOs”): United Healthcare of New Mexico, Inc. (“United” or “UHC”); Presbyterian Health Plan, Inc. (“Presbyterian” or “PHP”); Blue Cross Blue Shield of New Mexico, Inc. (“BCBS”); and Molina Healthcare of New Mexico, Inc. (“Molina”).

Through the 2017 RFP process, HSD solicited competitive proposals from MCOs to provide services to members of the New Mexico Medicaid managed care program and the second iteration of Centennial Care, known as “Centennial Care 2.0,” beginning in 2019.

The RFP delineated the process for dispute, or protest, of the award decision. The language of the RFP provides an administrative process that allows all unsuccessful Offerors the ability to protest contact awards. (RFP at 2.2.15, 2.3):

Any protest by an Offeror must be timely and conform to NMSA 1978, § 13-1-172, and applicable procurement regulations. The fifteen (15) Calendar Day protest period for Responsive Offerors shall begin on the day following the Contract award and will end at the Close of Business fifteen Calendar Days after the Contract award. Protests must be written and must include the protestor’s name and address as well as the RFP number. Protests must also contain a statement of grounds for protest, including appropriate supporting exhibits, and must specify the ruling requested . . . .

1 A copy of the full RFP is available at: http://www.hsd.state.nm.us/Centennial_Care_RFP.aspx.
Eight Offerors responded to the RFP and three contracts were awarded: PHP, BCBS and Western Sky Community Care, Inc. (“Western Sky”). A Notice of Contract Award was sent by HSD on January 19, 2018, notifying the unsuccessful Offerors and advising them of their right to protest the decision. (Exhibit #1.) The 15-day protest period began on January 20, 2018. Because the 15th day fell on a Saturday (February 3, 2018), HSD granted prospective protestors until 5:00 pm (MT) on Monday, February 5, 2018, to submit their protests.

The protest period is designed to provide each Offeror with an equal opportunity to protest the decision. Four of the unsuccessful Offerors filed protests by the February 5, 2018 deadline: Molina (supplement filed February 16, 2018); United (supplements filed February 21, 2018 and March 8, 2018); AmeriHealth Caritas New Mexico, Inc. (“AmeriHealth”) (supplement filed February 23, 2018); and WellCare of New Mexico, Inc. (“WellCare”) (supplements filed February 12, 2018 and February 21, 2018).²

**SUMMARY OF MOLINA PROTEST AND REQUESTED RELIEF**

In their protest, Molina alleges that:

1. HSD utilized bid evaluation criteria that were not disclosed in the RFP and thus violated the law;
2. HSD acted arbitrarily and capriciously when it scored Molina’s technical proposal;
3. The capitation rates HSD set for the RFP were not actuarially sound and thus arbitrary and capricious;
4. HSD’s practice of setting MCO rates on numerous services at similar dollar amounts renders HSD’s inclusion of a price score arbitrary and capricious;
5. HSD’s scoring of the price proposals was arbitrary and capricious as the scores were grossly disproportionate to the differences between bids;
6. HSD’s decision to not hold oral presentations, an additional scored component, was arbitrary and capricious;
7. HSD’s decision to reduce the number of MCOs was arbitrary and capricious and will harm New Mexico citizens;
8. Mercer, the entity that administered the RFP and made decisions for HSD has a financial tie to Western Sky, one of the successful Offerors;
9. The prices proposed by Western Sky and the other successful Offerors are not sustainable and thus not in the public’s best interests; and
10. HSD’s decision to eliminate Molina as an MCO in New Mexico is not in the public’s best interests.

Molina’s protest requests three separate remedies by HSD: (1) award a contract to Molina; (2) reject all bids and re-solicit bids for managed care organization contract for Centennial Care 2.0;

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² A fifth unsuccessful Offeror, Amerigroup Community Care of New Mexico, Inc. did not file a protest. A copy of each Offeror’s protest, supplements, and exhibits can be found at: [http://www.hsd.state.nm.us/Centennial_Care_RFP.aspx](http://www.hsd.state.nm.us/Centennial_Care_RFP.aspx).
or (3) eliminate the cost proposal component of the RFP and award a contract to Molina based on the Offerors’ rankings for the technical proposal and referral scores only.³

FINDINGS OF FACT

A. Introduction

1. On August 31, 2012, HSD issued Request for Proposal No. 13-630-8000-0001 (the “2012 RFP”) to select MCOs to provide managed care Medicaid services under a new management delivery system entitled “Centennial Care.”

2. Mercer’s Government Human Services Consulting Group (“Mercer GHSC”) provided consulting services during the 2012 MCO procurement assisting with the procurement evaluation process. (Exhibit #2, Affidavit of Nancy Smith-Leslie, ¶12 and Exhibit #3, Affidavit of Jared Nason, ¶5).

3. All Offerors to the 2012 RFP were aware of Mercer GHSC’s role in the procurement process. (Exhibit #2, Smith-Leslie Affidavit, ¶12).

4. Seven MCOs submitted proposals and four were selected to provide services under Centennial Care: BCBS; Molina; Presbyterian; and United.

5. Three of the unsuccessful Offerors timely filed protests of that procurement: Amerigroup Community Care of New Mexico, Inc.; Lovelace Health Systems, Inc. d/b/a Lovelace Community Health Plan; and Western Sky.

6. On April 18, 2013, Molina, by and through its attorneys, Modrall, Sperling, Roehl, Harris & Sisk, P.A. filed a response to the protests of Centennial Care. (Exhibit #4, Response to Protests by Molina Healthcare of New Mexico, Inc. (without attachments)).

7. The Centennial Care program serves approximately 700,000 New Mexico Medicaid recipients through a Section 1115 Demonstration Waiver that was approved by the Centers for Medicare & Medicaid Services (“CMS”), a division of the U.S. Department of Health and Human Services (“HHS”), for a five year period, from January 2014 through December 2018. (Exhibit #2, Smith-Leslie Affidavit, ¶¶4 and 5).

8. Although there were protests to the RFP, the four contracts for Centennial Care were executed by the former HSD Cabinet Secretary, Sidonie Squier, with services to begin on January 1, 2014, to align with the Section 1115 Demonstration Waiver.

9. Most of 2013 was a “readiness review period” to ensure that the four MCOs were prepared to cover all services and accept enrollment for Centennial Care beginning January 1, 2014. (Exhibit #2, Smith-Leslie Affidavit, ¶11).

³ Molina, February 5, 2018 protest, p. 2.
10. The Centennial Care waiver agreement with CMS expires December 31, 2018, and HSD is in the process of renewing the 1115 Demonstration Waiver to be effective January 1, 2019. (Exhibit #2, Smith-Leslie Affidavit, ¶6).

11. HSD conducted extensive public input sessions and outreach events from October 2016 through October 2017, to obtain feedback about its plan to renew the Section 1115 Demonstration Waiver. (Exhibit #2, Smith-Leslie Affidavit, ¶7).

12. Throughout the year-long process, HSD presented its timeline for both the waiver renewal and the procurement of the MCOs, describing how the two processes were in alignment. (Exhibit #2, Smith-Leslie Affidavit, ¶7).

13. Representatives from the New Mexico Department of Health (“DOH”) and the New Mexico Children, Youth and Families Department (“CYFD”) also participated in the public input process for the Section 1115 Demonstrative Waiver renewal and offered feedback, including provisions of new Medicaid services, such as home visiting for at-risk families. (Exhibit #2, Smith-Leslie Affidavit, ¶9).

14. Given that the Section 1115 Demonstration Waiver and MCO contracts expire in December 2018, HSD sought bids from companies for the provision of managed care services for Centennial Care 2.0. (Exhibit #2, Smith-Leslie Affidavit, ¶13).

B. RFP No. 18-630-8000-0001

15. On September 1, 2017, HSD issued a Request for Proposal (RFP No. 18-630-8000-0001) soliciting “competitive, sealed proposals from managed care organizations (MCOs) to provide services to Members of the New Mexico Medicaid managed care,” with the services to begin on the “Go-Live” date of January 1, 2019. RFP at 6, 15 and 17.

16. The purpose of the “competitive RFP is to select offerors that have the experience and expertise to perform the requirements described within.” RFP at 10.

17. HSD sought partners that are able to continue to advance the goals of Centennial Care 2.0. MCOs must have the capability to provide an integrated, comprehensive delivery system that offers the full array of Medicaid services, including acute, behavioral health, pharmacy, institutional and home and community-based services. (RFP at Section 1.2 p.8).


19. The RFP specified that the proposal had to be received by HSD no later than 3:00 pm MDT on November 3, 2017. (RFP at 17).
20. In the RFP, HSD published its “best estimate” of the schedule that will be followed to complete the procurement process. (Exhibit #2, Smith-Leslie Affidavit ¶14 and RFP at 16).

21. The initial RFP estimated dates were “subject to change at HSD’s discretion.” (RFP at 17).

22. The estimated timeline for contract negotiations with successful offerors was shorter than anticipated, largely because a draft of the expected contract was provided with the RFP and there were few requested changes. (Exhibit #2, Smith-Leslie Affidavit, ¶14).

23. In Amendment 2 to the RFP, issued on October 20, 2017, HSD stated that:

Following the procurement, HSD’s intent is to contract with three to five MCOs unless it is in the State’s best interest to do otherwise. The number of contractors selected and awarded through this procurement process is solely at HSD’s discretion based on the best interests of the State. HSD intends to award a contract that shall be effective on or about [March 15, 2018] and ending [December 31, 2022]. Thereafter, HSD reserves the right to renew this Agreement for on-year period(s), not to exceed 8 years for the total contract period. Rates will be re-evaluated every year.

(Amendment 2 to the RFP at 2.)

24. Oral presentations were at HSD’s discretion. (RFP at 17 and 21).

25. The RFP disclosed the criteria that HSD would consider in evaluating the bids, including each factor, the maximum points available for each factor and each sub-factor. (RFP at 37 (Scoring Summary), 41 (Technical Proposal Scoring), and 64 (Cost Proposal Scoring)).

26. The RFP referenced that successful offerors “who enter into a Contract will have adjustments made to their cost bids for the impacts of items excluded from the Cost Proposal and adjustments made for any changes deemed ‘material’ by the State and its actuaries which may include: significant changes in program demographics; programmatic changes (benefits or reimbursements) occurring after the procurement; [and] list of excluded Cost Proposal rate elements (e.g., 1115 [Demonstration] Waiver Renewal impacts, add-ons, and assessments).” (RFP at 65).

27. Offerors were also advised that their “Cost Proposal [would] be adjusted based on the relative position of its proposal within the revised minimum and maximum rate range.” (RFP at 65).

28. The RFP did not require offerors to propose price offers that the offeror deemed “actuarially sound.” (Exhibit #2, Smith-Leslie Affidavit, ¶19).

29. Offerors were advised that there would be two mandatory pre-proposal conferences to permit offeror representatives “to ask questions and clarify issues concerning the RFP and procurement process.” (RFP at 18).
30. The pre-proposal conferences were held on September 17, 2017, with the morning conference focused on the RFP & Technical Proposal and the afternoon session, Actuarial & Cost Proposal, focused on “data, rates, costs, Cost Proposal and actuarial issues related to the procurement.” (RFP at 18).

31. No later than September 29, 2017, Offerors were permitted to submit written questions “about the intent or clarity of the RFP and its appendices.” (RFP at 17 and 19).

32. The RFP was open “to any Offeror capable of performing work as described in the Sample Contract (Appendix O) and addressed in Section 1.3 of the RFP, Summary of Work, subject to the following stipulations:

1. An Offeror must be licensed by the New Mexico Public Regulation Commission, Division of Insurance, to assume risk and enter into prepaid capitation contracts at least six (6) months before the Go-Live date;

2. An Offeror must be either (i) National Committee for Quality Assurance (NCQA) accredited in the State of New Mexico, or (ii) NCQA accredited in another state that currently provides Medicaid services and achieve New Mexico NCQA accreditation within two (2) years of the Contract start date;

3. Pursuant to the Government Conduct Act, NMSA 1978, §§ 10-16-1 et seq., an Offeror shall have no direct or indirect interest that conflicts with the performance of services covered under this Contract;

4. Pursuant to NMSA 1978, § 13-1-191, § 30-24-1 through 30-24-2, and §§ 30-41-1 through 30-41-3, an Offeror shall not provide or offer bribes, gratuities, or kickbacks to applicable State personnel;

5. An Offeror shall ensure that it will comply with the New Mexico Governmental Conduct Act, NMSA 1978, §§ 10-16-1 et seq.;

6. An Offeror shall complete any and all required disclosure forms, including but not limited to campaign disclosure forms and other attestations; and

7. The burden is on the Offeror to present sufficient assurances to HSD that awarding the Contract to the Offeror shall not create a conflict of interest.

8. An Offeror must disclose to HSD its relationships with other entities contracting with the State, noting all entities, organizations and contractors doing work for both the State and the Offeror, and the nature of the work. Offerors must use the format provided in Appendix J – Disclosure Contractor Relationship and submit this information in the Exhibit Binder (Tab 1). (RFP at 12-13).
33. The RFP stated that the “Evaluation Committee” would be a body “appointed by HSD to evaluate the Offerors’ proposals.” (RFP at 15).

34. The Evaluation Committee comprised subject matter experts to evaluate and score Section 6, Technical proposal sub-sections. Exhibit #5, List of Evaluators. All of these sub-matter experts are HSD employees. Id.

35. The “Mandatory Requirements” included, among other things, a “List of References” that would identify the three Reference entities, including the contact name and phone number for each. (RFP at 37-40).

36. References from Offerors were to “be submitted directly to HSD by the Reference source, not by the Offeror, independent of the other Proposal materials.” (RFP at 17).

37. On December 22, 2017, HSD issued its Scoring Results Summary for Centennial Care 2.0. (Exhibit #6, 2017 Centennial Care 2.0 Scoring Results Summary).

38. On March 15, 2018, Chief Procurement Officer Gary Chavez issued a memorandum finding, pursuant to NMSA 1978 § 13-1-173 and NMAC § 1.4.1.83 that there were no exceptional circumstances warranting a stay of the procurement and that proceeding with the awards was necessary to protect the interests of HSD and ensure the safety of Medicaid members. (Exhibit #7).

39. On March 13, 2018, pursuant to NMAC § 1.4.1.90, Gary Chavez, designated HSD Cabinet Secretary Brent Earnest to preside over the proceeding for the purpose of reviewing the protests and issuing findings, conclusions and recommendations for resolutions of the protests. (Exhibit #8)

C. Molina Specific Findings of Fact

40. On November 1, 2017, Daniel Sorrells, Molina’s CEO, submitted a “Letter of Transmittal Form” expressly accepting the “Conditions Governing the Procurement.” (Exhibit #9, Molina’s Letter of Transmittal Form).

41. Molina agreed “that submission of our proposal constitutes acceptance of the Evaluation Factors contained in Section 4 of this RFP.” (Exhibit #9, Molina’s Letter of Transmittal).

42. On January 19, 2018, Daniel Clavio, the RFP’s Procurement Manager, wrote to Molina advising Molina that it was not a successful Offeror. (Exhibit #1, Clavio letter to Tina Rigler dated January 19, 2018).

43. Molina was a successful Offeror during the 2013 MCO procurement for Centennial Care 1.0, which employed the same process that Molina is now challenging.
DISCUSSION OF MOLINA’S PROTEST

MOLINA’S INTRODUCTORY STATEMENT / ARGUMENT

Molina’s protest provides that “[i]n accordance with NMAC 1.4.1.81, NMSA 1978, § 13-1-172, and § 2.2.15 of the RFP No. 18-630-8000-0001 (“the RFP”), Molina Health Care of New Mexico, Inc. (“Molina”), submitted a bid protest (“the protest”).

The following contracts were awarded on or around January 18, 2018:

- Blue Cross/Blue Shield: PSC18-630-8000-0033 CC2.0
- Presbyterian Health Plan: PSC18-630-8000-0034 CC2.0
- Western Sky Community Care, Inc.: PSC18-630-8000-0035 CC2.0

On Page 2 of their protest, Molina continues that “[o]n information and belief, those contracts are not yet effective, and lack signatures and approvals necessary for them to be enforceable.” In a letter dated March 6, 2018, (Exhibit #10,) Molina claims that approval by CMS is a “condition precedent” for the enforceability of these contracts.

DISCUSSION OF MOLINA’S INTRODUCTORY STATEMENT

PSC 18-630-8000-0033 CC2.0, PSC 18-630-8000-034 CC2.0, and PSC 18-8000-0035 CC2.0 are valid and enforceable contracts. Each of these contracts have executed signatures from BCBS, PHP, and Western Sky, as well as all necessary State officials, demonstrating acceptance of the offer to provide services pursuant to the specific terms of the contract. HSD and the successful Offerors have accepted the terms set out in the contracts and performance has begun. Parties have begun to expend resources in furtherance of the agreements.

Neither CMS nor any representative of the federal government is a signatory to these contracts. Pursuant to 42 C.F.R. § 438.806, prior approval is required for the contract to qualify for federal financial participation, but CMS approval is not a “condition precedent” for the enforceability of these contracts. CMS’s role is limited to certifying that contract requirements are based on existing federal requirements. Although CMS could ask that certain contractual requirements be amended, it has no authority to invalidate the contract and a CMS representative’s signature is not necessary for either successful Offerors or HSD to enforce their rights under the contracts.

The state has entered into valid and enforceable contracts with the successful Offerors. These new contracts are in effect and the parties are implementing their obligations. Molina does not provide authority or evidence to support their opinion that the contracts are not enforceable. Molina’s argument that the contracts are not yet enforceable, lack required signatures and that approval is necessary for them to be enforceable is not supported by the evidence or law and should be rejected.

4 Copies of the executed contracts can be found at: http://www.hsd.state.nm.us/LookingForInformation/medical-assistance-division.aspx.
MOLINA'S BACKGROUND STATEMENT / MOLINA'S ARGUMENT

Introduction Subsection “A” of Molina’s background outlines Molina’s participation in the original Centennial Care program and states, “HSD’s decision to end Molina’s Medicaid managed care contract places at risk all of Molina’s operations in New Mexico. . . . (Molina’s Initial Protest, p. 4.) Molina’s protest alleges harm to individuals it serves because a change in provider will “force these vulnerable populations to select new health plans.” (Molina’s Initial Protest, p. 3.)

Introduction Subsection “B” criticizes HSD’s “decision to issue an RFP rather than exercising its option to extend the contract of the incumbent MCO [Molina]”… (Molina’s Initial Protest, p. 5.) “B” also alleges that HSD did not include important stakeholders. Molina contends that “DOH, CYFD, and the Office of Superintendent of Insurance are critical for the delivery of Medicaid Services and should have had a seat at the table.” (Molina’s Initial Protest, p. 5.) Molina challenges that “HSD contracted with a third party, Mercer, to provide services related to the RFP, including drafting the RFP, training or ‘coaching HSD’s subject matter experts…’” and voices other concerns it has with Mercer’s involvement in the RFP. (See generally Molina’s Initial Protest, p. 4.) Of particular note, Molina alleges it became an unsuccessful Offeror because “Mercer appears to have an interest in ending Molina’s Medicaid contract” (Molina’s Initial Protest, p. 5.) Subsection “B” concludes by alleging scoring improprieties and declares that HSD “only awarded three contracts” based on Mercer’s recommendation. (Molina’s Initial Protest, p. 5.)

Subsection “C” of the background is titled, “Mercer’s and Western Sky’s Conflict of Interest.” (Molina’s Initial Protest, p. 6.) In this subsection, Molina alleges that “there appears5 to be a serious impropriety … infected HSD’s procurement of the RFP.” (Molina’s Initial Protest, p. 6.) Molina claims “Mercer had a significant conflict of interest and should not have had any involvement in the procurement process.” (Molina’s Initial Protest, p. 6.)

DISCUSSION OF MOLINA’S BACKGROUND STATEMENT

Molina is a current managed care provider for Centennial Care.6 It remains under contract through December 31, 2018. Molina has a contractual obligation to continue to serve New Mexicans currently enrolled in its health plan. It is inappropriate for Molina to conflate their current contract obligations and business operations with any protest it may bring under this RFP.

While it is certainly appropriate to consider the impact that transitions will have on the Medicaid population, and to take appropriate steps to minimize disruptive transitions, such transitions occur regularly in the health care system, and certainly happen when new MCOs enter the market and old ones leave. In 2013, Molina was part of a successful transition process when

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5 In subsection (J), this very serious allegation is based “on information and belief” See Molina protest P. 23. No actual evidence is provided to support the allegation of “a billion or multi-billion dollar contractual relationship” Id.
6 Molina’s contract can be found at: (http://www.hsd.state.nm.us/uploads/files/About%20Us/MAD%20Contracts/MCOs/Molina%20Contract.pdf.)
selected as one of four Centennial Care MCOs. Thousands of New Mexicans were transitioned from companies that were unsuccessful in the procurement. A similar transition process will be employed in 2018 in preparation for new MCOs in 2019.

Molina’s concerns are, at best, speculative, especially since Molina, along with all other Centennial Care MCOs, executed a Transition Management Agreement (“TMA”) on September 25, 2017. (Exhibit # 11, TMA.) The TMA defines transition team and staffing roles, membership transition periods, how to transition membership data and requirements for provider networks among other things. This protects the beneficiaries during the transition.

HSD expects Molina to honor that TMA and participate in a transition that benefits its Members. By threatening that there may be unsuccessful transitions of care or interruptions of services, Molina raises concerns to HSD about its commitment to the vulnerable populations it is contractually obligated to serve. Successful transitions depend on Molina honoring its obligations, including coordination and cooperation with the successful Centennial Care 2.0 MCOs, the same as was accorded to Molina in the 2013 transition.

HSD’s responsibility is to ensure the delivery of services and supports to eligible beneficiaries and to ensure the delivery of those services in the most cost effective manner possible. To that end, the Procurement Code specifies that its goal is to award contract(s) “to the responsible offeror or offerors whose proposal is most advantageous to the state agency . . . ,” See NMSA 1978, § 13-1-117. HSD acknowledges the work Molina has done as a current Centennial Care MCO, however, any abstract harm from Molina not being awarded a contract cannot be prioritized over HSD’s responsibility to ensure that New Mexicans are provided with quality healthcare services.

Molina’s current contract expires December 31, 2018. Molina’s arguments are based on a faulty assumption; that it is entitled to, reasonably expected, or was otherwise guaranteed continuing contracts with the state. In reality, Molina has no expectation or guarantee that it would be extended a new contract in the RFP process. While it is true that it was within HSD’s discretion to extend the existing contracts, doing so would have been contrary to the department’s stated goals. As noted in the statement of facts, HSD determined that implementing Centennial Care 2.0 at this time was in the best interests of the State and the hundreds of thousands of New Mexico residents who are eligible for Medicaid benefits.

DOH and CYFD participated in the public input process as members of the advisory committee selected by HSD, were aware of HSD’s procurement and renewal of the Section 1115 Demonstration Waiver and provided valuable input. Based on their suggestions, changes to the waiver request and Centennial Care 2.0 contract were made, including new home visiting services for at-risk families and wrap around services for children in or at-risk of out-of-home placements. The Superintendent of Insurance’s role is limited to licensing insurance entities, such as MCOs, and only HSD is legislatively authorized to administer the state’s Medicaid program. NMSA 1978,

Prior to Centennial Care, HSD contracted with four MCOs for physical health services: PHP, Lovelace Health Plan, BCBS, and Presbyterian. Two other MCOs provided long-term care services: UnitedHealth and Amerigroup. And there was one statewide entity providing behavioral health services: OptumHealth of New Mexico, Inc. HSD combined all of these services into Centennial Care and went from seven (7) MCOs to four (4).
§ 27-2-12. The Superintendent of Insurance is not authorized to determine what Medicaid services would be available and how those services would be obtained for eligible beneficiaries.

For a year, HSD obtained public input and conducted meetings regarding the Section 1115 Demonstration Waiver and the procurement of MCO services. Experts participated in those meetings and discussions regarding the formulation of new services (e.g. home-visiting). Molina’s statement that “HSD failed to include them [DOH, CYFD, and the Superintendent of Insurance] and instead rubber stamped Mercer’s biased and flawed recommendations” is without merit.

Mercer’s role in the procurement is addressed in detail (subsections A-N) below and in the response to the supplemental protest. HSD’s decision to award contracts to the top three offerors is discussed in subsection (I) below. Mercer had no decision-making authority in the RFP technical evaluation process. HSD employees (subject-matter experts) scored the proposals. The extent of Mercer’s role in the “scoring process” was in compiling the scores for the cost offers, which is a transparent and computational process. The evaluation process implemented by HSD for Centennial Care 2.0 was based on, and employed, industry best practices (RFP 4.2). Mercer’s role was advisory and known to all offerors, and was not different in 2017-2018 than it was in 2012-2013 when Molina was a successful offeror.

To the extent that Molina is challenging any responsibilities delegated to Mercer, Molina knew by not later than September 17, 2017, the date set for pre-proposal conferences, of Mercer’s involvement and role in the RFP process. If Molina believed that Mercer’s participation in the RFP process constituted a conflict, it could have filed a protest at that time. Pursuant to NMSA 1978, § 13-1-172, “[a]ny bidder or offeror who is aggrieved in connection with a solicitation or award of a contract may protest.” Molina’s protest would have been due 15 days later.8

Molina does not provide sufficient evidence to justify any contention that “Mercer has an interest in ending Molina’s Medicaid contract.” Molina was fully aware of the relationship between HSD and Mercer and Mercer’s specific involvement with this RFP. It was not until Molina was an unsuccessful offeror that Molina raised these objections to Mercer’s involvement in the RFP. Vague allegations of bias are insufficient.9 Therefore, this claim is rejected.

Subsection “C,” of the Introduction, the “potential” conflict, is addressed in subsection (J) below. Molina’s allegations are not accurate. There is no evidence suggesting a conflict of interest existed regarding Mercer’s role in the procurement, that there was any bias or unlawful activity related to the procurement, or that HSD proceeded in anything but good faith in evaluating each of the proposals related to the Centennial Care 2.0 procurement. Molina’s arguments are based solely on their own unsubstantiated belief.

MOLINA’S ARGUMENT SECTION

8 It is noted that, during the procurement process for Centennial Care 1.0, Mercer performed essentially the same function as it did for the procurement process for Centennial Care 2.0. Molina has been and is, well aware of Mercer’s relationship with HSD and its responsibilities in this RFP.

9 “[N]aked claims, no matter how vigorous, fall far short of meeting the heavy burden of demonstrating that the findings in question were the product of an irrational process and hence were arbitrary and capricious.” Banknote Corp. of Am., Inc. v. United States, 56 Fed.Cl. 377, 384 (Fed.Cl. 2003), affirmed, 365 F.3d 1345 (Fed. Cir. 2004).
“A. New Mexico law required HSD to only utilize evaluation criteria that were disclosed in the RFP,”
“B. HSD utilized evaluation criteria that were not disclosed in the RFP” and
“C. HSD’s use of undisclosed bid evaluation criteria requires re-solicitation of bids.”
“D. HSD’s Scoring of Molina’s Technical Proposal was arbitrary and capricious.”

MOLINA’S ARGUMENT A-D

Molina argues, “HSD on numerous occasions relied on undisclosed evaluation criteria to reduce Molina’s score…result[ing] in a decrease in Molina’s overall score, and likely colored the evaluator’s view of Molina such that Molina lost additional points that are not explicitly tied to the undisclosed evaluation criteria. HSD failed to abide by the Procurement Code, regulations, and factors in the RFP, and by that failure HSD has created at least an appearance of impropriety, and jeopardized the integrity of competitive bidding. . . . HSD’s unlawful and prejudicial conduct may deter qualified MCOs from bidding in the future, leading to fewer and lower quality choices in insurance and healthcare for New Mexicans. . . .” (Molina’s Initial Protest, p. 7.)

Second, Molina asserts new criteria were introduced after the publication of the RFP by pointing to “response considerations” listed in the consensus scoring sheets. (Molina’s Initial Protest, pp. 16-17.) Molina provides a “non-exhaustive” list of questions that they believe demonstrate that HSD applied undisclosed criteria.” (Molina’s Initial Protest, p. 7 and Molina’s February 16, 2018 Supplement to Protest.) Molina argues that “[f]ailure to comply with regulations, to [Procurement] code and the RFP evaluation factors is a violation of law and is arbitrary and capricious.”10 (Citing Planning & Design Solutions, 1994-NMSC-112, ¶¶7, 19, 22-23.) (Molina’s Initial Protest, p. 7.)

10 The Review should focus on whether the agency’s “findings are supported by substantial evidence on the record as a whole.” Perkins v. Department of Human Services, 1987-NMCA-148, ¶19, 106 N.M. 651 (quoting Garcia v. NM Human Services Department, 1987-NMCA-071, 94 N.M. 175); See also Planning and Design Solutions v. City of Santa Fe, 1994-NMSC-112, ¶22, 118 N.M. 707. A whole record review requires that the reviewer “consider not only evidence in support of one party’s contention, but also to look at evidence which is contrary to the administrative findings; it must then decide whether on balance the agency’s decision was supported by substantial evidence […]” while “viewing the evidence in light most favorable to the decision made by [HSD].” Id.; Attorney General of New Mexico v. New Mexico Public Service Commission, 1984-081, ¶11, 101 N.M. 549 (citing Garcia, supra). “Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” In re Timberon Water Company v. NM Public Service Commission, 1992-NMSC-047.

New Mexico appellate courts have noted that administrative proceedings by state agencies enjoy a “presumption of administrative regularity,” and a party accusing an agency of favoritism or lack of objectivity faces a “heavy burden.” See, Wing Pawn Shop v. Taxation and Revenue Department, 1991-NMCA-024, ¶29, 111 N.M. 735; see also, State ex rel. ENMU v. Baca, 2008-NMSC-047, ¶12, 144 N.M. 530. New Mexico’s administrative law principals presume that HSD acted in good faith and for the public good and that the reviewer refrain from substituting its judgment in place of HSD’s exercise of discretion granted to it under the New Mexico Procurement Code, NMSA 1978, §§ 13-1-28 to 13-1-199 (1984, as amended through 2017) (the “Procurement Code”). Procurement law mandates that a protestant “must show not only a significant error in the procurement process, but also that the error prejudiced it.” See, Data Gen. Corp. v. Johnson, 78 F.3d 1556, 1562 (Fed.Cir. 1996). To establish prejudice, the protestant must show that there was a substantial chance it would have received a contract but for the error. Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed.Cir. 1996).
Molina further argues that the “anomalies in the evaluation process demonstrate that the procurement process as a whole was tainted and that the contract awards are in violation of the law… [and that] HSD’s evaluation of the Proposals violated NMSA 1978, § 13-1-105 as HSD considered criteria outside the RFP itself.” (Molina’s Initial Protest, pp. 15-16 and that HSD “changed the rules in the middle of the game by creating and applying bid criteria that were not disclosed in HSD’s RFP,” (Molina’s Initial Protest, p. 16.)

It appears that Molina believes that the response considerations should have been included in the Centennial Care 2.0 RFP as form evaluation factors to allow Molina to custom tailor its proposal with the response considerations in mind. “All of the areas where Molina lost points were areas where Molina readily could have provided the information at issue had the need for that information been disclosed by HSD.” (Molina’s Initial Protest, p. 16 (emphasis in original).) Molina complains that the undisclosed bid criteria was “egregious” because bidders were required to limit the number of pages submitted in response.” (Molina’s Initial Protest, p. 7.) Molina did not “waste space” addressing questions that were unasked. (Molina’s Initial Protest, p. 8). Molina believes that “HSD’s use of undisclosed bid evaluation criteria requires re-solicitation of bids.” (Molina’s Initial Protest, pp. 6-16.)

**DISCUSSION ARGUMENT A-D**

HSD did not (1) rely on undisclosed criteria in evaluating proposals for Centennial Care 2.0; (2) utilize evaluation criteria that were not disclosed; nor (3) deduct points from the scores of proposals as a result of evaluation criteria that were not disclosed. The RFP specifically identified each evaluation factor that was considered in scoring proposals along with the number of points that could be awarded for each factor.

Points were earned based on the quality of each response in accordance with HSD’s vision for Centennial Care 2.0 as set forth in HSD’s application to renew the Section 1115 Demonstration Waiver. All proposals are not entitled to the full score for each evaluation criteria for providing a response. As demonstrated in the scoring, less satisfactory and descriptive responses earn fewer points and more thoughtful, thorough and satisfactory responses earn more points.

It was the consensus scoring group’s authority and duty to assess the quality of each proposal. Molina cannot now substitute its judgment for that of the consensus scoring group. Molina’s arguments that certain parts of their proposals should have received more points or that other offerors’ responses warrant less points is biased disagreement.

The Procurement Code gives HSD and all state agencies substantial latitude in determining how to structure an RFP to procure services such as those covered by Centennial Care 2.0. The Procurement Code, with respect to RFPs, requires what is set out and specifically enumerated in NMSA 1978, Sections 13-1-112 and 13-1-114, supra. The regulations provide that, “[a]t a minimum the RFP shall include the following . . . all of the evaluation factors and the relative

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1. **McDaniel v. NM Bd. of Medical Examiners**, 1974-NMSC-062, ¶17, 86 N.M. 447 (explaining that “administrative bodies whose members, by education, training or experience” may properly be given “special weight and credence to findings concerning technical or scientific matters”).
weights to be given to the factors in evaluating proposals.” See NMAC 1.4.1.31(a)(6). These provisions compelled HSD to notify prospective offerors of the evaluation factors relevant to the procurement and to evaluate the submitted proposals based on the published factors. *Planning and Design Solutions v. City of Santa Fe*, 1994-NMSC-112, ¶29.

*Planning and Design* does not stand for the proposition that agencies cannot provide guidance for their evaluation teams, especially where the guidance is designed to avoid arbitrary and capricious results. *Planning and Design* was a case in which the City of Santa Fe issued an RFP that listed and weighed four main factors the city would use in evaluating the proposal: 25 percent for the project approach; 10 percent for a project schedule; 20 percent for the experience and expertise of the firm; and 35 percent for the experience and expertise of assigned personnel. *Planning and Design*, 118 N.M. at 709. A California firm was selected as the “most advantageous to the city,” and when the contract was being ratified by the City Council, the council rejected the California firm and selected the forth place firm which was the “highest local firm on the list.” *Id.* The New Mexico Supreme Court held that the combination of introducing a new “locality” requirement into the RFP and failing to follow the city’s own procurement regulations by selecting the fourth place firm amounted to arbitrary and capricious behavior. *Id.* The “Response considerations” used by the evaluation committee are not comparable to the City of Santa Fe’s introduction of an entirely new evaluation factor (company location). As noted by Molina in 2013, when it was a successful bidder, “Planning and Design turned on the complete absence of disclosure of a critical factor, and the Supreme Court did not address any contention that the procurement Code requires disclosure of the weight given to sub factors in a required proposal.” (Exhibit #4, p.3).

HSD disclosed, in the RFP, the factors that guided the evaluation. Molina has identified areas in which it disagrees with assessments, but have not identified a violation of law. The Procurement Code and its regulations require HSD to fairly and equitably evaluate proposals based on the “factors set forth in the RFP” but leaves the specific application of those standards to the agency’s discretion. NMSA 1978, § 13-1-117 (1984). If a question in the RFP asked an offeror to discuss a certain subject area, HSD should be able to expect an offeror to address the question with sufficient knowledge and detail within the scope of that subject area.12

The Procurement Code or the regulations do not require, arguably by design, that state agencies specify the responses they expect from offerors, as Molina argues. Molina offers no authority to support its contention that an unsuccessful offeror’s disagreements with HSD’s evaluation are sufficient to support a bid protest.

The Centennial Care 2.0 RFP provided potential offerors with detailed information about what factors HSD would evaluate. First, the RFP asked offerors to meet certain mandatory requirements of which most were subject to a pass/fail determination. The only exception was for

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12 HSD chose subject matter experts to evaluate and score Section 6 Technical Proposal sub-sections relative to each individual’s area of expertise. For example, RFP § 6.5 sought responses relating Long-Term care. HSD chose individuals that had years of experience in long-term care and supports: Tallie Tolen, Angela Medrano, Joey Kellenaers, and Shari Roanhorse. Exhibit #5, List of Evaluators. Each sub-group was required to consider a large amount of information relating to numerous complex subject areas and then make judgment calls about which offerors’ proposal make the most sense for the New Mexico Medicaid program.
references, for which a maximum of 300 points were available. (RFP 4.3.4.) Second, the RFP separated the technical proposal into 12 sections, each covering and constituting a separate factor, including:

1. Experience & Qualifications (maximum 130 points);
2. Provider Network & Agreements (maximum 70 points);
3. Benefits & Services (maximum 160 points);
4. Care Coordination (maximum 280 points);
5. Long-Term Services & Supports (maximum 160 points);
6. Information Systems & Claims Management (maximum 220 points);
7. Native Americans (maximum 50 points);
8. Member & Provider Services (maximum 80 points);
9. Quality Improvement & Management (maximum 60 points);
10. Reporting & Program Integrity (maximum 50 points);
11. Financial Management (maximum 50 points); and
12. Value-Based Purchasing (maximum 80 points).

Within each of these technical proposal factors, the RFP required offerors to respond to 94 separate questions designed to elicit details of the offerors’ proposals. (See RFP)

The RFP also required offerors to submit a cost proposal for which 400 points were available, such points being awarded to an offeror based on a minimum and maximum capitation rate reflecting the range of payments HSD was willing to accept for payment under a contract and the offeror’s position on the rate offer as a percentile between the minimum and maximum rates (the “Cost Proposal”). (RFP, Section 7)

Molina affirmatively indicated acceptance of the evaluation process and did not dispute the process. Section 2.3 of the RFP provides that “submission of a proposal constitutes acceptance of the evaluation process contained in Section 4 of this RFP [,]” and Section 4 is where the factors, and the points available for each factor are specifically identified. Each protestor concurred “that submission of our proposal constitutes acceptance of the Evaluation Factors considered in Section 4 of this RFP.” (See e.g., Exhibit #9, Molina’s Letter of Transmittal).

“Response considerations” are not new evaluative criteria and do not stand in place of the direct questions asked in the RFP despite Molina’s inference to the contrary. “Response considerations” are used as guidance to ensure that evaluations teams fully consider the question at issue in an effort not to be arbitrary and capricious. All the response considerations were tied to the question itself and do not insert or incorporate a new factor into the RFP.\[14\]

\[13\] The total number of available points for the technical proposals was 1,390.

\[14\] For example, one of the RFP questions challenged by Molina asked Offerors to describe how they would initiate and manage care including services, supports and treatment options to achieve the best outcomes for the member. (Molina’s Initial Protest, p. 10; RFP at p. 46. In the consensus score sheet, HSD indicated that response considerations included whether the “response described the role of the care coordinator[.]” (Molina’s Initial Protest, p. 10) Such response considerations do not introduce previously unstated factors; they clarify the given subject matter of a particular question, for the benefit of the evaluators. The response considerations fall squarely within HSD’s discretion regarding how to interpret and rate the technical proposals. If the offeror did not fully answer
The process of using response considerations for the technical proposal evaluations was also used in the 2013 procurement for Centennial Care. At that time, Molina, which was a successful offeror, argued forcefully that NMSA 1978, §13-1-117 (1984) only required HSD to identify broad evaluation factors. At that time, Molina argued, “[i]f a question in the RFP asks an offeror to discuss a certain subject area, HSD is entitled to expect that the offeror will be able to address relevant matters within the scope of that subject area. There is no requirement in the Procurement Code or its regulations that HSD identify every detail of each ‘evaluation factor’ that it wants an offeror to address.” Molina went on to state that, “[i]n deed, the failure to recognize and discuss important elements intrinsic to an RFP question is legitimate grounds for assessing a deficiency.” (Exhibit #4, Response to Protests by Molina Healthcare of New Mexico, Inc., pp. 10-11 (citations omitted)).

In Molina’s 2013 response to the protests relating to Centennial Care, its counsel stated that:

While no New Mexico court has addressed this issue, a New York appellate court rejected a nearly-identical argument in Transactive Corp. v. N.U. State Department of Social Services., 236 A.D.2d 48, 53, 665 N.Y.S.2d 701, 705 (1997), aff’d on other grounds, 92 N.Y.2d 579, 706 N.E.2d 1180 (1998). In that case a disappointed bidder argued that a government entity violated a New York procurement statute, which provided that the solicitation “describe and disclose the general manner in which the evaluation and selection shall be conducted,” and that “[w]here appropriate, the solicitation shall identify the relative importance and/or weight of cost and the overall technical criterion to be considered by a state agency in its determination of best value.” N.Y. State Finance Law § 163(9) (b). The disappointed bidder argued that although “the RFP set forth the general evaluation criteria and the weight accorded to each,” it did not identify 109 subfactors at all. The New York Appellate Division rejected this argument, noting that the 109 “specific factors [were] subsumed within the five general criteria” set forth in the request for proposal, and holding that New York’s procurement statute only required disclosure of “the relative importance and/or weight of cost and the overall technical criteria.” 236 A.D.2d at 453, 664 N.Y.S.2d at 705. Similarly, here the New Mexico Procurement Code and procurement regulations required only the factors and their weights to be disclosed, not the weight assigned to every subfactor.

(Exhibit #4, Response to Protests by Molina Healthcare of New Mexico, Inc., p. 2 (emphasis added)). These arguments retain the same merit today that it had in the procurement of Centennial Care in 2012-2013.

Yet, Molina now uses new and contradictory logic, arguing that a public entity has to set forth the evaluation factors and questions it expects offerors to respond to, and also has to explain

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a question, or if the Offeror’s explanation of the role of a care coordinator raised a concern about its ability to perform the work, it is reasonable for that to be taken into consideration in the score.
in detail every concern, issue or consequence that may come to mind when evaluating a particular response.

Molina’s 2013 brief demonstrates that it knew the “undisclosed criteria” argument well. Molina was highly critical of the argument when they were a successful offeror, taking the exact opposite position it takes now. In 2013, Molina wrote, “[t]he RFP plainly disclosed the relative weight given to each factor, as required by NMSA 1978, § 13-1-114, which provides that an RFP “shall state the relative weight to be given to the factors in evaluating proposals,” and NMAC 1.4.1.31(A), which provides that an RFP “shall include the following: . . . (6) all of the evaluation factors, and the relative weights to be given to the factors in evaluating proposals[.]” (Exhibit 4, P.3)

Molina’s knowledge about the response considerations also demonstrates that this portion of its protest is waived. Molina, because of prior experience (and support for the process in 2013), knew or had reason to know that response considerations would be part of this evaluation. Molina failed to raise any concerns at all (or even ask if response considerations would be used) as part of the scoring procedure before the proposals were submitted. Molina explicitly agreed to the scoring procedure discussed in the RFP. Molina signed the letter of transmittal form, and its authorized representative stated, “I accept the conditions governing the procurement as required in Section 2.3.1[,]” and "I concur that the submission of our proposal constitutes acceptance of the evaluation factors contained in Section 4 of this RFP. If Molina believed that HSD’s RFP was legally deficient or in violation of law it should have filed a protest at that time. Instead, the protestors submitted their proposals without question or objection regarding the response criteria. By failing to object at that time, they have waived their ability to do so.15

The response considerations do not constitute evaluation factors of the type that must be included in the RFP. They did not introduce new factors of which an offeror should have been notified. They underscore the discretionary nature of the competitive sealed proposal process. (See example, RFP § 4.2). Evaluators considered a wide range of responses to RFP questions that they rated. The response considerations served as guidance on how to consistently interpret and evaluate responses. The HSD evaluation committee needed to have this consistency in evaluating all offerors’ responses.

The technical proposal sub-groups were comprised solely of HSD employees who are subject matter experts in the areas they were asked to evaluate. They are entitled to address and evaluate proposals that differed from one another. That was the very nature of what they are required to do. HSD’s sub-groups applied their expertise to consider large amounts of information relating to numerous, complex subject areas and then made informed decisions about which offerors’ proposals best met the requirements of Centennial Care 2.0. The Procurement Code and regulations, as well as the RFP, provide HSD with this discretion in considering proposals.

Molina’s opinion does not prove that HSD acted arbitrarily or capriciously or in violation of law. Molina’s belief that point deductions were not warranted cannot override HSD’s exercise of discretion. Molina’s complaint fails to consider that scores awarded to each offerors’ answers

differed for legitimate reasons. It is not surprising that Molina assesses its own response to be of higher quality than the consensus-scoring group. But to award more points post award would amount to placing the responsibility of evaluating the proposal in an offeror’s hands as opposed to the agency’s subject matter experts where it belongs.

Evaluation of Molina’s technical proposal was not arbitrary and capricious. Molina’s technical score was fifth out of eight offerors, having scored low in key areas: benefits and services, experience and qualifications, care coordination, and value-based purchase, among others. (Exhibit #6, 2017 Centennial Care 2.0 Scoring Results Summary). Overall and throughout its proposal, Molina did not provide sufficient detail in its responses and frequently offered a one-size fits all approach rather than a New Mexico specific approach. Molina’s responses did not indicate a thorough understanding of the care coordination program or cultural considerations for New Mexico’s unique population. (Exhibit #2, Smith-Leslie Affidavit, ¶ 26).

HSD followed the Procurement Code and its regulations when it promulgated the Centennial Care 2.0 RFP. The RFP: (1) provided all the information required by NMSA 1978, § 13-1-112(A); (2) explicitly listed each of the factors that would be considered in evaluating the proposals received to the RFP and the relative weights given to those factors (the maximum points available for each factor); and (3) provided that “[e]ach proposal shall be evaluated to determine whether the requirements as specified in the RFP have been met.” As required by NMSA 1978, § 13-1-112 and NMAC § 1.4.1.31(A), the RFP included specifications for the services to be procured and a statement of the relative weights to be given to those factors in evaluating criteria.” Allegations by Molina that “[u]ndisclosed evaluation criteria is even more egregious given the role that Mercer played in the evaluation process and Molina’s conflict of interest.” (Molina’s Initial Protest, p. 7,) are addressed below in subsection (J).

HSD, upon evaluating each proposal, concluded the successful offerors were most advantageous to HSD and awarded contracts to them. The Centennial Care RFP and HSD’s evaluation satisfied all of the requirements set forth in the Procurement Code and the Procurement Regulations. It was fully compliant with law. Molina’s request for “an award to Molina” should be denied.

As an alternative remedy, Molina requests a “re-solicitation of bids.” This remedy is not warranted or appropriate. HSD has already executed contracts with successful offerors (See Discussion Introductory Statement) and these contracts are enforceable. NMSA 1978, § 13-1-182 (2002) provides that after the execution of a contract, if HSD determines that there was a “violation of law” then the contracts may be ratified if it in HSD’s best interests or the contracts may be terminated with reimbursement to the contractors for certain expenses. It does not provide for a “resolicitation of bids.”

“E. HSD’s rates were not actuarially sound and thus should not have been a bid criterion as the RFP improperly rewarded bidders who accepted a non-viable rate.”

MOLINA’S ARGUMENT
Molina’s arguments center on Mercer’s services setting the “cost structure” or “rate table” for the RFP. “The pricing varies considerably depending on the “category” of the member, as a member known to, for example, require behavioral health services or living in a nursing facility requires significantly more medical services then a healthy adult or child.” (Molina’s Initial Protest, p. 17.) Molina contends that the rates HSD have accepted are unsustainable and “the fact that the capitation rate is … not actuarially sound makes the cost evaluation factor a violation of law, arbitrary and capricious, lacking in any actuarially foundation, and fraudulent or in bad faith.” (Molina’s Initial Protest, p. 18.) Molina further suggests that, “HSD’s use of rates that it knew were unsound and would have to be adjusted was an abuse of discretion, a violation of law, and arbitrary and capricious act. Molina argues that since HSD chose to use unsound rates, rates and the bidder’s scores on Cost Proposals should be eliminated from the RFP process.” (Molina’s Initial Protest, p. 18.)

DISCUSSION ARGUMENT E

The 2017 RFP did not require offerors to propose rates that they deemed “actuarially sound.” The RFP requested only that offerors propose rates within a minimum and maximum range. (RFP § 7.3 and Exhibit #2, Smith-Leslie Affidavit, ¶19.) Final contract rates were not requested in the RFP because multiple rate components were excluded, such exclusions were identified in the RFP, and future changes to rates were anticipated, such as: (1) programmatic changes may occur due to state legislative initiatives; (2) programmatic changes may occur due to Congressional acts; (3) CMS may require HSD modify services to align with an approved Section 1115 Demonstration Waiver renewal; and (4) CMS may, by regulation, require state Medicaid programs to make significant changes.17

HSD contracts with an actuary, Mercer, to make final determination of rates that are actuarially sound and those rates will be certified to CMS prior to the implementation of Centennial Care 2.0. Managed care plans do not determine actuarial soundness of the rates, or rate ranges, submitted to CMS for approval. (Exhibit #2, Smith-Leslie Affidavit, ¶20 and 42 CFR part 438). HSD’s approach to the cost proposal process provided each offeror with a level playing field and was designed to ensure that the final capitation payments that HSD will pay to contractors beginning 2019 are appropriate for the populations to be covered and the services to be furnished under the contract.

The minimum and maximum rates could not be certified as “actuarially sound” because certain costs, unknown at the time of the procurement, were explicitly excluded. These exclusions, including the process for adjustments post-contract award, were addressed in the RFP, data book narrative, mandatory pre-proposal conference presentation, pre-proposal conference discussions

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16 Molina offers no authority or evidence supporting its contention that HSD’s use of a rate range that was openly disclosed to be not “actuarially sound” was a violation of law, fraudulent or in bad faith.

17 Molina is well aware of the fact that programmatic changes take place. Since the initial contract was executed by HSD and Molina from Centennial Care 1.0, there have 8 amendments to the contract – more than one per year. The Molina contract and amendments can be found at: http://www.hsd.state.nm.us/LookingForInformation/medical-assistance-division.aspx.
and HSD’s written responses to offerors’ questions provide consistent information about the following elements for the cost proposal process:

- The data book, provided as part of the RFP, identified for Offerors how the minimum and maximum rates were derived, including a detailed discussion about the various adjustments and their respective impacts;
- HSD supplied all Offerors with the parameters of the cost proposal process, a data book that included detailed documentation describing the methodology, data sources and adjustments (including base data adjustments, trend factors, prospective program changes, care coordination and administrative costs loadings and underwriting gain), to develop the minimum and maximum rates. HSD clearly documented elements of the minimum and maximum rates that were specifically excluded due to the fact that they could not have been included because of their unknown nature;
- The minimum and maximum rates were developed in accordance with generally accepted actuarial principles and practices by Mercer credentialed actuaries, who are members of the American Academy of Actuaries;
- The RFP clearly stated that the minimum and maximum rates provided in the rate table did not include certain costs, such as premium taxes and assessments and would be adjusted prior to the finalization of MCO payment rates that would be certified as actuarially sound;
- The RFP clearly stated that the range represented the amount HSD was willing to pay (prior to these identified adjustments) for each of the 26 rating cohorts and the cost proposal amounts would be used for purposes of cost scoring and would be adjusted for the identical exclusions prior to “Go-Live” for final payment. Exclusions and adjustments were included in the RFP and data book narrative;
- HSD explained that the cost proposals were binding and adequately explained the process HSD would use to adjust the cost proposals of Offerors who were successfully awarded a contract; and
- The RFP, data book, pre-proposal conference materials, HSD’s responses of Offeror’s questions, provided transparent cost proposal scoring criteria such that each offer could calculate their cost proposal score before it was submitted to HSD.

(Exhibit #2, Leslie-Smith Affidavit, ¶22).

Molina does not support their “violation of law” assertion. The evidence does not support that HSD acted in an “arbitrary and capricious” manner, or that their actions were “fraudulent or in bad faith.” Molina, like all other offerors, had multiple opportunities to clarify any concerns or questions about the rate ranges provided in the RFP; however, Molina never sought clarification from HSD. Molina was aware that the capitation rates were not actuarially sound as of October 20, 2017. At that point, if it had objections it needed to raise them within 15 calendar days, which it did not do. NMSA 1978, § 13-1-172. The argument is without merit. Molina has also waived its opportunity to raise it. 18

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18 During the 2013 RFP procurement, Lovelace Health Plan raised issues about the cost proposals. In response, Molina raised the same issue set forth herein:

And if Lovelace believed that HSD’s cost proposal scoring method was legally defective, it could have filed a protest at that time. See NMSA 1978, § 13-1-172 (“[a]ny bidder or offeror who is aggrieved in connection with a
“F. Pricing should not have been a factor in evaluation of proposals because the prices are subject to change, and HSD’s considerations of pricing was thus arbitrary and capricious,” and

G. HSD’s scoring on price proposals was arbitrary and capricious as the scores assigned are grossly disproportionate to the price difference between bids.”

MOLINA’S ARGUMENT F and G

Molina alleges that pricing should not have been a factor in HSD’s consideration of bids because “the rate that a bidder includes in its Proposal is...not the rate that will actually govern the contractual relationship.” (Molina’s Initial Protest, P. 18). Molina speculates that, “[o]n information and belief, past practices regarding rates have resulted in MCO’s receiving substantially the same rate from any services such that the difference in rates between MCOs are not material.” “If, as Molina believes, the rates actually included in the Contracts are similar, then HSD’s decision to use costs and rates as a scoring factor is arbitrary and capricious as bid rates have no bearing on actual costs to HSD (Molina’s Initial Protest, p. 18). HSD’s “use of a cost score materially impacted the order of bidders and the outcomes of the RFP.” (Molina’s Initial Protest, pp. 18-19.) Molina argues, “While Molina’s prices were just percentage points away from the lowest bidders’ prices the scoring impact was grossly disproportionate to the actual prices differences.” (Molina’s Initial Protest, p. 19.) Molina alleges that HSD’s actions were an abuse of discretion, a violation of law, and an arbitrary and capricious act.

DISCUSSION ARGUMENT F and G

HSD had the discretion to give such weight as it chose to variations among the competing price proposals. Molina’s argument that some sort of proportional relationship must exist between the price variations and the points awarded is not supported under the law. Molina cites no legal authority either from New Mexico or any other jurisdiction. As Molina’s own lawyer observed in 2013, HSD had broad discretion to weigh and score the cost proposals as it deemed appropriate; so long as HSD disclosed its scoring methodology and the method was rational:

[B]elief that a different scoring method should have been used does not identify any ‘violation of law.’ See NMSA 1978, §13-1-182. Neither the procurement code nor the procurement regulations mandate any particular method of scoring a cost proposal. Thus, it was within HSD’s discretion to choose a method, as long as that method was disclosed, which it was. It may be true that actuaries would disagree
about what the best method is for scoring cost proposals, but this does not render HSD’s choice a ‘violation of law.’ (Exhibit #4, Response to Protests by Molina Healthcare of New Mexico, Inc.).

While Molina has asserted that this cost difference is only “pennies on the dollar,” an initial estimation of their proposal would cost the Medicaid program $94 million more annually than any other successful offeror. (Exhibit #2, Smith-Leslie Affidavit, ¶27.) A few percentage points in the price bid is not inconsequential. Molina’s cost proposal was the highest (receiving the lowest point score). (Exhibit #6, 2017 Centennial Care 2.0 Scoring Results Summary.)

HSD was responsible for evaluating and scoring the bids. Thirty-two HSD subject matter experts from HSD’s Medical Assistance Division and Behavioral Health Services Division served as the state’s RFP evaluation committee. (Exhibit #5, List of Evaluators.) They participated on 15 evaluation teams (including the executive committee) and were assigned based on their expertise. (Exhibit #5, List of Evaluators.) During the weeks of November 6, 2017 through December 3, 2017, each HSD evaluator independently read assigned sections of the RFP, within their area of expertise, and scored each offeror’s response. (Exhibit #2, Smith-Leslie Affidavit, ¶24.) Then, from December 4, 2017 to December 15, 2017, the HSD evaluators participated in the consensus scoring sessions. (Exhibit #2, Smith-Leslie Affidavit, ¶24.) These sessions resulted in one consensus team grade per question. (Exhibit #2, Smith-Leslie Affidavit, ¶24.) The process is further described in the “scoring results summary.” (Exhibit #6, 2017 Centennial Care 2.0 Scoring Results Summary.) Furthermore, it was HSD which signed the awards to the winning offerors. All final decisions regarding the Medicaid program were made by HSD as is required by law.

HSD held a pre-proposal conference on Tuesday, September 19, 2017, to “allow offerors to ask questions and clarify issues concerning this RFP.” (Exhibit #2, Smith-Leslie Affidavit, ¶23.) Daniel Sorrells and Tina Rigler, Molina’s president and vice-president of government contracts, respectively, attended the conference, but did not seek any clarification. (Exhibit #2, Smith-Leslie Affidavit, ¶23.)

The RFP provided all offerors with the opportunity to “submit written questions as to the intent or clarity of the RFP and its appendices.” (RFP § 2.2.4). The questions were due by September 29, 2017. Molina submitted one question related to the RFP about whether it could submit electronic files of its audited financial statements. (Exhibit #12, Molina’s written questions.)

Molina affirmatively indicated its acceptance of HSD’s evaluation process without any attempts to clarify criteria. (Exhibit #9, Molina’s Letter of Transmittal.) Section 2.3.1 of the RFP provides that “submission of a proposal constitutes acceptance of the evaluation process contained in Section 4 of this RFP.” Section 4 of the RFP contains the factors, and the points available for each factor. Molina signed the letter of transmittal form, and its authorized representative stated, “I accept the Conditions Governing the Procurement as required in Section 2.3.1.” (Exhibit #9, Molina’s Letter of Transmittal).

Molina did not object to the cost-sharing methodology as set out in HSD’s September 27, 2017 RFP. Molina does not argue that HSD did not score their proposals as it said it would, instead, it attacks the cost-sharing method itself. However, neither the procurement code nor the
procurement regulations mandate any particular method of scoring a cost proposal. Thus, it was within HSD’s discretion to choose a method, as long as that method was disclosed, which it was. Furthermore, Molina did not object to that methodology when it was issued or within 15 days thereafter. Molina failed to object to the cost proposal methodology in a timely fashion and its right to object has been waived. NMSA 1978, § 13-1-172.

For the reasons stated herein, Molina’s arguments F and G, regarding pricing, do not have merit and should be rejected. Molina’s allegation that HSD actions were an abuse of discretion, a violation of law, or an arbitrary and capricious act are not supported in law or fact.

“H. HSD’s decision to not conduct oral presentations, an additional scored component of the RFP, was arbitrary and capricious.”

MOLINA ARGUMENT (H)

Molina argues that, “HSD had the option to use a fourth scored component – oral presentations.” (Molina’s Initial Protest, p. 21). Molina acknowledges “holding oral presentations was discretionary.” (Molina’s Initial Protest, p. 21.) Despite acknowledging the discretionary nature of oral arguments and the fact that the RFP clearly states that oral arguments were at the option of HSD (RFP at p. 17), Molina argues, “HSD had adequate time to schedule and hold oral presentations. “HSD’s decision not to hold oral presentations coupled with Mercer’s involvement in the procurement, suggests that perhaps HSD and Mercer were concerned that the scores from oral presentations would change the bid order in a way that was unfavorable to Western Sky (and thus Centene, Envolve, and Mercer) or alternatively, favorable to Molina.” (Molina’s Initial Protest, p. 22.) Molina argues HSD’s decision not to hold oral presentations was an abuse of discretion and arbitrary and capricious.

DISCUSSION ARGUMENT (H)

First, Molina appears to misunderstand the purpose of oral presentations., since oral presentations are held for the benefit of the procuring agency. It is the procuring agency that decides if they are needed, not the offerors. The RFP stated that oral presentations regarding the RFP were to be conducted at HSD’s discretion.

HSD was responsible for evaluating and scoring the bids as established in the Discussion subsection (F,G & I). The evaluation committee, having determined it was satisfied that the procurement process had provided the information necessary to make decisions, without oral presentations, did not hold oral presentations. Molina did not object to HSD’s decision to not hold oral presentations until after learning it was unsuccessful. It should be noted that for the 2012 procurement process for Centennial Care, no oral presentations were held. (Exhibit #2, Smith-Leslie Affidavit, ¶17). Molina, a successful offeror under that RFP, did not object. (Exhibit #2, Smith-Leslie Affidavit, ¶17).

HSD utilized its discretion and declined to hold oral presentations. HSD and not Mercer was responsible for evaluating and scoring the bids. It was HSD’s decision not to conduct oral presentations as “they were deemed unnecessary by the evaluation committee.” (Exhibit #2, Smith-Leslie Affidavit, ¶15). This decision complied with the plain language of the RFP stating that oral presentations would occur “[a]t HSD’s discretion.” RFP at pp. 17 and 21 provide
sufficient justification for HSD’s action. HSDs decision not to conduct oral presentations was not arbitrary and capricious and it was not an abuse of discretion.

“I. HSD’s Decision to Reduce the Number of MCOs to Three Was Arbitrary and Capricious.”

MOLINA ARGUMENT (I)

Molina challenges HSD’s decision to award contracts to three highest scoring offerors. Molina alleges that, “HSD has provided no information justifying how its decision to depart from its stated intent to contract with up to five MCOs is in the State’s best interest,” (Molina’s Initial Protest, p. 22.) Molina cites NMAC 1.4.1.1.43(A) for the proposition that, “[t]he procurement officer shall make a written determination showing the basis on which an award was found to be most advantageous to a state agency based on the factors set forth in the RFP.” (Molina’s Initial Protest, p. 22.)

Molina continues its concern with the relationship between Mercer and HSD, stating, “HSD simply accepted wholesale the recommendations made by Mercer.” (Molina’s Initial Protest, p. 22.) Molina alleges, “[b]y failing to explain its decision and by relying on a contractor to make decisions for it, HSD necessarily acted without a guiding principle or rational reason ….” (Molina’s Initial Protest, p. 22). Molina’s alleges that HSDs actions were arbitrary and capricious.

DISCUSSION ARGUMENT (I)

HSD selected the three highest scoring proposals, PHP, BCBS and WS, and awarded those offerors contracts. The justification for the selection of those offerors is articulated by the executive evaluation committee. (See discussion Section F & G), which determined that those offerors scored very high in each of the three scoring sections (Technical, References and Cost) (Exhibit 13, Memo from Daniel Clavio). As the Executive Evaluation Committee noted:

- The three (3) highest-scoring plans overall demonstrated strong scores in the Technical Proposal.
- Contracting with three (3) MCOs furthers HSD’s efforts to create administrative simplicity for providers and state oversight staff while maintaining adequate choice for Members.
- The recommendation will provide stability in the NM Medicaid program through the retention of two incumbent MCOs while providing a new MCO option for Members.
- A reduction in the number of MCOs has the potential to create economies of scale and encourages lower administrative costs. (Exhibit #14, Memo from Jessica Osborne to Dan Clavio)

Moreover, HSD’s decision to select three MCOs complied with the plain language of the RFP. In Amendment 2 to the RFP, issued on October 20, 2017, HSD stated that:

Following the procurement, HSD’s intent is to contract with three to five MCOs unless it is in the State’s best interest to do otherwise. The number of contractors

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20 HSD never “stated” this. The actual language of the RFP is “HSD’s intent is to contract with three to five MCOs unless it is in the state’s best interest to do otherwise.” See RFP at 11. Molina acknowledges this in other places on page 22 of their protest.
selected and awarded through this procurement process is solely at HSD’s discretion based on the best interests of the State.

Amendment 2 to the RFP at 2. Similar language is found in Section 1.4 of the initial RFP. Molina’s argument that HSD erred in awarding three, rather than five contracts, is unfounded in light of the language of the RFP and its Amendments.

Further, Molina’s argument misperceives the scope and meaning of NMAC § 1.4.1.43.A. The regulation requires the procurement officer’s determination to be based on the factors in the RFP. Section 4 explains the evaluation process and scoring for the RFP. Section 4.3 details the Scoring Summary and contains the following language:

When the evaluation and scoring of the References, Technical Proposals, Cost Proposals, and Oral Presentations (if requested, at HSD’s discretion), are complete, HSD will tally the scores from the evaluations to determine the offerors that will receive Contract offers from the State.

Contracts will be awarded to the offeror(s) based on the proposals that are deemed to be most advantageous to the State. Although not mandatory, it is anticipated that Contracts will be awarded to the highest-scoring offerors. The number of Contracts awarded by the State for this work is not pre-determined and will be decided at the State’s discretion.

(RFP § 4.3.4).21

As shown by the language of the RFP, the number of MCOs selected to receive contracts was not a “factor” set forth in the RFP. The factors were those items listed in the scoring summary for which points were awarded by the evaluation committee, resulting in a total score for each offeror. The total score was then utilized by the committee to determine which offeror(s) would be awarded contracts. Inasmuch as the determination of the number of contracts was not a “factor” in the State’s decision under the RFP, the procurement officer was not required to explain it under the cited regulation.

The RFP also states that there was no pre-determination that any specific number of offerors would be awarded contracts. It was a discretionary decision made only after the scoring of the listed factors and in light of the relative quality of the proposals. By the clear language of the RFP, HSD did not “reduce” the number of MCOs, but, in its discretion, selected a number of MCOs within a stated continuum that the offerors knew in advance and that Molina did not dispute prior to the Notice of Award.

21 In the 2012 RFP for Centennial Care, HSD stated: “Following the procurement, HSD’s intent is to contract with no more than five MCOs unless it is in the State’s best interest to do otherwise. HSD intends to award a five-year contract; the term of the initial Contract will be five years, with options to renew at HSD’s discretion.” The 2012 RFP can be found at: http://clpc.ucsf.edu/sites/clpc.ucsf.edu/files/Centennial_Care_RFP_and_Contract__8_28_12__FINAL__.pdf. Ultimately, HSD awarded only four contacts with Molina being one of the successful Offerors. At that time, Molina did not object to HSD’s awarding only four contracts, obviously less than the five mentioned in the RFP.
Unlike other procurements which use strategies to solely seek purchase of products or services at the lowest cost, healthcare procurements use a multifaceted strategy focused on the managed care company's technical ability to deliver covered services to patients with complex health needs, through goals set by the state, in a cost effective and efficient manner. HSD conducted a competitive procurement process that aligns with its managed care program goals of improving care integration, driving value-based payments, and streamlining administrative processes. HSD has selected offerors that demonstrated understanding and experience in meeting those goals on the basis of the content of their responses to the specialized questions in the RFP. Eight companies submitted proposals, and the State selected the top three. Molina’s proposal scored sixth.  

Molina has no actual knowledge about the evaluation process or how it was carried out, and it provides no evidence of wrongdoing or misappropriation of duties. Instead, it alleges HSD failed to do its job in evaluating these proposals and simply rubber stamped the decisions of Mercer. HSD has already responded to this repetitive and unfounded assertion. (See again discussion Section F & G).

On December 18, 2017, the executive evaluation committee for the 2017 Centennial Care 2.0 MCO met to review and discuss the scoring result summary for the RFP and develop recommendations for the medical assistance director regarding the RFP. In the meeting, after the discussion the committee agreed, by consensus, to recommend that it would not be necessary to receive oral presentations from the offerers, and that contracts be awarded to Presbyterian Health Plan Incorporated, Western Sky Community Care and Blue Cross/Blue Shield of New Mexico. These recommendations were arrived based upon the independent judgment of the committee members, and were not directed, guided, or influenced by any third party. (See affidavit of Karen Meador, affidavit of Linda Gonzalez, affidavit of Kari Armijo, affidavit of Jason Sanchez, affidavit Angela Medrano, affidavit of Michael Nelson, and affidavit of Wayne Lindstrom Exhibits #15 through #21.)

On December 20, 2017, Jessica Osborne, a Principal of Mercer, issued a “Memo” to Dan Clavio, HSD’s procurement manager. This memo documents the “Monday December 18, 2017 Executive Evaluation Committee” meeting, to “discuss…and develop a recommendation.” The memo provides that “based on this discussion, the Committee recommends…” (See Exhibit #14 Memo from Jessica Osborne to Dan Clavio). Molina relies on this “memo” as its evidence that HSD delegated its responsibility. The plain reading of the memo demonstrates that this is not true.

Mercer served as a consultant in this RFP, just as it did in 2012 when Molina was a successful bidder. Based on experience, there is an unquestionable reasonable basis for the Human Services Department to enlist the services of Mercer government services as a consultant in this RFP. This was an enormous procurement involving complex programmatic and factual issues. The results of the contract affect hundreds of thousands of individuals in all counties in

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22 The decision to utilize three instead of four or five providers was not outcome determinative for Molina. Molina placed 6th out of eight bidders. Molina had no right to expect that it would be awarded a contract and, as an unsuccessful offeror, does not now have any input into the decision about how many contractors the state chooses to utilize.
New Mexico. The purchase of Medicaid Managed Care contracts requires considerable, specialized expertise. It was prudent for HSD to seek assistance for a procurement of this scale and scope, arguably the largest procurement in state government. Contracting with Mercer was not improper. Mercer is a facilitator for the committee and did not serve an improper role in this process.

Molina complains that Mercer’s involvement biased the results and tainted the procurement process. There are no credible claims of bias, secrecy, or conflicts of interest in the outcome of the RFP evaluation, much less evidence of any such unfairness in the process. All of the protestors were aware that HSD contracted with Mercer to provide identical consulting and actuarial services for both the Centennial Care and Centennial 2.0 procurement (Exhibit #2 Affidavit of Nancy Smith Leslie, ¶ 12). Notably, Molina was a successful offeror in the Centennial Care procurement in 2012. Molina knew of Mercer’s involvement with this procurement and raised no objection to the relationship and role it would play in this procurement. Ultimately all decisions regarding the RFP were made by HSD, not Mercer. It was HSD, and not Mercer, that signed the awards to the winning MCOs and it is HSD that administers the agreements signed with each successful offeror.

For the reasons argued above, Molina’s assertions and allegations are found to be without merit and should be rejected. HSD selected the three highest scoring proposals. HSD’s action was not arbitrary and capricious.

“J. A Significant Financial Conflict of Interest Between Mercer And Western Sky Has Tainted The Procurement to Such An Extent That Re-Solicitation Is Required.”

MOLINA ARGUMENT

Molina asserts that, “Mercer has a substantial contractual relationship with Envolve; based on information and belief, (emphasis added) Mercer and Centene, through Envolve, have a billion or multi-billion dollar contractual business relationship.” (Emphasis added) (Molina’s Initial Protest, pp. 22-23.)

Molina alleges that “Mercer has a direct interest in the success of Envolve, and because Envolve is an integral part of Western Sky’s proposal, Mercer possibly (emphasis added) stands to gain financially from Western Sky’s selection as an MCO in New Mexico . . . .” (Molina’s Initial Protest, p. 23 (footnote omitted).) Molina goes on to state, “…there is something inherently wrong when a company with a direct financial interest in the outcome of a procurement process is so interwoven in the process that it is, in effect, the procuring agency.” (Molina’s Initial Protest, p. 23.) “Not surprisingly, the only bidder in which Mercer has a financial connection was one of the three MCOs awarded a Contract and the only new MCO selected by HSD.” (Molina’s Initial Protest, p. 23.23) Molina cites to, what it believes to be “best evidence” of this influence, Mercer’s

23 During HSD’s investigation into this allegation, HSD learned that Molina Healthcare, Inc. a Delaware Corporation and parent company of Molina Healthcare of New Mexico, Inc., has had since 2016 a contractual relationship with Mercer professionals located in California and elsewhere. Molina fails to acknowledge its own financial relationship with Mercer or make any attempt to distinguish why its own analysis would not apply here.
December 20, 2017 memorandum to Dan Clavio, HSD’s Procurement Manager. (Molina’s Initial Protest, p. 23)

DISCUSSION ARGUMENT (J)

Molina’s argument with respect to Mercer is predicated upon two underlying premises: 1) that Mercer has a “billion or multi-billion dollar contractual business relationship” with Enolve, a specialty health services company, which is a subsidiary of Centene and also the parent company of Western Sky, a successful offeror here; and 2) that Mercer had such control of the procurement process that it was, in effect, “the procuring agency.” (P. 23). From those underlying premises flows the contention that Mercer directed the procurement in such a way as to insure that Western Sky would be a successful offeror to Mercer’s own pecuniary advantage. Neither of the premises is supported by credible evidence, however.

Molina’s allegations about Mercer’s perceived level of control of the procurement have been addressed in detail (See in particular Discussion (G, F, & I). Mercer’s role was facilitative. Mercer’s Government Human Services Consulting Group (GHSC) has a long-standing consulting relationship with HSD. In that capacity, it provided the same facilitation services for the procurement of Centennial Care in 2013 that it has done here. Decisions and recommendations were made by the evaluation committee and there is no evidence that its deliberations were directed or otherwise influenced by Mercer. There are no credible claims of bias, secrecy, or conflicts of interest in the outcome of the RFP evaluation, much less evidence of any such unfairness in the process.

Molina’s concerns about the financial relationship between Mercer and Enolve are also unfounded. There is no evidence of a “billion or multi-billion dollar business relationship” between Mercer and Enolve. Mercer’s Health and Benefits Consulting Practice, which is separate from GHSC, has a pre-screening contract with Enolve for the purpose of benefit plan design for its corporate customers that involves no compensation for either Mercer or Enolve. (Exhibit #22 David Dross affidavit ¶¶ 6, 7) The members of Mercer’s GHSC group that assisted with the procurement were unaware of the contract between Mercer and Enolve prior to Molina filing litigation against HSD subsequent to the award of the contracts. (Exhibit #3, Jared Nason affidavit, and Exhibit #23, letter to Collins). Molina’s allegations are based on conjecture and inference. No actual evidence was provided to support this very serious allegation; it is all “based on [Molina’s] information and belief.” (Molina’s Initial Protest, pp. 22-23.) Mercer has no interest, direct or indirect, in Centene’s operations. (See Exhibit #2 Affidavit of Nancy Smith-Leslie, ¶¶ 36-38; Exhibit #24, Affidavit of Carmen Fontanez, ¶ 7-8; and Exhibit #23, letter from Mercer to Collins).

Western Sky is a wholly-owned subsidiary of Centene Corporation. (Exhibit #24, Affidavit of Carmen Fontanez, Exhibit #25, Affidavit of Brent Layton, ¶¶ 13 and 18.) Centene has another separately held subsidiary, Enolve. (Id.). Enolve specializes in managed Medicaid business and is the pharmacy benefit manager (PBM) serving the largest managed Medicaid population. Enolve’s scale and scope brings necessary tools and services to manage drug trends while providing the most appropriate and affordable access to care. (Exhibit 24, Affidavit of Carmen Fontanez, ¶ 4.) Western Sky discloses and references Enolve as a subcontractor in its proposal to HSD. (Exhibit #25, Affidavit of Brent Layton, ¶ 19.)
In October 2016, Envolve and Mercer Health & Benefits, not Mercer Government Human Services Consulting, entered into is a single contract referred to as a Master Service Provider Agreement (“MSPA”). The MSPA provides no financial benefit to Mercer Health & Benefits as it is a zero dollar contract. (Exhibit #24, Affidavit of Carmen Fontanez, ¶ 5.) Under the terms of the MSPA, Mercer Health & Benefits has the option to refer plan sponsors to Envolve. (Id.). The MSPA does not contain any monetary remuneration between the parties for services or property. (Id. at ¶ 6). Mercer does not derive any financial benefit from the success of Envolve and will not benefit from any revenue Envolve obtains from Western Sky’s operations in New Mexico. Id. Mercer will not benefit from any revenue and profit Envolve or Western Sky obtains from operations in New Mexico or through other plan sponsors that would contract with Envolve in the future. (Exhibit #24, Affidavit of Carmen Fontanez, ¶¶ 8-9; and Exhibit #23, letter from Mercer to Collins).

None of the individuals from Mercer Government Human Services Consulting who assisted HSD with the 2017 RFP had any knowledge of a relationship between any Mercer business and Centene, Envolve, or Western Sky, prior to the award of Centennial Care 2.0. (Exhibit 3, Affidavit of Jared Nason and Exhibit 23, letter from Mercer to Collins). Even if Mercer Government Human Services Consulting had been aware that Mercer Health & Benefits had entered into a MSPA with Envolve, Mercer had no decision making authority in the RFP evaluation and scoring process. HSD subject matter experts, not Mercer, scored each of the proposals following weeks of consideration. (See Discussion (F, G & I)). The extent of Mercer’s role in the scoring process was in compiling scores for the cost offers, which is a transparent and largely computational process. (Exhibit #2, Affidavit of Nancy Smith-Leslie, ¶¶ 12, 24-25; and Exhibit #23, letter from Mercer to Collins).

Molina did not present any credible evidence demonstrating a conflict of interest existed regarding Mercer’s role in the procurement, that there was any bias or unlawful activity related to the procurement, or that HSD proceeded in anything but good faith by evaluating each of the proposals related to the Centennial 2.0 procurement.

K. The prices proposed by Western Sky are not sustainable and, if Centene's past practices hold true, will result in Western Sky pressuring the state for additional funds or leaving the state.

MOLINA ARGUMENT

Molina alleges that “if the prices or rates offered by Western Sky/Centene in New Mexico (and by other bidders that bid the low end of the price range or the bottom of price range) were not actuarially sound…These unsound rates will result in either Western Sky seeking additional funds from the state or Western Sky abandoning the New Mexico market.” (Molina’s Initial Protest, p. 25.) Molina does not allege that Western Sky did not follow the requirements for the rate range for the cost proposal section of the RFP; Molina argues that a different rate range should have been used.

Molina also alleges that Western Sky failed to make all necessary disclosures regarding litigation and sanctions as required in the RFP. Molina alleges that they “cannot confirm whether
Western Sky reported the issues in the compliance history as part of its response to the RFP because that information has been redacted by HSD.” (Molina Protest, Page 26) “These issues are substantial enough to warrant consideration for suspension or debarment. See NMSA 1978, Section 13-1-178.”… (Id.). Molina characterizes these decisions as “not in the best interests of HSD, fraudulent and in bad faith, arbitrary and capricious, in violation of law, without substantial evidence and outside the scope of HSD’s authority.” (Molina Protest, Page 26)

**DISCUSSION ARGUMENT K**

The arguments regarding scoring and price are addressed in detail in Discussion Sections (A-I). The Centennial 2.0 RFP did not require offerors to propose price offers they deemed actuarially sound. (Exhibit #2, Affidavit of Nancy Smith Leslie, ¶19). The RFP requested only that offerors propose rates within the provided minimum and maximum range. (Id ¶¶19-22, RFP 7.3.1). If MCOs had questions or concerns regarding the draft rate range provided by HSD, they had an opportunity to submit a formal question through the procurement question and answer process and verbally ask questions at the offerors’ conference. (Id at ¶6; RFP 7.3). Questions or comments regarding specific assumptions/adjustments used to develop the draft rate range and questions or comments regarding the rate development and cost proposal evaluation process should have been submitted and the offeror could have objected to the process if HSD did not fully address the questions or concerns. (Id; RFP 2.2.3-5.) No questions were submitted and no concerns were raised during the development and valuation process. Molina’s recent belief that a different scoring system should be used does not create a “violation of law.” NMSA 1978 § 13-1-182.

Molina takes great liberty to demand another offeror be considered for suspension or disbarment, especially given it cannot “confirm” the facts of their allegation. Suspicion and innuendo are not sufficient grounds to demand the relief requested by Molina. Molina does not identify which documents it alleges were “redacted by HSD.” HSD does not have any record of redacting compliance history documents. Regardless, procurement protests are also not the proper venue to challenge IPRA disclosures. (See NMSA § 14-2-12).

Section 3.4.3.3, Section 6.1, Question 5, of the RFP requires all offerors to: “Provide a statement of whether there is any pending or recent (within the past five (5) years) litigation against your organization, Directed Corrective Action Plans, or sanctions levied.” Kentucky Spirit Health Plan, Inc. v. Commonwealth of Kentucky, Case# 12-CI-01373 (Franklin County Court; filed Oct. 22, 2012) (“Kentucky Spirit”), was disclosed by Western Sky in its proposal to HSD. Harvey v. Centene Corp., et al., No. 18-cv-00012 (“Harvey”) was not disclosed in its proposal because the complaint was not filed until January 11, 2018, nearly ten weeks after HSD’s November 3, 2017, deadline for Western Sky and other offerors to submit proposals and supporting information. (Exhibit #25, Affidavit of Brent Layton, ¶¶ 39-45) Finally, with regard to sanctions, the State of Washington imposed sanctions in December 2017, after the HSD’s November 3, 2017, deadline. (Exhibit #25, Affidavit of Brent Layton, ¶¶ 39-45).

The relationship between Mercer and HSD, Mercer’s role in the procurement, and the relationship between Mercer and Western Sky is discussed in detail throughout this document and does not need to be readdressed here. The evidence does not support Molina’s speculative arguments that Mercer intentionally attempted to harm to Molina or that it intentionally tried to benefit Western Sky. There is substantial evidence to support the decisions of HSD. Speculative
accusations do not demonstrate violation of law. The fact that Molina disagrees with HSDs determinations is not sufficient reason to overturn that decision or determine it was arbitrary.

Molina provides no evidence to support the very serious allegation of fraud by Western Sky. HSD’s actions were not arbitrary and capricious and were not in violation of law. There is substantial evidence to support HSD’s decisions which are in the scope of HSD’s authority.

L. HSD's decision is not in the public's best interest.

MOLINA ARGUMENT

Molina alleges, “HSD intends to eliminate two incumbent MCOs… HSD proposes to introduce a new MCO… New Mexicans will be forced to seek a new MCO and health plan…[and that Medicaid recipients will be] forced to scramble for care, care which is currently and professionally provided by Molina.” (Molina initial protest Page 28). “HSD does not seem to recognize the disruption its award will create. HSD has not recognized or addressed Molina's stability, economy of scale, or status as the largest provider of managed Medicaid healthcare services.” (Molina initial protest Page 29).

Molina argues that “HSD’s decision is not in the best interest of the citizens of New Mexico, and HSDs conclusion to the contrary is arbitrary and capricious.” (Molina initial protest P. 28).

RESPONSE ARGUMENT (L)

Company location, history in NM, and the financial interests of a specific offeror were not evaluation factors in the RFP. The goal of the RFP is not to guarantee a specific company’s profit or well-being. HSD determined that implementing Centennial Care 2.0 at this time was in the best interests of the State and the hundreds of thousands of New Mexico residents who are eligible for Medicaid benefits. The damage Molina alleges to Medicaid beneficiaries is based in speculation and conjecture. HSD disagrees that Molina is too big to not be automatically awarded a contract.

HSD was only required to award contracts to bidders "whose proposals and scores are most advantageous to HSD.” (RFP Section 4.1). The Procurement Code specifies that its goal is to award contract(s) “to the responsible offeror or offerors whose proposal is most advantageous to the state agency . . .,” (See NMSA 1978, § 13-1-117). HSD selected offerors that demonstrated understanding and experience in meeting the goals of the RFP on the basis of the content of their responses to the specialized questions in the RFP. Eight companies submitted proposals, and the State selected the top three. Molina’s proposal scored sixth.

As previously stated, Molina’s assertion of harm relies on the faulty premise that they were entitled to, reasonably expected, or were otherwise guaranteed continuing contracts with the state. While it is certainly appropriate to consider the impact that transitions will have on the Medicaid population, and to take appropriate steps to minimize disruptive transitions, such transitions occur when new MCOs enter the market and old ones leave. HSD has taken appropriate steps to manage such a transition as was done successfully in 2013.
The state has entered into valid and enforceable contracts with the successful offerors. These new contracts are in effect and the parties are implementing their obligations. HSD’s responsibility is to ensure the delivery of services and supports to eligible beneficiaries. The RFP is one of the processes by which HSD conducts that duty.

This procurement used a multifaceted strategy focused on the managed care company’s technical ability to deliver covered services to members, with a wide range of health care needs, through goals set by the state, in a cost effective and efficient manner. HSD conducted a competitive procurement process that aligns with its managed care program goals of improving care integration, driving value-based payments, and streamlining administrative processes. HSD chose the providers whose proposals and scores were most advantageous to HSD. HSD’s decisions were in the public’s best interest.

Molina voluntarily submitted a proposal in response to RFP #18-630-8000-0001, and submitted a “Letter of Transmittal Form” “accept[ing] the Conditions Governing the Procurement.” Molina had no right to expect that it would be awarded a contract. It is only after Molina became an unsuccessful offeror that it unfairly maligns the RFP process and HSD’s decisions so that they can allege their status, as a losing offeror, is “not in the public’s best interest.” Molina wants HSD to halt its process and its efforts to implement contracts with the selected MCOs. If granted, the relief sought will cause severe disruption to Medicaid services to this particularly vulnerable population. There is substantial evidence to support the decisions of HSD. The decision was not arbitrary and capricious.

M. **HSD improperly considered the same reference source as two separate sources when evaluating Presbyterian's bid.**

**MOLINA ARGUMENT**

Molina alleges that reference-scoring sheets indicate that HSD allowed Presbyterian to use the same reference twice. And, “that this issue would have likely been immediately recognized if HSD had not used a third party contractor to assess the proposal …Mercer was apparently unaware that there is only one public school district in Albuquerque.” (Molina Protest Page 29).

**DISCUSSION ARGUMENT (M)**

Mercer’s role in the procurement process has been set out in detail through this discussion. As previously stated, the evidence does not support the allegations.

Molina incorrectly claims that HSD allowed Presbyterian to use the same reference twice. The references are in fact from two separate and distinct entities, the City of Albuquerque and Albuquerque Public Schools. There was a typographical error on the labeling of a reference-scoring sheet, which misrepresented it as being the same reference. A review of the actual reference reveals the simple labeling error. HSD understood from its own review of the actual references that they were from two separate entities. In addition, the scores for each reference were not the same.
N. If HSD declines to award a contract to Molina cancellation of the three-awarded contracts and re-solicitations of bid is the appropriate remedy.

MOLINA ARGUMENT (N)

Molina alleges that, “The procurement process was fatally flawed and the interests of the public and HSD require a fair and impartial procurement ....” HSD should “remedy its errors by starting over”...“Alternatively, an award to Molina is in the best interest of the state and [HSD should] award an MCO contract to Molina.” (Molina protest page 29).

DISCUSSION OF ARGUMENT (N)

Molina has failed to provide sufficient justification to determine that it should be awarded a contract. Molina finished sixth out of eight offerors that submitted responses to the RFP. Each of Molina’s arguments has been addressed. The evidence does not support the contention that Mercer had a conflict. Since there was no conflict, the allegations that Molina was treated unfairly as a result of that conflict also fail.

The New Mexico Procurement Code and regulations promulgated thereunder set forth the rules regarding competitive bidding, protests and protest resolution. Pursuant to NMAC 1.4.1.88 (B), the chief procurement officer or his designee must make a “written determination that a solicitation or award of a contract is in violation of the law and that the business awarded the contract has not acted fraudulently or in bad faith.” NMAC 1.4.1.88 (B). Under this section:

1. the contract may be ratified, affirmed or revised to comply with law, provided that a written determination is made that doing so is in the best interest of the state; or

2. the contract may be terminated, and the business awarded the contract shall be compensated for the actual expenses reasonably incurred under the contract plus a reasonable profit to termination.

The regulation further provides that, “If, after award, the state purchasing agent or central purchasing office [here, HSD’s chief procurement officer] makes a written determination that a solicitation or award of a contract is in violation of law and that the business awarded the contract has acted fraudulently or in bad faith, the contract shall be canceled.” NMAC 1.4.1.88 (B) (2).

The contracts between HSD and the winning MCOs are valid and effective. Pursuant to NMAC 1.4.1.88 (B), the chief procurement officer or his designee must make a “written determination that a solicitation or award of a contract is in violation of the law and that the business awarded the contract has not acted fraudulently or in bad faith.” NMAC 1.4.1.88 (B). There is no reason for such a finding to be made in this case.

HSD did conduct a fair and impartial procurement, all evaluation factors were disclosed, and no person or entity with an [improper] financial stake in the outcome participated in the procurement. The state has entered into binding contracts with the winning MCOs. These new contracts are in effect and the parties are implementing their responsibilities as this protest unfolds.
There is no evidence to support forcing the state to contract with Molina or for it to otherwise halt the contract implementation process. There are no findings or evidence to support the allegation that the solicitation or award of a contract is in violation of the law or that any business awarded the contract has acted fraudulently or in bad faith.” NMAC 1.4.1.88 (B). The evidence does not support the contention that “an award to Molina is in the best interest of the state.” HSD should continue implementing the contracts it negotiated and executed.

SUPPLEMENTAL PROTEST

On February 16, 2018, Molina filed a Supplemental Protest (“SP”), supplementing its original bid protest, which was filed on February 5, and also including “additional arguments based on our review of documents produced by HSD.” HSD awarded contracts for Centennial Care 2.0 on January 19, 2018. Under the protest rules contained in Section 2.2.15 of the RFP, protests were due within fifteen (15) days of Contract award, which fell on Monday, February 5, 2018. Protests were required to state the grounds for protest. Protestors were afforded an opportunity to supplement their protests in order to provide additional support for their original arguments, but all issues under protest were required to be raised by February 5. To the extent that Molina’s Supplemental Protest raises additional issues not contained in its original protest, they are not considered.

MOLINA’S ARGUMENT REGARDING AN ADDITIONAL CONFLICT OF INTEREST

In its supplement, Molina raises an additional conflict of interest argument regarding Mercer. In an October 19, 2017 email between Procurement Manager Daniel Clavio, Chief Procurement Officer Gary Chavez and Assistant General Counsel Constance Tatham, Clavio stated that Mercer disclosed that it had been approached by the parent company of one of the Offerors about a contract in another area, and Clavio was seeking input from the others as to whether such a relationship would create a conflict of interest.24

In that email Mr. Clavio pointed out that Mercer was approached by the “parent company of an offeror” 25 regarding some work in the parity area. Molina alleges that the contact described in Mr. Clavio's email was improper because it violated the "communication blackout" in place at that time.

HSD DISCUSSION OF MOLINA’S SUPPLEMENT

Healthcare Services Corporation ("HCSC") is the entity that had the communication with Mercer that is referred to in Mr. Clavio's email. (See Exhibit #2, Affidavit of Nancy Smith Leslie, ¶38.) This phone call did not violate the "communication blackout" clause of the RFP. This communication blackout is limited in scope to matters pertaining to the procurement and states: "Offerors may contact only the procurement manager [Daniel Clavio] regarding this procurement. Other state employees, consultants, and agents do not have the authority to

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24 The e-mail in question was disclosed inadvertently, but is subject to attorney-client privilege. Upon request from HSD, Molina refused to return or destroy the email. HSD maintains its position, but will address Molina’s argument.
25 BCBSNM is an operating division of Healthcare Services Corporation ("HCSC"). There is not a parent subsidiary relationship as Mr. Clavio incorrectly indicated in his email of October 16, 2017.
respond on behalf of HSD... an offer that contacts another state employee or agent in violation of this requirement will be excluded from further participation of procurement." (See RFP at p. 11.)

“In September 2017, HCSC was looking for a contractor to assist it in conducting a review and assessment that could further support compliance with mental health parity requirements for HCSC's commercial line of business. “ (Exhibit #26, Affidavit of Peter Fischer ¶3). Mr. Fischer knew that Mercer had some involvement with this type of review, so he made a brief, preliminary contact with Jonathan Meyers of Mercer and had an approximately 20-minute phone call with Mr. Meyers on October 3, 2017. (Id. at ¶4-5). During that call Mr. Meyers mentioned that Mercer was involved in another project in New Mexico and that a firewall would have to be put in place if this parity review contract were pursued. (Id. at ¶5). Within a short time after that October 3 call, HCSC decided to hire another contractor. Mr. Fischer had no further contact with Mercer after the brief phone call on October 3. (Id. at ¶6).

Mr. Fischer's communication with Mr. Meyers of Mercer was limited and unrelated to the procurement. There is no evidence that Mr. Fischer discussed Medicaid business, the RFP, or Blue Cross Blue Shield New Mexico's involvement with the RFP. The blackout clause prohibits communications about matters "regarding this procurement." Since, as Mr. Fischer's affidavit demonstrates, the limited communication between HCSC and Mercer did not concern the RFP or the procurement, there was no violation of the "communication blackout" and there was no conflict of interest.

The current MCOs have frequent contacts with HSD about matters relating to the current Centennial Care Program. The plain and unambiguous language of the blackout clause does not prohibit and cannot be interpreted as prohibiting all non-RFP related communications between an offer and HSD. It would not be reasonable to interpret the blackout clause as prohibiting all non-RFP related communications between an offer and Mercer. The fact of an isolated preliminary contact between HCSC and Mercer, that did not result in any present or future contractual arrangement, is insufficient to constitute a conflict, or appearance of conflict, sufficient to require the rebidding of the procurement. Further, a contact between Mercer and an Offeror's parent company that was wholly unrelated to the procurement, does not qualify as a violation of the communications blackout.

**MOLINA ARGUMENT REGARDING MERCER UNDUE INFLUENCE, ARBITRARY AND CAPRICIOUS SCORING AND NOT CONDUCTING ORAL ARGUMENTS.**

Molina also revisits it argument that Mercer had undue influence over the decisions of the evaluation committee, which it states is a problem because of Mercer’s alleged pecuniary interest in assuring that Western Sky was a successful offeror and in limiting the number of contracts. Molina also raises the issue of what it describes as arbitrary and capricious scoring discrepancies between it and the other offerors.

**HSD DISCUSSION**

As explained in Discussion Sections F, G, I and J. above, Mercer did not have a pecuniary interest in the outcome of the procurement, and decisions were ultimately made by HSD staff. There is no compelling evidence of a lack of independent judgment by HSD. The alleged arbitrary
and capricious scoring discrepancies between Molina and the other offerors were also addressed above. (Discussion Section A-H). Molina’s arguments that it was unfairly penalized for improperly referring to exhibits in its responses where other offerors were not and believes it received an unfairly low score, compared to other offerors are not supported. The arguments are speculative, and are subjective disagreements with HSD’s evaluation committee. Molina fails to consider that scores awarded to each offer’s answers differed for legitimate reasons.

Molina attempts to buttress its argument regarding Mercer’s alleged undue influence by asserting that HSD had initially intended to hold oral presentations, until its “adoption, whole-cloth and without its own analysis, of Mercer’s recommendation…” (SP, p. 5) In support, it cites an October 30, 2017 email between Daniel Clavio and Nancy Smith-Leslie discussing questions to be used potential oral presentations. Molina’s argument ignores the fact that the exchange occurred before the offerors’ proposals were received and evaluated. It was only subsequent to the evaluation process that HSD determined that it was satisfied that it had adequate information to award the contracts without the need for oral presentations. Further, the affidavits of the members of the evaluation committee establish that the decision to limit the number of contracts to three MCOs was the consensus of the committee and was arrived at independently after extensive discussion, without direction from Mercer.

MOLINA ARGUMENT REGARDING REQUEST FOR STAY

Molina’s claims that HSD knew it was required to halt the procurement process and that it incorrectly concluded that a summary statement of “best interest” was sufficient are erroneous. Molina’s incorrectly asserts that “[h]aving ‘anticipated’ the protests, it was arbitrary and capricious for HSD to proceed with the procurement instead of staying it as mandated by the Procurement Code.” (SP, p. 4)

HSD DISCUSSION

The Procurement Code and its enabling regulations only address the issue of a stay where a protest has actually been filed, not where one is “anticipated.” HSD had no legal obligation to stay the procurement in anticipation of potential protests. Further, the exhibits appended to the protest are only indicative of internal discussion between HSD staff about how protests were dealt with in the 2013 Centennial Care procurement, and, tangentially, the legal requirements regarding issuance of a stay in the event of a protest. The March 15, 2018 memo issued by Chief Procurement Officer Gary Chavez makes specific findings about the need to move forward with the procurement. (Exhibit #7, memo from Gary Chavez). Moreover, the memo reveals that the correct regulatory standard regarding a stay is not NMSA 1978 § 13-1-173, as asserted by Molina, which applies where an award has not yet been made. Rather, it is NMAC § 1.4.1.83(B), which applies where, as here, contracts have already been awarded.

Under NMAC § 1.4.1.83(B), a procurement is not stayed after contract award unless there is a showing of exceptional circumstances, which is not the case here. The record
establishes that, once protests were filed, HSD applied the correct legal standard to the issue of whether a stay was required and, in its discretion, determined that it was not required and that there were no exceptional circumstances justifying a stay and that the substantial interests of the state required that the procurement move forward.

NEW ISSUES RAISED IN THE SUPPLEMENTAL PROTEST

In its Supplemental Protest, Molina raises a number of issues that were not raised in its initial protest on February 5, 2018. Among these are:

“HSD believed, wrongly, that all it was required to do was summarily state that the procurement was in the state’s best interest.” (SP, p. 4)

“HSD deviated from its standard practice for obtaining signatures on contracts.” (SP, p. 5)

“Other emails demonstrate a lack of clarity about the timing of the award…These emails again demonstrate HSD’s “rush to finish attitude,” which was arbitrary and capricious. (SP, p. 6)

“The documents also demonstrate the lack of time devoted to the evaluation of the Responses. (SP, p. 6)

“(W)e note that Western Sky relied on affiliated entities as references for its “proposed Major Subcontractor,” the proposed Subcontractor being Envolve…The RFP was faulty in not requiring neutral, unaffiliated references for contractors.”

As noted, each of these matters is raised for the first time in the Supplemental Protest. As such, they are untimely under the protest rules established in Section 2.2.15 of the RFP, to which Molina agreed when it signed the Letter of Transmittal, pursuant to Section 2.3.1. As such, these arguments are waived.

It is noted, however, that in each instance, the arguments are based upon Molina’s speculation from review of internal communications between HSD staff about the procurement that were provided in response to IPRA requests. These communications reveal a careful and deliberative process where questions were asked, different viewpoints were considered, and ultimately a decision was made. The communications reveal, rather than an arbitrary and capricious process, one that was thoughtful and that involved many participants.

Other concerns raised in the communications about the process for internal routing of the contracts, the timing of issuance, the extra steps necessary to complete an award to a non-legacy Offeror and the amount of time available for evaluation again reflect internal discussions between participants in the process, normal in any major procurement process. They are not, as Molina contends, evidence of unpreparedness or a lack of clarity, but are indicative of the day to day communications that occur between collaborators in a contract process who each play separate roles in a comprehensive project.

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In summary, the arguments raised in Molina’s Supplementary Protest are not meritorious, are, in large part, untimely, and should be rejected.

RECOMMENDED CONCLUSION

The request for stay should be denied. Under NMAC § 1.4.1.83(B), a procurement is not stayed after contract award unless there is a showing of exceptional circumstances, which is not the case here.

HSD's disclosure of evaluation criteria in the RFP was consistent with law and its decision to award contracts to the successful offerors was not arbitrary or capricious and is supported by the record with substantial evidence. Moreover, to the extent that Molina was aware of the scoring criteria in October 2017, its arguments are untimely under the rules of the procurement and, therefore, are waived.

The New Mexico Human Services Department's ("HSD" or "Agency") decision to award contracts to Blue Cross/Blue Shield of New Mexico ("BCBS"), Western Sky Community Care, Incorporated ("Western Sky") and Presbyterian Health Plan ("PHP") . . . "successful offers" was appropriate.

HSD's procurement of MCO services for Centennial Care 2.0 via the RFP is a matter of great importance for the State of New Mexico (the "State"), HSD and the citizens of the State, especially those who will receive Medicaid coverage under Centennial Care 2.0.

HSD's evaluations of all proposals submitted under the RFP conformed with the RFP specifications and complied with all applicable law and were therefore not arbitrary or capricious.

The scoring procedures applied by HSD in evaluating each offeror's cost proposal shows that they were reasonable and not arbitrary or capricious.

Substantial evidence exists that HSD conducted this procurement with deliberate and extensive attention to detail, significant planning and foresight, and incorporating best practices and lessons learned in the procurement of Centennial Care 2.0's predecessor, Centennial Care, other national Medicaid procurement practices, and fully in accord with applicable law and regulations. Therefore, no violation of law occurred.

No conflict exists that tainted the procurement. The review of evidence clearly demonstrated that concerns about Mercer are without merit and are not grounded in fact.

HSDs decisions were in the public interest.

The following contracts were properly awarded and are enforceable:

Blue Cross/Blue Shield: PSC18-630-8000-0033 CC2.0
Presbyterian Health Plan: PSC18-630-8000-0034 CC2.0
Western Sky Community Care Inc.: PSC18-630-8000-0035 CC2.0
The protest should be denied and the contracts awarded to the successful offerors should be affirmed as required by §1.4.1.84(c)(1) and §1.4.1.88(b)(1)(a) and NMAC.

Respectfully Submitted:
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