February 23, 2018

Via Email and Hand Delivery

Brent Earnest  
Cabinet Secretary  
New Mexico Human Services Department  
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Re: Supplemental Protest of AmeriHealth Caritas New Mexico, Inc.  
Regarding Award of Contract for RFP # 18-630-8000-0001

Dear Cabinet Secretary Earnest:

AmeriHealth Caritas New Mexico, Inc. ("AmeriHealth Caritas"), timely submits its supplemental protest to the award for RFP # 18-630-8000-0001 (the "RFP") for Managed Care Organization Contractors for Centennial Care 2.0.

AmeriHealth Caritas submitted its initial protest to the award for the RFP by the due date, as indicated by HSD, on February 5, 2018. Pursuant to the Procurement Code regulations, 1.4.1.82B(4) NMAC, a protestor’s supporting exhibits which are not available within the protest filing time, 15 calendar days after knowledge of the facts or occurrences giving rise to the protest, are to be indicated in the protest along with the expected availability date. AmeriHealth Caritas indicated in its protest that as certain supporting material for the protest had been requested through an Inspection of Public Records request (an "IPRA request") and was not
available prior to the protest filing time, pursuant to the regulation, it would provide that material within fifteen (15) days following the receipt of the information requested from HSD. On February 8, 2018 and February 19, 2018, HSD responded to AmeriHealth Caritas’ February 2, 2018 IPRA request asking for documents related to the RFP and the procurement process by sending secure files containing thousands of documents to AmeriHealth Caritas. Thus fifteen (15) days from the initial disclosure of records from HSD on February 8, 2018, pursuant to 1.4.1.93 NMAC, which provides that in computing time under the Procurement Code regulations, the day of the event from which the designated period of time begins to run shall not be included, falls on February 23, 2018.

In *James Hamilton Const. Co. v. State ex rel. New Mexico Highway*, 2003 -NMCA- 067 ¶ 11, the New Mexico Court of Appeals in computing the time for a protest, states, “It is clear from both the statute and the regulation that the triggering event is the knowledge of facts or occurrences giving rise to the protest during the entire procurement process, regardless of whether the protestant is protesting the solicitation, bid, or award processes.” (emphasis added).

Under N. M. S. A. 1978, § 13-1-74 “Procurement” means:

A. purchasing, renting, leasing, lease purchasing or otherwise acquiring items of tangible personal property, services or construction; and
B. all procurement functions, including but not limited to preparation of specifications, solicitation of sources, qualification or disqualification of sources, preparation and award of contract and contract administration.

As such, with respect to the RFP, the procurement process is still underway and in this instance, the triggering event to supplement AmeriHealth Caritas’ protest is HSD’s February 8, 2018 and February 19, 2018 Disclosure of records providing knowledge of further facts or occurrences giving rise to the protest.

AmeriHealth Caritas supplements its protest based upon review of the documents disclosed thus far and notes that HSD, in its letter dated February 19, 2018 to undersigned counsel states that the Department continues to process the remaining portions of AmeriHealth Caritas’ requests and intends to fulfill the remaining portions of the IPRA requests on or before February 23, 2018.

Supplemental grounds for AmeriHealth Caritas’ protest are as follows:

I. **Actual or Potential Contractor Conflict Issue**

On February 14, 2018, Julie Lovato, HSD’s Public Records Custodian, and Constance Tatham, HSD Assistant General Counsel, sent AmeriHealth Caritas’ local counsel a letter via email to

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1 The date to supplement the protest in response to the February 19, 2018 disclosure of records by HSD is March 6, 2018. If HSD provides further documentation, as it states it may do on or before February 23, 2018, AmeriHealth Caritas reserves the right to further supplement its protest and to compute time for such in accordance with 1.4.1.93 NMAC.
“Dear Mr. Kaufman,” counsel for WellCare of New Mexico, Inc. ("Wellcare"); presumably the letter contained the wrong salutation as undersigned counsel’s name is in the address block and the correct email address, with undersigned counsel’s name, is included. The letter purports to withdraw the disclosure of an email disclosed in its response to an IPRA request. The email in question was sent by Daniel Clavio, Procurement Manager of HSD and of this RFP, to Gary Chavez, Chief Procurement Officer of HSD, and Constance Tatham, entitled “Contractor Conflict Issue?” In their letter, Ms. Lovato and Ms. Tatham state that the Department does not waive the attorney-client privilege by the inadvertent disclosure of the document sent out in response to IPRA requests.

A proclamation by an attorney that a disclosure was inadvertent and does not waive the attorney-client privilege, however, is not dispositive. New Mexico courts consider the following factors in determining if inadvertent disclosure waives the privileged status of a communication: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; (5) whether the overriding interests of justice would be served by relieving a party of its error. *Hartman v. El Paso Natural Gas Co.*, 107 N.M. 679, 763 P.2d 1144 (1988) (finding waiver, stating waiver is a function of the prior disclosure, and quoting court in *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D. N.C. 1987)).

HSD delayed its response to AmeriHealth Caritas’ IPRA request of February 2, 2018, providing information in increments, exceeding the requisite deadlines (Under N.M.S.A. § 14-2-8 D, a records custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request). HSD specified twice in its letters that it was proceeding with caution, stating, “Additional time must be allotted for a thorough review of the voluminous and potentially responsive documents…” in its letter of February 8, 2018 and stating, “Additional time must be allotted for a thorough review of the voluminous and potentially responsive documents…” in its letter of February 19, 2018. Thus HSD took precautions to prevent inadvertent disclosure of the alleged attorney-client privileged document though the disclosure was still made. HSD appears to have disclosed the email about the “Contractor Conflict Issue?” to all offerors, and importantly, HSD appears to have disclosed the email to Thom Cole (or another requester) of the Santa Fe New Mexican who wrote an article citing to the email on February 14, 2018, *Providers say memo backs up concerns about bias in Medicaid contract process*. See Exhibit A. As such, the matter is now in the public domain, through no fault of AmeriHealth Caritas, and AmeriHealth Caritas may address it at least through the information disclosed in the newspaper article cited, though arguably also through HSD’s withdrawn disclosure of the email. “Privileged communications that are intentionally imparted to third parties cannot, however, again become privileged. Their intended disclosure renders the protection inapplicable, even if the attorney, on behalf of the client, makes the disclosure. *State v. Deutsch*, 103 N.M. 752, 713 P.2d 1008 (Ct. App. 1985).”
The newspaper article author recounts Mr. Clavio’s email regarding the “Contractor Conflict Issue” to state that the RFP consultant, Mercer, disclosed it had been approached about a possible business deal by the parent company of a firm seeking a Medicaid managed care contract and that Mercer would consult with the parent company on the private/commercial side, not the government/Medicaid side. Mr. Clavio asked if this distinction makes a difference and further stated that although Mercer’s contract with the parent company wouldn’t start until after the Medicaid managed care contracts were issued, “obviously the intention/potential for $$ is there right now.” The article further recounts Mr. Clavio as writing in the email that Mercer representatives “claim there are major firewalls within their organization to stop undue influence, but it makes you wonder” and that Mr. Clavio inquires if there are problems with this arrangement. Mr. Cole quotes Mr. Clavio as writing, “Can this be a spoiler for the [Medicaid] procurement, or do you feel it’s OK, that their [Mercer’s] internal integrity is fine?” he asked, “Should we put the kabosh [sic] on it, or approve it?”

In the article, the author states that a spokeswoman for HSD responded to Mercer as follows about the actual or potential conflict of interest between Mercer and an RFP offeror’s parent company, “HSD instructed them not to pursue the separate contract and they did not move forward with the consulting engagement.”

Yet other than a Department spokeswoman’s reassurance to Mr. Cole that Mercer did not pursue a contract with the parent company of one of the RFP offerors, HSD, despite providing thousands of documents to AmeriHealth Caritas in response to its IPRA requests, has not provided any documentation to support its contention that Mercer did not proceed with the verboten business relationship with an offeror’s parent company and that thus there is and was no conflict of interest during the RFP evaluation period. AmeriHealth Caritas is not able to rely upon HSD’s spokeswoman’s statements alone and seeks concrete evidence that HSD in fact instructed Mercer not to proceed with the consulting engagement and that Mercer did not proceed with the possible business deal. Additionally, AmeriHealth Caritas is entitled to receive information about the unknown offeror and its parent company and about the specifics of the communications between the parties.

Even if, as HSD states, Mercer passed on the potential business deal, it nonetheless apparently communicated with the parent company of an RFP offeror (per Daniel Clavio, Mercer was at least approached by the parent company of an offeror and per the Department spokeswoman, Mercer responded to decline the potential arrangement). The communications may have been somewhat limited or could have spanned a prolonged timeframe. In either case, the communications between Mercer and the parent company of an offeror during the procurement create, at a minimum, the appearance of impropriety and erode HSD’s credibility in contending that Mercer acted as an impartial consultant to the Department on the RFP. This level of communication between an offeror’s parent company and HSD’s agent, Mercer, also suggests a violation of the communication restriction set out in Section 1.6 of the RFP. This restriction requires that any inquiries or requests regarding the procurement must be submitted only to the Procurement Manager. Section 1.6 goes on to specify that the appropriate remedy for a violation of this restriction is exclusion from further participation in the procurement. Here, an offeror’s
parent company made an inquiry directly to Mercer, HSD’s agent in this procurement. This type
of end-run around the communication restriction should serve to disqualify the offeror.

HSD states in the RFP that although the resulting Managed Care Services Agreement is exempt
from New Mexico’s procurement code, HSD and the New Mexico Behavioral Health Purchasing
Collaborative will follow the procurement process set forth in the code. See RFP 1.1. “The
purposes of the Procurement Code are to provide for the fair and equitable treatment of all
persons involved in public procurement, to maximize the purchasing value of public funds and to
provide safeguards for maintaining a procurement system of quality and integrity.” NMSA § 13–
1–29(C). (emphasis added). The actual or potential conflict discussed herein is contrary to the
purposes explained in the Procurement Code.

II. HSD Considered Awarding Contracts to the top Four Scored Offerors and
Appears to have Declined to Contract with Four in the interest of its own Convenience Rather
than the Interest of the Public

As was its right, HSD revised the RFP, issuing two amendments after issuance. In the amended
RFP version combining A1 and A2, in Section 1.4 the RFP states as follows:

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.

While the number of MCO contractors selected and awarded through the procurement process is
in HSD’s discretion, the discretion is to be based upon the best interests of the State. See RFP
version combining A1 and A2, Section 1.4.

The Procurement Code specifies that one of the purposes of the Code is to maximize the
purchasing value of public funds. N.M.S.A. § 13-1-29(C). AmeriHealth Caritas received the
highest score obtainable for its RFP cost proposal (400 out of 400 points, tied by UnitedHealth
Care of New Mexico, Inc. and with the next closest offeror a full 63 points lower). N. M. S. A.
1978, § 13-1-108, requires that, “A contract solicited by competitive sealed bids shall be
awarded with reasonable promptness by written notice to the lowest responsible bidder.” The
Procurement Code regulations necessitate that, “An award shall be made to the responsible
offeror whose proposal is most advantageous to a state agency, taking into consideration the
evaluation factors set forth in the RFP.” 1.4.1.43 NMAC.

AmeriHealth Caritas’ consensus score of 400 for its cost proposal attests to the fact that as one of
the two lowest responsible bidders, it would be among the most advantageous offerors to the
Department. HSD, nonetheless, awarded contracts to offerors that will each cost the State
between $10 million to $20 million more per year than would AmeriHealth Caritas. This
substantial flaw is to the detriment of New Mexicans and to taxpayers at large.

Moreover, given the numerous impermissible and irregular scores awarded by the Evaluation
Committee, See Sections I and II of AmeriHealth Caritas’ February 5, 2018 protest, AmeriHealth
Caritas contends that it should have received a higher technical proposal consensus score and a
higher reference consensus score (See in specific, Section II, paragraph 7, page 9 regarding
AmeriHealth Caritas’ score of 53 by its reference 2 writer as opposed to BCBS’s score of 45 by its reference 3 writer and yet both attained a score of 85 for the references). As such, AmeriHealth Caritas should have been within the top three scored offerors, or even with the erroneous scoring of AmeriHealth Caritas as the fourth highest offeror, HSD could have and should have awarded a contract to AmeriHealth Caritas.

Within HSD’s February 19 disclosure of documents responsive to AmeriHealth Caritas’ IPRA request, HSD disclosed hand written notes of a decision maker weighing the pros and cons of awarding contracts to the top 4 offerors versus the top 3 offerors. See Exhibit B. The writer of the notes, evidently one with some authority to weigh in on the matter, notes that there is more negotiating power with four MCOs and that the fourth offeror is in first place in one of the sections as “pros” for awarding contracts to the top 4 offerors. As for the “cons,” the writer alleges that there are not enough members to spread to the two new plans if they award 4 contracts; that they will need to bring up the two new plans; it will be more administratively challenging; and, that the fourth offeror scored the lowest on the technical score.

The Department also disclosed notes by the same individual as to the pros and cons of awarding contracts to the top 3 offerors only. See Exhibit C. The writer lists as the “pros” something to the effect of administering, especially behavioral health; that there will be 2 incumbents and only 1 new plan; that it will improve economies of scale; consolidating long term care membership; and, that the top 3 were in the top in the technical proposal scoring. The “con” listed by the note taker is that an award to the top 3 will limit the negotiating power with rates and that no one plan will have the largest market share.

A reasonable interpretation of the notes finds that the decision to award contracts to the top 3 offerors rather than to the top 4 offerors was based largely upon convenience to the agency (the need to “bring up 2 new plans” and “more admin challenging”) if awards go to 4 rather than what is most advantageous to the agency and the public. Inarguably, having more negotiating power with an additional MCO is advantageous to the agency and the public. The alleged “con” of having not enough members to spread to two new plans is incorrect. HSD currently has four MCOs providing Medicaid managed care through Centennial Care. The reference to “two new plans” can only mean that these notes were prepared by someone with the knowledge that only two (2) of the incumbents were being awarded a contract; but in any event, two incumbents plus two new plans still equals four – the exact number of MCOs currently proving Medicaid managed care through Centennial Care. Further, the RFP cites to the program’s membership as over 700,000 individuals in the state; new plans were to be afforded a minimum of 10% of enrolled eligibles (See Section 4.2.4 of the Sample Contract that was included with the RFP), so even with this minimum allocation, over 500,000 enrollees would still be available for assignment to the two incumbent plans. Additionally, with Centennial Care 2.0’s new initiatives, MCOs will be charged with providing more and different services, thus having more providers is in the agency’s and the public’s best interest for adequate membership services. As for the contention that #4 has the lowest score on the technical section, as illustrated in AmeriHealth Caritas’ February 5, 2018 protest, its technical proposal was incorrectly scored through numerous, pervasive, impermissible scoring errors and irregularities that support AmeriHealth Caritas’ request for its proposal to be re-scored by an impartial evaluation committee in strict
adherence to the permissible factors. Such would result in AmeriHealth Caritas attaining a higher technical score as it deserves.

The decision to award contracts to only the three top offerors was arbitrary and capricious, not only based upon erroneous, unlawful scoring, but it also based upon the agency’s convenience rather than the public’s best interests.

III. Procurement Evaluation Guide Contains Response Considerations Not Included in the Questions.

Scoring of an RFP proposal and the subsequent award of a contract based upon such scoring is to be based upon the evaluation factors set forth in the RFP. 1.4.1.43A NMAC. HSD released an email from Jessica Osborne, principal with Mercer, containing evaluation guides for the subject matter experts completing the individual review and scoring. See Exhibit D.

The procurement evaluation guides, which appear to have been incorporated into the consensus score sheets, reveal that the response considerations developed by Mercer ask the evaluators to consider elements that are outside of the questions posed and which the offeror will be penalized for not responding to, although such scoring criteria had not been disclosed to the offerors.

For example, Question 23 in the RFP states as follows:

Describe how your organization will provide and monitor transportation services provided to Members in Rural, Frontier, and Tribal areas of the State. At a minimum, the response should include how your organization will:

a. Ensure appropriate mode of transportation for a Member;
b. Ensure that your Non-emergency Medical Transportation (NEMT) quality assurance program adequately monitors and identifies issues and addresses identified issues in a timely manner;
c. Address pick-up and delivery deficiencies identified by Members;
d. Address Member grievances/complaints regarding transportation issues; and
e. Ensure that transportation providers provide Internet and smart phone based systems for requesting and accessing transportation needs. See RFP, page 48 or Exhibit D.

Mercer’s evaluation guide for question 23, however, incorporates into the scoring as “response considerations,” 9 considerations, only the second of which consideration sensibly asks the evaluators to consider, “Does the response fully address all aspects of the question?” The other response considerations deviate from the language of the question, asking for consideration of factors that perhaps an offeror may creatively offer, but may perhaps omit in the interest of adhering to the question posed and prescribed page limits.

A telling unasked-for response consideration to question 23 is found in c, “Does the response include how the Offeror will use community resources and demonstrate an understanding of how transportation services are currently provided and utilized in New Mexico?” Question 23 asks an
offeror to describe how it will provide and monitor transportation services to members in transportation-challenged areas of the State and none of the subparagraphs ask the offeror to respond in terms of using community resources and an understanding of how transportation services are currently provided - unknowable response considerations developed by Mercer and implemented by HSD. Why would an offeror respond to a question about its plan for future transportation of members by demonstrating an understanding of current transportation services if the offeror will create its own transportation services, the offeror was not asked about the current services and the offeror does not need to understand current transportation services to respond to the question posed? Response considerations d, e, f, g and h of question 23 similarly ask the evaluators to focus on extraneous, unknown (to the offerors) factors. These response considerations reveal the impermissible grading factors used by the evaluators and the incontrovertible fact that the evaluators considered factors not included in the questions.

Consequently, Mercer’s evaluation guides and HSD’s final consensus scoring sheets result in an offeror which rambles on and provides more information than requested being awarded a contract, while an offeror which follows the directions by directly answering the question will miss out on opportunities to accrue more points.

An even more egregious departure from the bald terms of the RFP is the block of text on the procurement evaluation guide stating, “The response considerations are where you should focus. They are designed to help think about the response you are reading and assign a score.” See Exhibit D, block of text in lower right hand corner (emphasis added). Mercer instructed the evaluation team to focus on extraneous considerations rather than on the specified elements of the questions.

Not only did Mercer develop and HSD implement scoring mechanism based upon criteria not requested in the RFP and which could not be known by the offerors, but emails between HSD employees demonstrate that HSD did so knowingly. In emails from Procurement Manager Dan Clavio to Kari Armijo and Linda Gonzales dated September 15, 2017 with the subject: Confidential: Eval Scoring Sheets for Your Review, the Procurement Manager writes, regarding Mercer’s scoring sheets and the requested review of Mercer’s response considerations, “We do not want to give away too many details in the questions, but we’re looking for certain details in the responses. Details that move an “adequate response” to a “great response”. Please be sure those details get listed.” See Exhibits E and F.

In short, HSD hid the ball in violation of the lawful purposes of procurement and the means to effectuate lawful procurement. “The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.” N. M.S.A. 1978, § 13-1-105A. (emphasis added). HSD was obligated to request the details it was looking for by setting such forth in the questions. Mr. Clavio’s emails leave no doubt that HSD purposely declined to do so, leaving an offeror’s ability to glean the details sought from thin air and invalidating the scoring of the offers.
To evaluate an offer based on evaluation factors outside the RFP is a violation of law and arbitrary and capricious. *Planning & Design Solutions*, 1994-NMSC-112 ¶¶ 16-17, 24. Mercer instructed the Procurement Manager to include the evaluation guides for individual review and scoring. HSD implemented Mercer’s recommendations and thus acted *ultra vires* and in an arbitrary and capricious manner by advising the evaluators to consider and to “focus” on response considerations which are outside the parameters of the questions.

These impermissible, undisclosed evaluation factors warrant AmeriHealth Caritas’ request for relief contained in its February 5, 2018 protest.

IV. 2017 RFP Grading Methodology Contradicts the Response Considerations in the Evaluation Guide and the Consensus Score Sheet and Further Demonstrate the Scoring Irregularities

The Department’s 2017 RFP Grading Methodology, presumably developed by Mercer and adopted by HSD, reflects that scoring of questions should have been circumscribed to only a few, limited considerations. *See* Exhibit G. The considerations are:

- Are all elements of the question addressed;
- The desirability of the approach to the State; and
- The sufficiency of the detail of the response.

Yet as demonstrated by the inclusion of undisclosed evaluation factors as “response considerations” in the score sheets, it is clear that the evaluators were in fact asked to score responses based upon factors other than those listed above in the Grading Methodology sheets and the factors disclosed in the question. In other words, while an offeror’s response which addressed all elements of the question, which is highly desirable to the State and which included sufficient detail should, per the Grading Methodology sheet, obtain 100% of the points available if the evaluators adhere to the response considerations in the evaluation guides and the consensus score sheets, the verbose, “throw in everything but the kitchen sink” response which includes other, unrequested information will prevail. While an offeror responding only to the actual questions asked should, per the Grading Methodology sheet, obtain 100% of the points available, that offeror obtains a lower score for failing not to answer the question, but for failing to magically discern and address the unknown response considerations used by the evaluators.

The Procurement Code prohibits the evaluation of any factors not specified in the RFP. “The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids.” N.M.S.A. 1978, § 13-1-105A. (emphasis added).

The contradictions between the plain text of the RFP questions, the evaluation guides containing Mercer’s response considerations in scoring the responses to questions, implemented into HSD’s consensus score sheets, and the 2017 RFP Grading Methodology support AmeriHealth Caritas’
February 5, 2018 protest provisions regarding the inflated scoring of contract winners by impermissible evaluation of unsolicited exhibits and information contrary to the provisions of the RFP and to the arbitrary and capricious, inequitable, irregular, erroneous scoring of offerors’ submissions which invalidate the scoring as defective.

Wherefore, AmeriHealth Caritas reiterates its request for relief as set forth in its February 5, 2018 protest letter.

Sincerely,

Jacqueline Berg
Counsel for AmeriHealth Caritas New Mexico, Inc.

cc: Eileen M. Coggins, Esq.
General Counsel, AmeriHealth Caritas Family of Companies
Providers say memo backs up concerns about bias in Medicaid contract process

By Thom Cole | The New Mexican  Feb 14, 2018 Updated Feb 15, 2018

The state Human Services Department announced in January that Molina Healthcare of New Mexico and UnitedHealthcare of New Mexico wouldn’t receive contracts to continue to provide managed care for Medicaid recipients after this year.

But with hundreds of millions of dollars in contract fees at stake, Molina and United aren’t going quietly into the night.

The companies are lawyered up and fighting the decision by the Human Services Department, saying it violated state law and regulations that government agencies must follow in awarding contracts.

Molina and United also are alleging the department’s contracting process may have been biased in favor of Western Sky Community Care, a contract winner and subsidiary of industry giant Centene Corp. of St. Louis.

Molina and United say Mercer Health & Benefits LLC, which helped the department evaluate contract proposals, has business ties to Western Sky.

Molina has cited a 2016 published report that Mercer had partnered in a pharmacy service with Envolve Pharmacy Solutions, a sister company of Western Sky and another subsidiary of Centene.
Molina and United also have said Western Sky, in its Medicaid contract proposal, told the Human Services Department that it would use Envolve as its pharmacy benefits manager in New Mexico. The companies contend that all adds up to a potential conflict of interest on the part of Mercer as it advised the department on how to score Medicaid managed care contract proposals from Western Sky, Molina, United and other companies.

The Human Services Department, run by the administration of Gov. Susana Martinez, has countered that the contracting process was competitive and fair. But an email obtained by The New Mexican shows an official with the Human Services Department was concerned about a potential Mercer conflict of interest at least as far back as October.

The email — titled “Contractor Conflict Issue?” — was written by Daniel Clavio, procurement manager and compliance officer for the department’s Medical Assistance Division. The recipients of the email were the department’s chief contracting officer, Gary Chavez, and an assistant general counsel for the agency, Constance Tatham.

Clavio wrote that Mercer had disclosed it had been approached about a possible business deal by the parent company of a firm seeking a Medicaid managed care contract. The email doesn’t name the parent company or the subsidiary.

Clavio wrote Mercer would consult with the parent company on the “private/commercial side” and not on the “government/Medicaid side.” But, he asked in the email, “Does this really make a difference?”

He also wrote that Mercer’s contract with the parent company wouldn’t start until after the Medicaid managed care contracts were issued. “But obviously, the intention/potential for $$ is there right now,” Clavio wrote.

Clavio said Mercer had disclosed it would work with the parent company in the area related to parity of mental health and medical benefits. He said Mercer also was helping the Human Services Department in that area.

“They [Mercer representatives] claim there are major firewalls within their organization to stop undue influence, but it makes you wonder. Are there problems with this arrangement?” he asked.

Clavio also asked whether the department should make sure that no one from the Mercer parity team gets involved with the process of issuing the Medicaid managed care contracts.
"Can this be a spoiler for the [Medicaid] procurement, or do you feel it's OK, that their [Mercer's] internal integrity is fine?" he asked. "Should we put the kabosh [sic] on it, or approve it?"

Investigation sought

In a written statement, Molina said the email validates the company's concern about a conflict of interest on the part of Mercer.

"The conflict of interest must be thoroughly and impartially investigated before [the Medicaid] contracting process is allowed to proceed further," the company said in its statement.

Mercer has declined comment on the controversy over the new contracts for the Medicaid managed care organizations. The New Mexican has been unable to reach Centene representatives for comment.

A spokeswoman for the Human Services Department said in an email Wednesday that "Mercer had requested the department approve their working on a separate consulting engagement with a potential bidder" for a Medicaid contract. At time of the email, managed care companies hadn't yet submitted contract proposals.

"HSD instructed them not to pursue the separate contract and they did not move forward with the consulting engagement," the email said.

The department declined to name the company with which Mercer was considering consulting. It also didn't respond when asked what disclosures, if any, Mercer made to the agency concerning conflicts of interests or potential conflicts.

Prior to Mercer disclosing being approached about the consulting deal, there had been "a back-and-forth" between the company and the department about Mercer signing confidentiality agreements, according to Clavio's email.

"We decided that their confidentiality clause in their contract with HSD would suffice," he wrote.

Mercer's contract with the Human Services Department, which expires June 30, says the company "shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required with this Agreement."
Mercer, a global company, provides a range of services to the department, including setting per-patient rates for managed care organizations, evaluating the financial performance of the organizations and helping the agency with changes in managed care contracts. Mercer has been paid nearly $25.8 million since July 1, 2012, according to a state website.

In his email, Clavio said Mercer would run the department’s evaluation and scoring sessions for the proposals from the companies seeking managed care contracts.

He also said Mercer had provided comment on the Human Services Department’s request for proposals and that it was developing evaluation and scoring sheets for the proposals, as well as tips and pointers for proposal reviewers. Clavio added Mercer wouldn’t do any of the actual scoring.

The Human Services Department released the Clavio email in response to requests under the state Inspection of Public Records Act.

It has since said the agency considers the email to be attorney-client privileged communication, that the email was released in error and that it should be deleted by recipients.

Company protests

The Human Services Department estimates it will spend $5.7 billion this budget year on running Medicaid, the state- and federally funded health care program for low-income people.

More than 850,000 New Mexicans are enrolled in the program. About 700,000 of those are served by four managed care organizations under contract with the department: Molina, United, Blue Cross Blue Shield of New Mexico and Presbyterian Health Plan.

Since 2014, the managed care organizations have provided physical, behavioral, pharmaceutical and long-term care services to the Medicaid recipients.

All the organizations are in the final year of five-year contracts ending Dec. 31.

Last fall, the Human Services Department issued a request for proposals from managed care organizations to serve Medicaid recipients beginning in 2019.

The department announced the winners for the Medicaid contracts were Blue Cross, Presbyterian and Western Sky.
Four losers — Molina, United, WellCare of New Mexico and AmeriHealth Caritas New Mexico — have appealed the decision in protests filed with the department. The protests allege a smorgasbord of errors in the contracting process.

Molina also has filed a lawsuit in state District Court in Santa Fe, seeking to nullify the department’s contract with Western Sky and to force the department to enter into a contract with Molina.

In its lawsuit, Molina alleges Mercer and Centene, the parent company of Western Sky, have a billion- or multibillion-dollar contractual relationship through Envolve, the sister company of Western Sky.

"Mercer has a vested interest in the success of Envolve, and apparently will benefit from any revenue and profit Envolve obtains from operations in New Mexico" under Western Sky’s contract, the lawsuit says.

The lawsuit adds that if the Human Services Department knew of Mercer’s business relationship with Centene and allowed Mercer to continue to consult on the Medicaid contracting process, then the process “was conducted in a biased manner, fraudulently or in bad faith, and in violation of law.”

The department is seeking dismissal of Molina’s lawsuit, saying it’s premature because the agency hasn’t yet ruled on its protest of the contracting process. Western Sky also is seeking to intervene in the lawsuit and is making the same dismissal argument.

United says in its protest filed with the Human Services Department that the integrity and fairness of the contracting process may have been compromised by a conflict of interest or an appearance of a conflict.

“Based on information that surfaced after the announcement of the award, we understand that Mercer has a significant business alliance with Envolve that warrants further inquiry,” the protest says.

“The mere appearance of an undisclosed conflict of interest can be enough to justify overturning” a contract award, the protest adds.

Under its Medicaid managed care contract that expires at year’s end, United provides services to more than 88,000 New Mexicans. Molina serves more than 221,000.
In its lawsuit, Molina says it also provides health care services to 5,500 New Mexicans through Medicare and to 29,000 more residents who have purchased insurance through the Affordable Care Act exchange.

The department has accused Molina of attempting "to threaten and scare New Mexico's poorest and most vulnerable citizens."

A judge is scheduled to hold a hearing on the lawsuit Feb. 26.

Contact Thom Cole at 505-986-3022 or tcole@sfnmexican.com.
Top 4
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Buy up
2 new places
- hardware
- more admin
- challenging
- #4 longest
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EXHIBIT C
Hi Dan – Attached are the Draft evaluation guides for those completing the individual review and scoring. The SMEs have until 9/29 to review and provide feedback according to the project plan. Ideally we will get back one set of unified comments in one document so how you manage collecting the feedback is up to you. I would limit the number of reviewers wherever possible. These instructions may be helpful to share:

<table>
<thead>
<tr>
<th>Question</th>
<th>Response Considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Does the response fully address all aspects of the question?</td>
<td></td>
</tr>
<tr>
<td>2. Does the response take into account the specific group's and cultural setting of the client?</td>
<td></td>
</tr>
<tr>
<td>3. Does the response demonstrate understanding of the client's unique needs?</td>
<td></td>
</tr>
<tr>
<td>4. Does the response reflect an understanding of the client's cultural background?</td>
<td></td>
</tr>
<tr>
<td>5. Does the response reflect an understanding of the client's socioeconomic status?</td>
<td></td>
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<tr>
<td>6. Does the response reflect an understanding of the client's legal status?</td>
<td></td>
</tr>
<tr>
<td>7. Does the response reflect an understanding of the client's health status?</td>
<td></td>
</tr>
<tr>
<td>8. Does the response reflect an understanding of the client's language and communication skills?</td>
<td></td>
</tr>
<tr>
<td>9. Does the response reflect an understanding of the client's educational level?</td>
<td></td>
</tr>
<tr>
<td>10. Does the response reflect an understanding of the client's employment status?</td>
<td></td>
</tr>
<tr>
<td>11. Does the response reflect an understanding of the client's housing situation?</td>
<td></td>
</tr>
<tr>
<td>12. Does the response reflect an understanding of the client's family structure?</td>
<td></td>
</tr>
</tbody>
</table>

The response considerations are where you should focus. They are designed to help you think about the response you are reading and assign a score.

Jessica M. Osborne, Principal
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M: 202-296-0909
jessica.m.osborne@mercer.com
www.mercer-government.merger.com | Mercer Health & Benefits LLC
Making a difference in the health, wealth and careers of 110 million people every day

MERGER  MAKE TOMORROW, TODAY
Hi Kari – Just a reminder that this is needed pronto. Thank you.

From: Clavio, Daniel, HSD  
To: Armijo, Kari, HSD  
Subject: RE: Confidential: Eval Scoring Sheets for Your Review  
Date: Tuesday, October 03, 2017 8:09:00 AM  
Importance: High

Kari - Here are your sections of the evaluator scoring sheets (attached).

6.3 Benefits & Services (8) - Kari

These are drafts from Mercer. Our job is to review and revise as needed. To flesh them out and make them better guides for our evaluation teams.

There is a worksheet for every question/response in each section. You will note the question text in one box followed by the “Response Consideration(s)” box. The page that follows is a grid for evaluators to write their notes in.

You need to review the “Response Considerations” for each question. Mercer has numerous considerations listed, and they may be generic and fairly basic. What can you add that will beef up these considerations? What details? What NM-specific and Centennial Care-specific topics are we looking for in the responses?

We did not want to give away too many details in the questions, but we’re looking for certain details in the responses. Details that move an “adequate response” to a “great response”. Please be sure those details get listed.

You are the SME for this area. Feel free to revise the Mercer text however you choose. Please do so in Track Changes.

Call or email me with any questions. Please return your revisions to me by Friday, Sept. 29.

Reminder that this is extremely confidential and these should not be shared or forwarded to anyone.

Thank you!
Daniel Clavio  
Compliance Officer  
Medical Assistance Division     
NM Human Services Department  

Daniel.Clavio@state.nm.us  
505-827-1345  

http://www.hsd.state.nm.us/
Thanks Linda.

Daniel Clavio
Compliance Officer
Medical Assistance Division
NM Human Services Department

Daniel.Clavio@state.nm.us
505-827-1345

http://www.hsd.state.nm.us/

Dan,

I reviewed the Response Considerations and I only had a few additions. Attached are my comments.

Thanks.

Linda

HI Linda – Just a reminder that this is needed pronto. Thank you.
Linda - Here are your sections of the evaluator scoring sheets (attached).

6.6 Info Systems & Claims Mgmt. (11) - Linda

These are drafts from Mercer. Our job is to review and revise as needed. To flesh them out and make them better guides for our evaluation teams.

There is a worksheet for every question/response in each section. You will note the question text in one box followed by the “Response Consideration(s)” box. The page that follows is a grid for evaluators to write their notes in.

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Thank you!

++++++++++++++++++++++++++++++

Daniel Clavio
Compliance Officer
Medical Assistance Division
NM Human Services Department

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2017 RFP Grading Methodology

5 – The response is excellent. All elements of the question were addressed, the approach is highly desirable to the State, and the response included sufficient detail. **100% of points**

4 – The response is good. All elements of the question were addressed, and the approach is desirable to the State; however, the response was lacking detail. **80% of points**

3 – The response is acceptable. Nearly all of the elements of the question were addressed, and the approach is acceptable to the State; however, some additional detail was needed to fully evaluate the approach. **60% of points**

2 – The response is minimally acceptable. Most elements of the question were addressed; however more detail was needed to fully evaluate the approach and/or the State did not find the approach desirable. **40% of points**

1 – The response is poor. Only some elements of the question were addressed and it lacked sufficient detail to evaluate the approach and/or the State did not find the approach desirable. **20% of points**

0 – The response is unacceptable. It fails to meet the requirements or has major deficiencies OR no response was provided. **NO POINTS**