THE NEW MEXICO HUMAN SERVICES DEPARTMENT'S DISCUSSION REGARDING PROTEST OF THE REQUEST FOR PROPOSAL NO. 18-630-8000-0001 BY UNITED 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 contract 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 (MST) 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 UNITED’S PROTEST and REQUESTED REMEDY

United alleges:

1) HSD’s failure to offer UHC a Centennial Care 2.0 contract was arbitrary and capricious³ because, among other things:

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.

³ 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).
• HSD failed in its duty to follow up with Rhode Island about the missing reference for UHC, even though HSD did so for other offerors, and that reference very likely would have made UHC at least the third highest scorer;

• When Rhode Island recently learned about the missing reference, and then submitted it directly to HSD, HSD refused to review it or score it, even though doing so would not unfairly prejudice the three chosen MCOs (since UHC is not asking to displace them), HSD itself or the integrity of the RFP;

• HSD accepted and scored at full 100-point value a reference for Western Sky that was really a reference for another company, Health Net, which was only recently bought by Western Sky's parent company and but for that 100 points, all other things being equal, Western Sky would have been ranked fifth and UHC would have been the fourth ranked offeror;

• By wrongly giving AmeriHealth 20 scores of "two" that should have been "ones" AmeriHealth received 20 points it should not have received, while using the same measure, UHC received only two "extra" points. It should not have, and that net gain of 18 points by UHC vis a vis AmeriHealth by itself, would have put the two offerors in a tie for fourth place;

• Because the evaluation committee (EC) in many instances reduced UHC's technical proposal scores based on criteria not found in the questions, UHC's total points are arbitrarily and improperly reduced;

• HSD has no substantial evidence to support a reduction from four to three MCOs in New Mexico.

United Requested Relief:

1. The secretary to direct HSD to consider and score Rhode Island's reference for UHC and to offer a Centennial 2.0 contract to UHC.

2. A hearing and a stay of the procurement.

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.”

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, United, by and through its attorneys, Fulbright & Jaworski, L.L.P. filed a response to the protests of Centennial Care. (Exhibit #4, UnitedHealthcare’s Response to the Arguments Posed in Protest Letters (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.)

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 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 offeror’s 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, Memo from Gary Chavez)

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, Designation)

C. United Specific Findings of Fact

41. On October 30, 2017, Charles Milligan, Jr., United’s CEO, submitted a “Letter of Transmittal Form” expressly accepting the “Conditions Governing the Procurement.” (Exhibit #9, United’s Letter of Transmittal Form.)

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

43. On January 19, 2018, Daniel Clavio, the RFP’s Procurement Manager, wrote to United advising United that it was not a successful offeror. (Exhibit #1, Clavio letter to Charles Milligan, Jr. dated January 19, 2018.)

44. United was a successful offeror during the 2013 MCO procurement for Centennial Care, which employed the same process that UHC is now challenging.

DISCUSSION

UNITED’S ARGUMENT

FEBRUARY 5, 2018 PROTEST OF CONTRACT AWARD

- “A. Factual Basis and Background,”

- “B. HSD Breached its Duty to Inquire About UHC’s Missing Reference and Failed to Treat Offerors with Missing Information Equally,”
  - “1) The purposes underlying public procurement”
  - “2) HSD failed to inquire about UHC’s missing Reference”
3) HSD failed to treat Offerors with missing information equally
4) Although HSD refuses to consider UHC’s compliant reference, HSD accepted and scored MHC’s and WS’s non-compliant References

SUPPLEMENTAL PROTEST BY UNITED DATED FEBRUARY 21, 2018

- “A. The Additional Documents Underscore The Importance Of The High Value Reference Scoring And Show That HSD Had Plenty Of Time To Make Further Inquiry About UHC’s Missing Reference.”
  - “1) The crucial importance of the Reference scores in the RFP process”
  - “2) Mercer designed an objective reference scoring system that could – even now-allow HSD to fairly score UHC’s Rhode Island Reference.”
  - “3) Even after the established November 2, 2017 deadline for receiving references, HSD had adequate time to follow up on UHC’s missing Rhode Island Reference.”

MARCH 8 SUPPLEMENTAL PROTEST OF CONTRACT AWARD BY UNITED

- “Scoring The Rhode Island Reference”
- “United Fulfilled Its Responsibilities As To References Under The RFP.”
- “HSD Failed To Make Any Inquiry When It Discovered The Missing Rhode Island Reference.”

HSD DISCUSSION

United alleges that “HSD failed to follow up with UHC’s listed contact at the Rhode Island Executive Office of Health and Human Services to inquire why no reference had been received, and that failure was outcome determinative. Had HSD inquired, as HSD did with other offeror's missing or incomplete references, UHC's missing reference would have been supplied, and, by itself, that reference would have vaulted UHC from fifth place in the rankings to second or third place.” (United Protest Page 1.)

United’s protest acknowledges that a “proper response to the RFP required submission of (1) "Mandatory Requirements," (2) three "references," (3) a "Technical Proposal" and “Exhibits,” and (4) a "Cost Proposal." (RFP at 30) The RFP specified that the proposal had to be received by November 3, 2017 (RFP at 19-20 and United Protest Page 3.) The RFP does not state that HSD is responsible for obtaining references.

United’s application did not include three references. “HSD timely received the completed reference form from two of UHC’s listed references, [but] HSD received nothing from

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4 Emphasis added by HSD
5 Emphasis added by HSD

United initially insisted that the error was caused by HSD and that all references had been timely submitted. (Exhibit # 10, e-mail from Ray Mensack). However, after an investigation began into those allegations, the Rhode Island Executive Office of Health and Human Services subsequently acknowledged that it had in fact failed to submit the reference. (Exhibit #11, e-mail and letters from RI)

Subsequently, United modified its allegation from HSD misplaced the reference to stating that “HSD had a duty to inquire about apparent mistakes or items missing from an RFP response.” (See United protest Page 8.) United does not provide statutory authority or regulatory authority to support this contention, relying instead on what they refer to as “general principle[s] of procurement law…” (Id.) 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 safe guards for maintaining a procurement system of quality and integrity.” NMSA 1978 § 13-1-29(c) (See United Protest Page 7)

In arguing that HSD had a duty to ask Rhode Island Medicaid Director why it had not submitted a reference, United relies on Griffy's Landscape Maintenance, LLC v. United States, 46 Fed Cl 257 (2000). Griffy’s involved a post-award challenge to a contract for tree trimming services at a military installation. In that case, the agency failed to award Griffy points because contact information was absent from their proposal. (Id. at 258.) The court found that the agency had a duty to inquiry because the absence of the information indicated a clerical error. (Id.) Moreover, the applicable federal statute required that "In cases of apparent mistakes, the contracting officer "shall" communicate with the bidder. (Id. at 259.)

References are not insignificant. In this RFP, they were “required.” (United protest Page 3). Failure to submit a reference is not a minor clerical error; it is failure to meet a required component of the RFP. RFP Section 4.3.4, “Scoring Summary,” distinctly identifies references as a mandatory requirement. The term "mandatory" was defined in the RFP. “Mandatory means "required." The terms "must," "shall," "will," "is required," or "are required" identify a mandatory item or factor.” (RFP Section 1.9) The Rhode Island Medicaid Director did not submit the required reference. It was United’s responsibility to ensure that HSD received all the materials completing United's proposal. United accepted the obligation to provide three references as required by the 2017 RFP when its CEO Charles Milligan, Jr., signed and returned to HSD the letter of transmittal form acknowledging and agreeing to all of the terms of the 2017 RFP. (Exhibit # 9, United’s Letter of Transmittal)

United did not exercise due diligence in following up with Rhode Island to ensure the submission of the required reference. United's failure to follow up with its reference contacts to ensure they submitted the reference so that United had a complete proposal was not consistent with their responsibility to ensure they submitted a complete response to the RFP. The RFP is clear that each offeror was "responsible for...[s]ending the form to each reference contact [and] giving the contact a deadline that allows for HSD to receive the reference form prior to the
Griffy's involved a definite duty, appearing in a federal acquisition regulation 48 CFR 14.406-1, for federal procurement officers to inquire about apparent clerical mistakes. The duty was set by statute, and reinforced the court’s conclusions that a government officer should take reasonable steps to alert bidders to mistakes. There is no corresponding regulation cited by United necessitating a state procurement office such as HSD to proactively take steps to complete a proposal for an offeror. Furthermore, the federal regulation requires inquiry regarding “clerical mistakes,” in this instance the offeror failed to submit all documents on time (“a requirement”) The Court of Federal Claims has also limited the reach of Griffy's decision, holding that in negotiated procurements where RFPs "repeatedly informed offerors of the importance of provided complete and correct information in their proposals...the court cannot say that [the procurement office] was obligated under [federal law] to seek clarification where information was missing or wrong, or that [the procurement officer's] decision to forego clarifications was arbitrary, capricious or an abuse of discretion. ST Net, Inc. v. U.S., 112 Fed. CL 99,111 (CT. CL. 2013). This is true even when the request for proposals give the procurement officer the right (but not the obligation) to "waive informalities and minor irregularities." Id. at 104.

Successful bidders have already been awarded contracts in this case and United acknowledges that those contracts are valid and enforceable.(United Protest Pages 1-2) United however now asks HSD to apply section 1.4.1.42 of the New Mexico State Procurement Code to “correct” their proposal. (United protest P. 9)

Section 1.4.1.42 of the New Mexico State Procurement Code provides that when "[HSD] knows or has reason to conclude before award that a mistake has been made…" (emphasis added) HSD "should request the offeror to confirm the proposal," and the "proposal may be corrected..." Subsection 42(c) further states that "technical irregularities" can be "waived or corrected without prejudice to other offerors…"

Section 1.4.1.42 of the New Mexico State Procurement Code applies “before award” and is therefore not applicable. United did not allege that the “inadvertent failure to timely submit its reference” “was an obvious mistake” (United protest Page 8-9) until their protest was filed on February 5, after the contracts had been awarded. As noted above, United initially took the position that Rhode Island had in fact submitted the reference. United, having failed to ensure the reference was submitted was unaware of the alleged “inadvertent mistake” until the admission from Rhode Island after award of the contracts to the successful offerors.

Furthermore, as noted above, failure to submit a reference is not a “mistake,” it is failure to meet a required component of the RFP.

United’s contention that HSD knew or had access to a "listed contact" for UHC's references is incorrect. United alleges, “the RFP was structured to allow HSD to follow up directly with the named reference sources concerning any issue with references.” (United protest Page 4.) This is misleading. HSD had no way to know who any of the offerors’ references were until such time as it received a reference. While it is true that Section 5.9 of the RFP
required all offerors to provide a list of their references, the response to Section 5.9 was submitted along with each offeror's full RFP response.

Four sealed boxes from United were received by HSD on Nov. 2 containing their response to the RFP. United’s response was kept in a locked room along with other proposals that had been received, and they remained sealed until Nov. 3rd, the proposal due date (nearly a full 24 hours after the November 2, 2017 deadline for the submission of the required reference in the proper format.) HSD waited until proposals from all offerors had been received on the proposal deadline date to open submissions.6

Procurement protocol is to wait until the submission deadline has passed to open submissions. NMAC 1.4.1.37 (A) (Receipt and Opening of Proposals) provides that “[p]roposals and modifications shall be time-stamped upon receipt and held in a secure place until the established due date.” 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.) HSD could not have contacted United's Rhode Island reference because it did know about the reference until after the deadline for submission had passed. The primary goal of all sealed bid protests is to maximize competition. United assumed the delivery of their references and did not appear to exercise due diligence to ensure delivery. United was in the best position to follow up with Rhode Island to confirm its required references were sent and received, but failed to do so.

It was United’s obligation to ensure that the requirements imposed by the terms of the RFP were complete. Copies of emails between Human Services Department and other respective offerors, which were made available by HSD pursuant New Mexico's Inspection of Public Records Act requests, show that other responsive offerors followed up prior to the due date to ensure that all of the required forms were submitted to HSD. (Ex., Exhibit #12, e-mails from Presbyterian.) United could have easily taken similar steps. The fact that United missed or elected not to take these proactive steps is not the fault of the evaluation committee or the Human Services Department.

United characterizes the submission of the references from the requested reference directly to HSD as a “patent MCO "lack of control" over the references, and the framework” (United 2/21 Supplemental protest page 2). This contention is baseless, every other MCO was able to meet the requirement to submit the references. There was nothing prohibiting United from checking with its own references to ensure they had been submitted. United had control of the process. They knew their requested references. It is reasonable that offerors would follow up with their references to ensure they had been submitted. There was structure to the process, and it could not be the responsibility of the evaluation committee or procurement manager to ensure United’s references were submitted timely.

6 NMAC 1.4.1.35 (Modification or Withdrawal of Proposals) Proposals may be modified or withdrawn prior to the established due date in accordance with 1.4.1.20 NMAC of this rule. The established due date is either the time and date announced for receipt of proposals or receipt of modifications to proposals, if any;
United is the only offeror protesting a “missing” reference. United’s allegation that “HSD failed to treat offerors with missing information equally” is untrue.

On Page 5 of its protest, UHC outlines the specific situations in which it believes HSD acted unfairly and inconsistently by alleging preferential treatment of Well Care, Amerigroup and Western Sky. The difference between HSD’s actions with respect to any other offeror and United is that for each and every one of these offerors HSD actually received a reference. United failed to have the reference submitted and HSD did not receive any form of communication from United or its reference before the specified deadline. As discussed, the procurement manager did not know the names of references until they were submitted or until after the full proposals were submitted and opened.

It is not unreasonable for HSD, after having received communication from a reference, to have replied to that reference with respect to any questions or clarifying matters. In this respect, HSD acted consistently and fairly and exercised its “duty to treat all bids fairly and equitably.” See Planning and Design Solutions v. City of Santa Fe, 1994 – NMSC – 112 ¶ 8.

United also claims it was treated unfairly as compared to Western Sky and Molina, alleging, “Although HSD refuses to consider UHC’s compliant reference, HSD accepted and scored MHC’s and WS’s non-compliant References.” (United Protest Page 11.) As noted above, United’s reference was not “compliant,” it was untimely and submitted after the deadline. MHC’s and WS’s references were submitted timely and are easily distinguishable from United’s not providing a reference. The WS reference issue is the type of “clerical error” described in Griffy’s. The California Department of Health Services inadvertently referenced “Health Net” instead of Western Sky in e-mail while transmitting the reference. However, the actual reference form plainly stated that it was a reference for “Centene Corporation- Health Net Community Solutions, Inc. and California Health and Wellness Plan.” Any confusion caused by the e-mail was cleared up by the actual reference. Furthermore, United’s characterization of the Molina and Mental Health Resources reference is not accurate. Section 5.9 of the RFP allows for “client” to include a provider. The RFP language only restricts offerors from requesting references from the New Mexico Medicaid agency. Furthermore, Molina was also not a successful bidder. The score given for any reference for Molina is not determinative of United receiving an award.

HSD has acted consistently and fairly in its treatment of all offerors references. It would be unjust and unfair for HSD to consider an untimely reference and to use that reference to alter the scores after contracts have been awarded. Allowing HSD to consider untimely materials would violate the requirement for fair and equitable treatment in public procurements. The purpose of public procurement, as cited by United, “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 safe guards for maintaining a procurement system of quality and integrity.” NMSA 1978 § 13-1-29(c).” (United protest Page 7).

7 United alleges “all other things being equal, Western Sky would have been ranked fifth and UHC would have been the fourth ranked offeror...” HSD notes that this would not have been outcome determinative as the top three offerors were selected.
United argues that HSD could still objectively score the Rhode Island reference and give United credit for it. If HSD were to take this action, it would result in special and preferential treatment for United. The Rhode Island reference was submitted months after the deadline. United bears the responsibility for that omission. Although United might benefit by a review of their untimely reference, United’s arguments disregard the potential effect on the other bidders. United was not the fourth place offeror. The fourth place offeror submitted a complete proposal and was evaluated on that proposal. It would be unfair now to score a late submission, potentially award more points and another contract after the fact. The RFP was clear that references were a required part of the proposal and that they would be scored. United failed to meet this requirement. Their requested relief should be denied.

UNITED’S ARGUMENT

FEBRUARY 5, 2018 PROTEST OF CONTRACT AWARD

- “C. The RFP Scoring System Was Not Sufficiently Precise to Appropriately Differentiate Among the Second Through Fifth Ranked Offerors, and There Is Little Detriment to the State and Potentially Great Advantage to Medicaid Members to Awarding Contracts To At Least Four Offerors”

  1) “The RFP scoring system was inherently imprecise.”
     a. The evaluation committee's failure to follow the technical proposal instructions for assessing score of "two."
     b. The EC's reduction of points for UHC's answer for reasons not based on the actual questions.
     c. The highly subjective nature of the questions coupled with the "blunt" scoring approach.
     d. Oddly and arbitrarily requiring points for a bad Reference, and even for unanswered questions in a Reference form but giving no points for a missing Reference.
     e. The inherent subjectivity of a scoring system is shown when another group scores the same responses using the system.

HSD DISCUSSION

United argues that HSD unfairly held them to standards, criteria, or sub-factors that were not disclosed in the 2017 RFP. The New Mexico Procurement Code, however, gives HSD and all state agencies substantial latitude in determining how to structure the RFP to procure services such as those covered by Centennial Care 2.0. The Procurement Code, with respect to RFPs, requires nothing more than what is set out and specifically enumerated in NMSA 1978, Sections 13-1-112 and 13-1-114, supra. The procurement regulations provide that, “[a]t a minimum the RFP shall include the following . . . all of the evaluation factors and the relative weights to be given to the factors in evaluating proposals.” NMAC 1.4.1.31(a)(6). These provisions compelled HSD only to notify prospective offerors of the evaluation factors relevant to the procurement and to evaluate...

United assumes that all proposals are entitled to the full amount of points available for each evaluation criteria found in the technical section of the RFP for providing a response and that points were subsequently deducted on identified deficiencies in each response. This is a mistaken assumption. United presents a biased disagreement with how the proposals were scored by the Evaluation Committee. It is the Evaluation Committee’s exclusive duty and province to assess the quality of each proposal. See, NMAC 1.4.1.38; *McDaniel v. N.M. Bd. Of Medical Exmrs.*, 1974-NMSC-062, ¶ 17, 86 N.M. 447 (explaining that “administrative bodies whose members, by education, training or experience, are especially qualified and are functioning within the perimeters of their expertise” may properly be given “special weight and credence to findings concerning technical or scientific matters”).

To accept United’s assertion that more points should be awarded to their proposal or points should be deducted from the scores of other offerors would amount to placing the responsibility for evaluating proposals in United’s (or its expert’s) hands as opposed to the Evaluation Committee. This responsibility is rightfully with the Evaluation Committee, which has substantial experience in overseeing Medicaid managed care programs. To allow United or any other protestor the ability to substitute their scores for those of the Evaluation Committee would directly contravene the Procurement Code and Regulations and would serve to dismiss HSD’s legislatively authority to manage, oversee, and operate the State’s Medicaid program. NMSA 1978, §27-2-12 (2006) and §27-2-12.6 (1994).

United’s contention that the Evaluation Committee failed to follow the Technical Proposal instructions for assessing scores of “2” and the use of the 0–5 scale as being inherently subjective fails to consider the Evaluation Committee process established for procurement. From December 4, 2017 to December 15, 2017, individual evaluators participated in consensus scoring sessions. (Exhibit # 6, Scoring Results Summary.) These sessions were conducted using the individual reviewer score sheets and notes and resulted in “one consensus team grade per question. . . .” (Exhibit #6, Scoring Results Summary.) “Prior to finalizing a consensus score, all members of the evaluation team agreed to the final score and documentation.” (Exhibit # 6, Scoring Results Summary.)

United knew of this approach – it was the same methodology used in the 2012-2013 RFP. In the April 18, 2013 letter, United’s representative stated, “the Department, as detailed in the RFP, utilized ‘consensus’ scoring, and the results and summaries of the consensus meetings were maintained and produced.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 13.)

The evaluators were provided with individual scoring sheets and were instructed to review the proposals independently in preparation for a consensus meeting. The individual evaluators graded the responses to the individual proposals on a scale of 0 to 5, and recorded superior elements and deficiencies. See Centennial Care Procurement Scoring Summary

(Exhibit #4, UnitedHealthcare’s 2013 Response, p. 13.)
For the 2017 RFP, United never questioned HSD’s use of the scoring methodology, including the use of the 0 to 5 scale even though it had multiple opportunities to do so. Therefore, HSD’s use of its scoring methodology, including but not limited to the use of a 0 to 5 scale, was proper. This is further supported by other statements made by United and its expert to the 2012-2013 RFP and protest.

United’s 2013 letter is enlightening when compared to its current protest of the 2017-2018 RFP. In 2013, United consulted with its Medicaid procurement expert, Joel Menges – the same individual United consulted for its current protest. In 2013, Menges stated:

- “Use of rank and range scores in RFPs is a standard process that has been used in over a dozen Medicaid procurements in multiple states for many years.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 3);
- “[T]he Department made the decision to provide the Offerors with significant amounts of information related to the scoring process, while at the same time withholding certain details in an effort to maintain and preserve the integrity of the scoring process.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 5);
- “The Protestors [to the 2013 RFP] were aware of the methodology from the very beginning of the bidding process because the RFP’s scoring approach was well-conveyed.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 6); and
- “The Department conducted a standard process . . .” and “it was conducted fairly and impartially.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 7.)

United acknowledged in 2013 that Lovelace, an unsuccessful offeror and protestor, “waived its challenge to the Department’s scoring methodology based on its failure to challenge, question, or seek clarification of the scoring process or weighting of certain factors through the Q&A process and under the Compliance and Acceptance section of the proposal.” (Exhibit #4, UnitedHealthcare’s 2013 Response, p. 10.) United, like Lovelace, “is a sophisticated MCO.” (Exhibit # 4, United Healthcare’s 2013 Response, p. 10.) “[I]t fully understood the RFP process and the purpose behind the Q&A period, such that it was well aware that any issues with the scoring process should be brought to the Department’s attention before the bids were scored. Accordingly, Lovelace’s failure to question, seek clarification, or challenge the process should result in waiver.” (Exhibit # 4, UnitedHealthcare’s 2013 Response, p. 10.) The same is true in this instance and, as such, United’s challenge to the scoring methodology is waived.

United’s comparison of an offeror that submitted all its References and receiving points, even when the References stated that the offeror was “unsatisfactory” or left blank versus United’s failure to submit a required Reference is invalid. HSD met is requirements under the Procurement Code and its regulations. NMSA 1978, § 13-1-114 (1984) (“The request for proposals shall state the relative weight to be given to the factors in evaluating proposals.”). United agreed to the conditions governing the procurement and it accepted the evaluations factors contained in Section 4 of the RFP. (Exhibit # 9, United’s Letter of Transmittal.) As set forth herein, United failed to submit a required Reference. United is a sophisticated entity and accepted the terms of this procurement. Failing to submit a required Reference and scoring other submitted References
regardless of the score given to each received Reference is not the same. Therefore, HSD acted properly in awarding United no points for failing to submit a required Reference.

**UNITED’S ARGUMENT**

**FEBRUARY 5, 2018 PROTEST OF CONTRACT AWARD**

“(C) (2) The decision to award only three contracts was arbitrary and capricious.”

**SUPPLEMENTAL PROTEST BY UNITED DATED FEBRUARY 21, 2018**

“B. The additional documents helped confirm that the decision to reduce the number of MCOs from four to three was not supported by any substantial evidence and hence was arbitrary and capricious.”

**HSD DISCUSSION**

HSD selected the three highest scoring proposals, PHP, BCBS and WS, and awarded those offerors contracts. The justification for the selection of those offerors was outlined by the executive evaluation committee for the 2017 Centennial Care 2.0 MCO RFP, 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 stated in the Executive Evaluation Committee notes:

- 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 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. United’s argument that HSD erred in awarding three, rather than five contracts, is unfounded in light of the clear language of the RFP and its Amendments.
NMAC § 1.4.1.43.A requires a 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 § 4.3.4.8)

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 regulation.

The RFP is clear 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, in its discretion, selected a number of MCOs within a stated continuum that the offerors knew in advance and that United did not dispute prior to the Notice of Award.

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 a 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 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. United’s proposal scored fifth.

8 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 contracts with United being one of the successful offerors. At that time, United did not object to HSD’s awarding only four contracts, obviously less than the five mentioned in the RFP.
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. (Exhibits # 15 through #21, 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.)

On December 20, 2017, Jessica Osborne, a Principal of Mercer, issued a “Memo” to Dan Clavio, HSD’s procurement manager. The memo was not required to “provide supporting facts or analysis.” The purpose of the memo was to document 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…” (Exhibit #14 Memo from Jessica Osborne to Dan Clavio emphasis added).

For the reasons argued above, United’s assertions and allegations are found to be without merit and should be rejected. There was substantial evidence to support HSDs decision to select the three highest scoring proposals. The decision was not arbitrary and capricious.

UNITED’S ARGUMENT

FEBRUARY 5, 2018 PROTEST OF CONTRACT AWARD

“D. The Conflict of Interest”

SUPPLEMENTAL PROTEST BY UNITED DATED FEBRUARY 21, 2018

“C. The additional documents show that, given the strict standard HSD applies to potential conflicts of interests, Western Sky should have disclosed the relationship with Envolve and Mercer.”

HSD DISCUSSION

United alleges “The integrity and fairness of the procurement process as well as the final award may have been compromised by an undisclosed conflict of interest or an appearance of a conflict, concerning the relationship between Mercer and Envolve Pharmacy Solutions (Envolve), a proposed subcontractor of Western Sky. Mercer has a significant business alliance with Envolve that warrants further inquiry into whether it could have affected the fairness of the procurement process.”
United’s argument is predicated upon two underlying premises: 1) that Mercer has a significant contractual business relationship with Envolve, 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) the relationship was such that a failure to disclose the relationship is a failure to respond to a mandatory portion of the RFP and Western Sky should be disqualified. (See United Protest Page 21-22). Neither of the premises is supported by credible evidence, however.

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. The evaluation committee made decisions and recommendations and their deliberations were not directed or otherwise unduly influenced by Mercer.

There is no evidence of a significant contractual business relationship between Mercer and Envolve. Mercer’s Health and Benefits Consulting Practice, which is separate from GHSC, has a pre-screening contract with Envolve for the purpose of benefit plan design for its corporate customers that involves no compensation for either Mercer or Envolve. (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 Envolve prior to Molina filing litigation against HSD⁹ subsequent to the award of the contracts. (Exhibit # 3, Jared Nason affidavit, and Exhibit # 23, letter to Collins from Mercer). United’s allegations are based on conjecture and inference, no evidence was provided to support this very serious allegation. Mercer has no interest, direct or indirect, in Centene’s operations. (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, ¶ 3; Exhibit # 25, Affidavit of Brent Layton, ¶¶ 13 and 18.) Centene has another separately held subsidiary, Envolve. (Id.) Envolve specializes in managed Medicaid business and is the pharmacy benefit manager (PBM) serving the largest managed Medicaid population. Envolve’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.)

In October 2016, Envolve and Mercer Health & Benefits, not Mercer Government Human Serices 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

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The allegation that the integrity and fairness of the procurement process was compromised is not supported. 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, Jared Nason affidavit, and Exhibit # 23, letter to 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. The extent of Mercer’s role in the scoring process was in compiling scores for the cost offers, which is a transparent and computational process. (Exhibit # 2, Affidavit of Nancy Smith-Leslie, ¶¶ 12, 24-25; and Exhibit # 23, letter from Mercer to Collins).

United did not present any 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. Western Sky did disclose and reference Envolve as a subcontractor in its proposal to HSD. Given the actual nature of the relationship between Envolve and Mercer, HSD disagrees that failure to disclose the relationship is a failure to respond to a mandatory portion of the RFP or that Western Sky should be disqualified.

UNITED’S REQUEST FOR A HEARING AND A STAY OF THE PROCUREMENT.

United requested a hearing on its protest. Under NMAC § 1.4.1.84(C), the decision whether a hearing is necessary is discretionary with the Department. In this circumstance, the decision was made that a hearing was unnecessary, which was within the Department’s authority.

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.

On March 15, 2018 Chief Procurement Officer Gary Chavez issued a memo which makes specific findings about the need to move forward with the procurement. (Exhibit #7, Memo from Gary Chavez). 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 and that there were no exceptional circumstances justifying a stay and that the substantial interests of the state required that the procurement move forward.
RECOMMENDED CONCLUSION

United did not submit a third reference as required. HSD did not have a duty to follow up with Rhode Island about the missing reference for UHC, nor could it have under the structure of the procurement. HSD did not do so for other offerors. United is the only entity alleging a missing reference.

It would be unjust and unfair for HSD to consider an untimely reference and to use that reference to alter the scores after contracts have been awarded.

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 United 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

HSDs decisions were in the public interest

The following contracts were properly awarded and are enforceable
The protest should be denied and contracts awarded to the successful offerors 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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